

People before Trade

EAPN Position on the Transatlantic Trade and Investment Partnership (TTIP) and other related Free Trade Agreements



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Trojan Horse

<https://openclipart.org/detail/211105/ttip-trojan-horse>

1. INTRODUCTION

This paper outlines, in brief, the position of the European Anti-Poverty Network (EAPN) regarding international trade agreements currently being negotiated by the European Commission, on behalf of Member States, to promote free trade. It looks specifically at negotiations on agreements such as CETA, TTIP, TiSA¹, and tries to point out the potential consequences of these agreements, in their current form, on poverty and social exclusion in European countries.

The basis for this input is the belief that international trade should promote sustainable social equality, justice and development in a globalised world and should not be left unregulated and controlled by the market. International trade should primarily serve the people and bring added value to the economy. **EAPN rejects the notion that the main objective of free trade agreements and the TTIP should be “removing barriers to trade and investment”. EAPN insists that the free trade agreements and any removing of barriers to trade and investment must be at the service of the achievement of sustainable, social, economic and environmental development.**

Subjecting the objective of removing barriers to trade and investment to sustainable development should respect existing social and environmental standards and democratic principles, and should prevent relocation of jobs. The principles of an ecologically sustainable social market economy must prevail over the values of free trade in any free trade agreement.

The EU is not purely an economic community, but sees itself as a community of values, in which the citizens are at the centre.²

EAPN is particularly concerned about the impact of enhanced free trade on socially disadvantaged people, such as those who work in low-wage sectors, benefit from social services or receive state benefits. Moreover, the entry into force of such free trade agreements is likely to further increase poverty and exclusion, through an abrupt erosion of social, employment, and environmental rights and standards, as further explored in the sections below.

2. EFFECTS ON ECONOMY AND EMPLOYMENT

The optimistic forecasts of the European Commission that the European economy could grow by an annual rate of EUR 120 billion due to TTIP³ are contrary to studies⁴ that predict only minimal employment and growth effects. Reservations about these predictions are likely to be proved right if the effects of previous free trade agreements are taken into consideration. For example, the economic benefits of the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico are controversial. However it is undeniable that the predicted employment growth has not occurred.⁵ It is therefore doubtful whether the annual gain of more than EUR 500 for a family of four forecasted for the EU will occur. This is especially true for the growing population at risk of poverty and social

¹ Since July 2013 the European Commission negotiates with the US government on a free trade agreement, short TTIP (Transatlantic Trade and Investment Partnership). It is also called TAFTA (Trans-Atlantic Free Trade Agreement). In addition, the EU Commission negotiates since 2012 with 23 partners on an agreement on trade in services, short TiSA (Trade in Services Agreement). Meanwhile, the treaty text of the European-Canadian free trade agreement, called CETA (Comprehensive Economic and Trade Agreement), is published since September 2014.

²Cp. The EU Treaty and the EU Charter of Fundamental Rights enshrines the fundamental right to access to Services of General Economic Interest (art.36), inter alia.

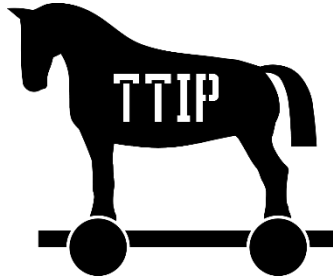
³Cp. EU Commission: The Transatlantic Trade and Investment Partnership (TTIP) - Current State of Negotiations, 19/04/2014

⁴ For example: See written statement to the public hearing of the Committee on Economic Affairs and Energy of the German Bundestag on 16 March 2015 by Prof. Dr. Sebastian Dullien, University of Applied Sciences Berlin.

