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## TTIP: MORE THAN A FREE TRADE AGREEMENT

A bilateral shortcut for the elimination of trade barriers, faced with the obstacles of multilateralism

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The Transatlantic Trade and Investment Partnership known as the TTIP is not envisaged as a classic trade agreement that limits itself to eliminating tariffs and opening markets up to investment, services and public procurement. Its importance, as well as what makes it complicated, is that it claims to go further with the modification of the technical rules and standards that are currently the greatest barriers to transatlantic trade. The regulatory changes may mean additional costs that are equivalent to tariffs of between 10% and 20% in some sectors, while classic tariffs are on average around 4%, but the TTIP's importance and benefits lie in the elimination of the non-tariff barriers based on complex regulations that currently represent the greatest obstacle to business.

### The agreement and its frame of reference

The joint declaration by the president of the United States, Barack Obama, the

president of the European Council, Herman Van Rompuy, and the president of the European Commission, José Manuel Barroso, on February 13th 2013 marked the beginning of the process towards reaching the TTIP. It confirmed the recommendations, published on February 11th 2013, of the High

Level Working Group, which was created on November 28th 2011 and led by US trade representative, Ron Kirk, and the EU trade commissioner, Karel de Gucht. Its goal was to recommend policies and measures to increase business and investment for greater employment, economic growth and international competitiveness on both sides.

In his *State of the Union* address on February 12th 2013, President Obama had already announced the beginning of the talks and left no doubt as to the objectives of balancing the Asia-Pacific axis and its Trans-Pacific Partnership Agreement (TTP), with that of the north Atlantic (the TTIP).

In June 2013, the European Council gave the European Commission the mandate to

The importance of the TTIP, as well as its difficulty, is that it claims to go beyond the adaptation of technical rules and standards that currently represent the most significant barriers to transatlantic trade.

This fear of the TTIP touches, in particular, upon the protection of rights to intellectual property and investment. The emerging economies fear the changes to multilateral rules that this agreement would impose.

Where multilateralism blocks the progress of globalisation, bilateralism is imposed as a fast track. Many countries have opted for trade negotiations outside the sphere of the WTO, where multilateral negotiations are extremely long and complex.

The TTIP provokes fears and uncertainties in the sectors that may see themselves as losers after the implementation of the agreement, with no sign of a compensatory alternative.

The positive effect of greater liberalisation and imports at lower prices would cause real Spanish per capita income to grow by 6.55%, as well as an increase in employment and salaries of 0.78% and 3.65%, respectively, with 143,000 jobs being created owing to liberalisation.

Developing countries and emerging economies may experience a positive impact of greater demand due to the economic growth of the United States and the EU thanks to the TTIP.

The TTIP is one of a number of agreements being negotiated by the EU but it is not just one more. If the negotiations are successfully concluded, the implementation of TTIP will condition the future of global trade and investment.

begin negotiations. If transatlantic relations have an initially bilateral nature, a future regional dimension could lead to a possible transatlantic free trade agreement between North America (the United States, Mexico and Canada) and the European Union. In effect, once the agreement with the United States is reached, the EU would then have agreements with the three North American partners (with a foreseeable and necessary updating of the partnership agreement with Mexico, in force since 2000). By contrast, multilateral trans-Pacific relations take, as a starting point, the regional dimension between America and Asia. The Trans-Pacific Partnership Agreement was created in 2006 out of a trading bloc formed for the elimination of tariffs and is made up of New Zealand, Singapore, Brunei Darussalam and Chile. The incorporation of the United States initiates a broader, more open negotiation platform on the potential economic integration of the Asia-Pacific region, which currently includes twelve countries.<sup>1</sup>

The United States is the common element in the TTP and the TTIP but it is the bilateral agreement between the United States and the EU –the two great global business and investment powers– that raises fears in Europe about the changes that may result in the field of multilateral trade negotiations. This fear touches, in particular, on the protection of rights over intellectual property and investment. The emerging economies, for their part, fear the changes to multilateral rules that this agreement would impose.

## The launch of the bilateral negotiations on the TTIP between the United States and the EU is an imperative for this phase of globalisation and achieving it represents a challenge.

### The problems with the Doha Round of the World Trade Organisation

In May 2013, between the date of the declarations and that of the mandate of the European Council to the Commission, the final election of the candidate for Director General of the World Trade Organisation took place. Herminio Blanco, the liberal Mexican candidate, negotiator of the North American Free Trade Agreement (NAFTA), supported by the United States and the EU, was defeated by the Brazilian candidate, Roberto Azevêdo, who was strongly backed by developing countries. Although there should be no direct relationship between the two events, what is certain is that since 2001 the Doha Round of the WTO –whose mission is to eliminate obstacles to trade through multilateral agreements– bilateral and regional agreements have proliferated and the WTO's multilateral negotiations have stalled. The problems faced during the negotiations have been enormous. The failure of the Millennium Round of the WTO in Seattle in 1999 was meant to be amended by the new Doha Round (Qatar) in November 2001. Seattle was where the movements known as “anti-globalisation” or “alter-

globalisation” that oppose free trade began. They were consolidated at the parallel World Social Forum, held for the first time in Porto Alegre (Brazil) in January 2001, and protests and alternative proposals have accompanied the ministerial meetings of the Doha Round and other bilateral and multilateral negotiations on free trade and property rights associated with international trade.