⁵Cp. Gary Clyde Hufbauer, Cathleen Cimino and Tyler Moran: NAFTA at 20: Misleading Charges and Positive Achievements, Peterson Institute for International Economics, May 2014.

exclusion, which has risen to over 120 million people within the EU (24.5% of the population). **There should be a clear mechanism in the trade agreements to review their impacts on poverty, inequality and social cohesion and to allow alterations as needed.**

There are also concerns that TTIP could lead to a reduction of workers' rights in the EU, which are high



in comparison to those in the USA, if these are classified as barriers to trade. Unlike the EU, the United States have so far recognised only two of the eight core labour standards of the International Labour Organisation (ILO)⁶. This could lead to a further increase in competitive pressure and could cause production and employment to be relocated to where workers' rights and wages are lowest. This could result in poorer and cheaper standards supplanting better and more expensive standards within the market. The low-wage sector could be

affected by a further increase in in-work poverty if wages stagnate or drop. Thus, the growing income divide could continue to increase in Europe. To prevent this, **it must be ensured that trade agreements are linked to the strengthening of workers' rights, to the preservation of employment standards, to decent pay and working conditions (including sustainability of contracts, social protection contributions, etc.), as well as strong trade-union representation and reinforced collective-bargaining mechanisms.**

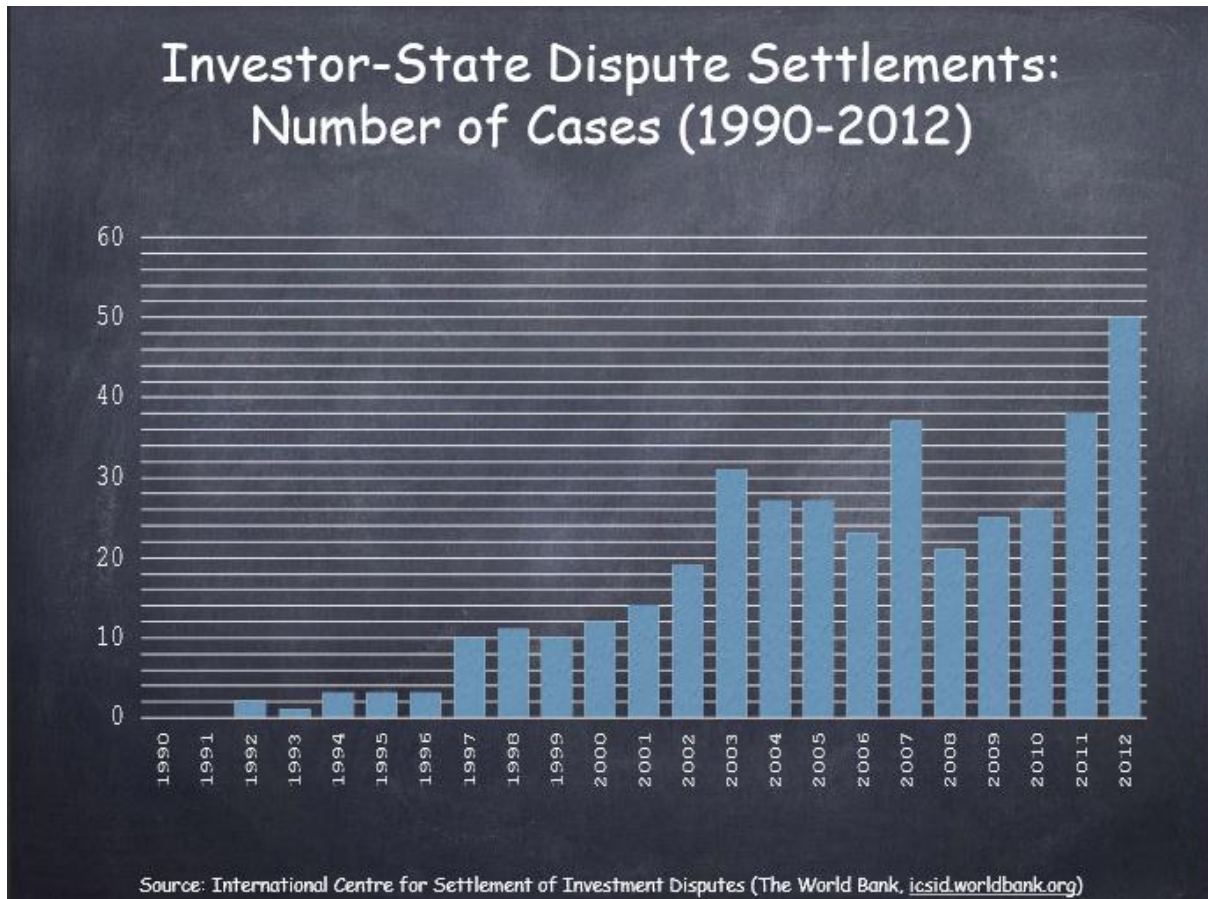
3. INVESTMENT PROTECTION

CETA - as with other free-trade agreements – includes clauses on investment protection, which are also provided for TTIP. The Investor-State Dispute Settlement process (known as ISDS), which plans for the jurisdiction of private international arbitration, is particularly controversial. These tribunals would be able to decide on claims for damages by companies against the future contractual states - without the possibility of an independent judicial review. In recent years, claims by investors against states for their regulatory decisions (laws, regulations etc.) have increased on the basis of investment protection agreements.

The door is left open for such claims by the extensive use of openly formulated terms, such as "fair and reasonable treatment", "non-discrimination" and "investment". This gives an investor the option to sue a government for damages if an expected investment environment changes due to government regulations. So, under certain circumstances, regulatory changes relating to environmental and consumer protection, health, labour and social affairs could become the subject of investment protection claims.

⁶ The following ILO core labor standards were not signed by the USA: Freedom of Association and Protection of the Right to Organize, Right to Organize and Collective Bargaining, Forced Labour, Minimum Age, Equal Remuneration, Discrimination.

Even if the Commission has proposed substantial improvements to its original proposals the inclusion of an investor-state dispute settlement process in CETA and TTIP should be rejected, because the introduction of independent arbitration is not required, due to the developed and functioning legal systems of the Member States.⁷ It is incomprehensible why the existing legal and judicial systems should not be able to guarantee quick, effective and impartial legal protection for investors without additional investment protection.



The investor-state dispute settlement process creates a parallel private legal system to the existing ordinary jurisdiction.

There is so far no evidence that investor protection has sustainably brought more investment, but there is a legitimate concern that the capacity for policy design by the level of corporate claims and thus the democratic sovereignty of the Member States could be restricted.⁸ If Member States are required to pay billions of dollars in compensation to private law claimants, it may mean that the funds are withdrawn from the state budget. This would also affect the socially disadvantaged in many ways, e.g. if it results in cuts to social spending.

⁷For example, the Australian and the US government agreed in 2005 on a free trade agreement without investment protection, because such a procedure - it was declared by both negotiating partners - was unnecessary in the face of robust legal and judicial systems in both countries.

⁸ This negative assessment was confirmed by the results of the EU consultation on investment protection in TTIP published early 2015. The analysis of 150,000 contributions resulted in a rejection of 97%.

4. REGULATORY COOPERATION

The focus on the Investor-State Dispute Settlement has diverted attention from the equally important and equally dangerous proposal re 'Regulatory Cooperation'. The regulatory cooperation planned for TTIP and the establishment of a council for regulatory cooperation should also be questioned critically. Any alleged issues relating to the implementation of the free trade agreement is proposed to be clarified by the Regulatory Cooperation Council. However, the mandate, the composition and the decision-making powers are not yet known. The European Commission has designated TTIP as a "living agreement", which suggests that the contractual parties agree on a general framework and shall clarify contentious issues retrospectively in committees such as the Regulatory Cooperation Council.

However, it could also mean that the monitoring of the agreement would bypass the European Parliament and national representative assemblies and thus escape democratic control. Moreover, state sovereignty and the EU and democratic rights of Member States could be interfered with, if the Regulatory Cooperation Council also investigates questions of the running of our community and its consistency with the free trade agreement.

This would mean that no state can take regulatory measures in the area of the agreement alone, but must do so jointly and mutually with all contracting parties. This could in turn result in a delay in introducing urgently needed regulations and standards that affect all citizens, or prevent it all together.