What is more, the WTO's multilateral negotiations are extremely long and complex. WTO decisions are taken by consensus between the 159 members, consensus that turns out to be necessary at every stage in order to take the negotiations forward. If a country does not give its approval, negotiations grind to a halt. The complexity of reaching consensus is added to by the **single undertaking** procedure, which means that every chapter of the negotiation forms part of an indivisible package that cannot be negotiated separately. In the Doha Round there are more than 20 issues up for negotiation (agricultural, industrial and service products). In order to be able to advance to the next phase of negotiations, consensus is required on each of the issues. If the negotiation stalls in one sector, all the other subjects in the Doha Round also have to wait.

It is the decision-making complexity that led Pascal Lamy, then European negotiator in the Doha Round, to state in Cancun in 2003 that the WTO –of which he was soon afterwards to become director– was a feudal organisation. No wonder, then, that since the beginning of the Doha Round in 2001, the number of bilateral agreements has multiplied. The great powers –the EU, the United States, Japan and China– are moving in the direction of bilateral agreements.

Something has changed. Classic free trade agreements were a response to a specific era of international trade. The elimination of tariffs was meant to reduce protectionism based on policies of impoverishing your neighbour, ineffective in the medium and long term but sometimes popular for justifying increases in production and national employment. Globalisation easily outstrips slow multilateral agreements and, when added to the fragmentation of production, global value chains arise that render protectionism at least redundant in the short term, not to say, counter-productive. A country that is castled in protectionism may be vetoing imports that make up part of their own products in some place in the value chain. Direct investments are incorporated in the fragmented production processes and so protection of investments becomes inherent in the process, which also includes the embedded knowledge and, hence, the protection of intellectual property rights. It follows, then, that where multilateralism blocks the progress of globalisation, bilateralism is imposed as a fast track. For this reason, many countries have opted for trade negotiations outside the domain of the WTO, although this leaves aside many countries that, because of their size and productive structure, cannot include themselves in the value chains and take advantage of the possible benefits in terms of generating employment and knowledge.

1. Australia, Brunei Darussalam, Canada, Chile, USA, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

With globalisation, the subject of intellectual property rights has taken on great importance. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) introduced the issues related to intellectual property in business. Since then, intellectual property rights linked to information and communication technologies, counterfeiting and the protection of innovation have become another subject for multilateral and bilateral agreements. One attempt at a multilateral agreement is the Anti-Counterfeiting Trade Agreement (ACTA) that established specific criminal liabilities for protecting intellectual property rights and preventing the counterfeiting of goods and generic medicines as well as internet piracy. Negotiated under great secrecy, the agreement aroused significant opposition and the European parliament was motivated to reject it in July 2012.

### **TTIP: More than a free trade agreement**

The Transatlantic Trade and Investment Partnership will mark a before and after for global trade policy. The two powers negotiating it account for 30% of worldwide trade and represent almost half the world's GDP, exchanges of goods and services worth €2 billion are made daily, while direct investments of €2.8 trillion accumulate on both sides of the Atlantic. This reality means that the two actors are obliged to get along if they want to keep their place in a global competitive space that is increasingly based on global value chains.

The launch of the bilateral negotiations on the TTIP between the United States and the EU is therefore an imperative for this phase of globalisation and achieving it is a challenge. Despite the large regulatory differences between the two economies, agreement is sought on three large subjects: access to markets, regulatory cooperation to solve problems with non-tariff barriers and the rules to be included in the agreement.

From the point of view of net total gains, various studies have made estimates of the profits deriving from the TTIP. They show that the most positive results are due, in large part, to the elimination of non-tariff barriers and the alignment of the regulatory and production standards of the United States and the European Union. On the other hand, the reduction in tariffs, though it may generate profits, has a less spectacular effect because the current tariff level, of around 4% on average, is already low. Nevertheless, arguments against the agreement also arise and provoke fear and uncertainty in the sectors that see themselves as possible losers following the implementation of the agreement, without the sign of a compensatory alternative.

As well as the expected positive effect of trade creation, the agreement will alter trade diversions. As well as affecting European Union manufacturing sectors and member states, it will also have consequences for third countries, some of whom have commercial agreements with the EU. One of the effects of trade diversion will be produced in the EU itself, which has no internal trade barriers. When the current tariff and non-tariff barriers with the United States disappear, part

of the intra-EU trade will be diverted to the United States. A study by **Felbermayr** (2013) has estimated that trade between Germany and Spain could diminish by 33% in both directions, while trade between Spain and the United States could grow by 80%. Even so, in volume, the effects of trade creation with the United States will not compensate Spain for the effects produced by the diversion of trade with Germany. Nevertheless, the positive effect of greater liberalisation and lower-priced imports would cause real Spanish per capita income to grow by 6.55%, as well as an increase in employment and salaries of 0.78% and 3.65%, respectively, with 143,000 jobs being created due to liberalisation. A similar situation, with a drop in trade of around 31%, would result between Germany and the countries affected by the economic crisis (Spain, Greece, Ireland, Italy, Portugal).

There may also be trade diversion effects for developing countries and emerging economies (**Felbermayr, 2015**). On the one hand, these countries may experience a positive impact of greater demand due to the economic growth of the United States and the EU thanks to the TTIP. However, the bilateral agreement could lead to trade diversion because producers in TTIP countries may import less from third countries given the fall in internal costs from trade. In some cases, the effects of a greater demand for primary materials, semi-finished products, services and tourism from the TTIP may compensate for the decline in sales of other relatively expensive products from third countries.

### **The TTIP will mark a before and after for global trade policy.**

A **study** commissioned by the European Commission from CEPR (Centre for Economic Policy Research) in 2013, considered that the impact on third countries would not be so negative and estimated that the TTIP would have an annual impact on the EU economy of €120 billion (or 0.5% of GDP), while for the United States it would be €95 billion (or 0.4% of GDP).

In spite of the gains estimated by various studies, criticisms of the TTIP grow as the rounds of negotiations advance (ninth round, April 2015) and particularly concentrate on the secrecy of the negotiation. Opposition groups have concluded that the secrecy is the result of a desire to hide the suspected losses for the European consumer and citizen. These would be down to the reduction in protectionist regulation in certain fields, and the loss of labour and social rights and of legislative sovereignty in exchange for the process of arbitration of disputes between the investor and the states. In response, the Commission argues that this confidentiality is valuable at the time of making the agreement, as it would start at a disadvantage to the US if all the documents were published.

The negotiation secrecy is being amended by the new communication strategy of the EU and the member states, which began on October 9th 2014 with the **publication of the mandate declassifying the Directives for the TTIP negotiation** and other relevant documents, in accordance with the decision of the EU member state governments. Additionally, European parliamentarians have been given access to special reading

rooms in which they may consult the documents on the treaty that are not accessible to the public, under a declaration of confidentiality.

## The Investor State Dispute Settlement

One of the most controversial and criticised points of the negotiation is Investor State Dispute Settlement (ISDS), which entails the acceptance by both parties of a system of international arbitration in place of a state judicial system. In its **recommendations**, the High Level Working Group had already proposed that the TTIP “should include investment liberalization and protection provisions based on the highest levels of liberalization and highest standards of protection that both sides have negotiated to date”.

The bilateral ISDS is nothing new – it is common practice in bilateral investment agreements between two countries. In these cases, a mutually agreed tribunal of international arbitration is accepted in place of the courts of justice of one or the other party. Bilateral Foreign Investment Promotion and Protection Agreement (FIPAs) are an example of this. Before the coming into force of the Treaty of Lisbon, in addition to the free trade agreements between the EU and another state, bilateral FIPAs were signed between the (most interested) EU states and the other state signing the partnership agreement. With article 3.1 (e) of the Treaty on the Functioning of the European Union (TFEU), the EU has gained exclusive com-

## Currently, globalisation streaks ahead of the slow multilateral agreements.

petence for common commercial policy, including foreign direct investment, according to articles 206 and 207 of the TFEU, which becomes a subject for negotiation in international trade agreements. The Treaty of Lisbon changes things in relation to previous negotiations. Thus, the EU can directly negotiate the investment protection agreements and the TTIP, being a treaty of trade and investments, includes the protection of investments.

The Treaty of Lisbon allows the simplification of the investment agreements to eliminate the need for multiple FIPAs between the EU member states interested and the state hosting the investment. Now, with just one agreement, investment protection covering all EU member states is achieved.

Currently, more than 2,000 FIPAs have been signed between industrialised and developing countries. Germany has 132 bilateral investment treaties in force. That is what allows the critics of the TTIP’s ISDS in Germany to argue that it is a superfluous instrument without taking into account its necessity for other EU member states, as well as the improvement it represents when compared to other existing bilateral agreements.

Spain also has FIPAs signed with various countries, made possible thanks to the system of international arbitration recognised in the FIPA signed between Spain and Argentina in 1991, which resolved the negotiation over the expropriation

of YPF, and later brought a conclusion to the appeal presented by REPSOL to the International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank Group. Thus, the instrument of the FIPAs protects measures of non-discrimination against foreign investors relative to national ones and permits methods of direct and indirect expropriation.

The controversial ISDS is an improvement on the FIPAs in two senses. First, thanks to the Treaty of Lisbon, a single agreement will be able to resolve the differences between investors and the host state, whether the investor is from an EU member state and the host state is the United States or, in the opposite sense, whether the investor is from the United States and the host any EU member state. Second, as a cutting edge agreement of investment protection, it can be much more specific about what the situations subject to arbitration should be and act as a common model for the United States or EU to adopt with regard to other investment treaties that are likely to be implemented, with China, for example, or within the TTP framework. In fact, the North American Free Trade Agreement already contains an ISDS precedent.

The other reference that must be taken into account is the **Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)**, which has already been negotiated. Still pending ratification, it includes a chapter on ISDS that offers a fairly precise approximation of what the ISDS agreement between the EU and the United States may be.

CETA establishes in a clear, detailed way what constitutes indirect expropriation to the end of avoiding claims against legitimate public policies. It is clear that public policies taken to protect health, security and the environment do not constitute indirect expropriation. This occurs only when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of their investment. In CETA a detailed case-by-case analysis is included to determine whether an indirect expropriation has taken place. The mere fact of a measure increasing costs for the investor does not signify an expropriation. CETA also establishes, in minute detail, the mediation process as well as the agreement on arbitration within the ICSID framework to be resorted to in the case of differences between the investor and the state.

## The structure of the agreement

The TTIP under negotiated will include 24 chapters grouped into three parts: 1) market access; 2) regulatory cooperation; and 3) rules.

The part concerning market access includes the trade in goods and services, public procurement and the rules of origin, which determine, technically, that a product’s origin corresponds to one of the countries that signed the agreement, in order to avoid tariff fraud.

Regulatory cooperation affects the rules that include the protection of health, security and the environment, even if, due

to legislative differences they become a hindrance to trade. Regulatory cooperation aims to avoid unnecessary, inconsistent differences on both sides, and seeks to bring them into line without causing a reduction in the level of protection. They mainly affect the automobile and pharmaceutical sectors. Compatible regulation on the connections to the current in electric cars, to give a very modern example, means a significant reduction in costs in a growth sector. Health and phytosanitary measures on food security have great importance and, therefore, the negotiations are based on WTO regulations in order to guarantee the commercialisation of safe products.

In the section on rules, aspects are negotiated that have also sparked controversy, such as labour regulation and fracking for shale gas. The position of the EU is clear in both cases. Growth in trade will not be at the expense of worker protection, as based on the instruments of the International Labour Organisation, nor will the TTIP limit the sovereignty of each member state in its decision on fracking.

Intellectual property rights are another of the subjects that have provoked great opposition in the past in relation to ACTA. Thus, one of the worries held by the groups opposed to the TTIP is that it is trying to bring ACTA in through the back door. The EU's position in the negotiation consists of establishing binding agreements in a limited sphere of intellectual property, particularly with regard to protecting creation and fomenting innovation, without going into controversial penal issues or the responsibility of internet service providers. It should be obvious that the current European Parliament could not approve the TTIP if it included a version of the rejected ACTA.

The Geographical Indications (GI), an EU hobbyhorse in the multilateral and bilateral fields of trade, are included in the TTIP and it is expected that the United States will recognise the GI of certain European food products and prevent incorrect uses of the same. It is a point that does not raise controversy in Europe, in spite of running in parallel to the rights of intellectual property.

As has been underlined, the TTIP is one of a number of agreements being negotiated by the EU but it is not just one more. If the objective of closing the negotiation is reached and if finally it comes into force –once approved by the Council, the European Parliament and ratified by the member states and the United States– it will be the most important agreement for both the EU and the United States, and, for that matter, its implementation will condition the future of global trade and investment. The EU is negotiating agreements with Asian industrial and emerging economies, of which those with Japan and China are among the most important. While, in turn, the United States is following the same path with the Trans-Pacific Partnership Agreement.

The largest obstacles to the agreement come from the sectors that may feel they are losers in the process and the groups

opposed to free trade and globalisation. The winners of an agreement of this kind are the small and medium-sized enterprises (SMEs), the consumers and citizens who will benefit from increased competition, productivity and falling prices of consumption. These gains will mean more disposable income and higher salaries without giving up on sustainable development and greater social and environmental protection. The dilemma is not whether the agreement is reached or not. Not subscribing to it does not signify preserving the status quo but leaving the future of the EU in a position of great weakness relative to the two great global economies, the United States and China. The decision to be taken by EU governments and the European Parliament is first and foremost strategic.

**A country that is castled in protectionism may be vetoing imports that form part of their own products in some part of the value chain.**