The existence of a Regulatory Cooperation Council such as this should be questioned from a democratic and transparency point of view. Central decisions must be reserved for democratically elected authorities. If the contractual partners do settle on the introduction of a Regulatory Cooperation Council, it must be ensured that the council only deals with those regulatory measures which relate solely to technical product standards and are on a sub-legal level. **It is essential that the regulatory cooperation council, while remaining within its remit on trade, has expertise not only on trade but expertise on poverty, and social policy, labour rights and environmental protection within its membership to ensure the impacts of trade on these areas is properly taken account of.**

5. LIBERALISATION OF SERVICES

For TTIP and CETA, a general push for liberalisation is envisaged, which shall in principle affect all services – including Services of General Interest (public services). Only the areas which are specifically defined in the agreement are exempt (as proposed a positive list approach is envisaged for market access and a negative list approach for non-discrimination). In addition, all new services would be liberalised, without exception. This approach, to extend free trade to all areas, should also be critically questioned. There are also uncertainties when exceptions are not clearly defined.

As raised by the Social Platform regarding Services of General Interest, the TTIP proposal - to differentiate services by source of funding, i.e., publicly funded services would be exempt from privatisation -, is severely flawed. Rather than separating services by source of funding, it would be better to differentiate on the basis of the purpose of the service. The proposal from the Platform arises because there are services of general interest which are not publicly funded or, at the very least, it is not clear if they fit into the definition of public funding as proposed. Subsequently, the position paper of the Social Platform⁹ clearly calls to **“exclude all social services, and health, education and water services and services of general interest, regardless if they are publically or privately funded”**. EAPN supports this demand.

⁹ Social Platform, Position Paper, Preserving Services of General Interest in Trade Agreements, 27 October 2015.

The current TTIP proposal to only exclude government-funded services will lead to a lack of clarity and could become the starting point for further liberalisation of services of general interest (by means of the investor-state dispute settlement process). Moreover, there are concerns that returning temporarily privatised sectors to the public domain is so difficult that liberalisation is irreversible (the so-called Standstill and Ratchet Clauses). With this in mind, the intention to return to the previous principle of positive lists, where **areas to be liberalised are expressly and precisely laid down**, appears to be a move in the right direction. However this positive list approach should now also be used to also cover the question of non-discrimination.

For social and health services, the EU and a number of Member States have introduced reservations on the CETA agreement¹⁰ which prevent any further liberalisation and allow for individual national regulations (e.g. non-profit status). Thus, the obligations for market opening will not go beyond the existing binding services agreement of the World Trade Organization (General Agreement on Trade in Services, GATS). The European Commission seems to also be following this strategy for the TTIP negotiations. However, in the area of public services, different definitions (e.g. public utilities vs. public services) exist in the USA, EU and member states. Exceptions, terms and definitions given up to this point are not clear, so this regulatory approach does not provide one hundred per cent legal certainty.

Socially disadvantaged people in particular could be affected by further liberalisation in the area of public services. Previous experience has, on the one hand, shown that market liberalisation has had a negative impact on employment. On the other, competition mainly takes place over employee wages and services have not become cheaper as a rule. This is particularly critical when it comes to meeting basic needs, such as water, housing, energy, health, social services and education, price increases would disproportionately hit the socially disadvantaged. In addition, they would also be affected if market opening were to have a negative impact on the quality, availability and accessibility of services, as they use them extensively, and may be dependent on them.

6. CRITICISMS OF TRANSPARENCY AND DEMOCRATIC DEFICIT

After ratification by the respective contractual parties, international agreements such as TTIP, CETA and TiSA are international treaties which have priority over nation-state law.¹¹ Once the treaty has entered into force, the agreement of all contractual parties is required for any alteration. Unless clauses for the termination or end of the TTIP contract are provided, the agreement is of indefinite duration. To date, it is planned to publish the contractual texts after conclusion of the negotiations.

Due to the widespread impact of the free trade agreements, the broad participation of civil society and the general public is essential. The continuous lack of transparency of the negotiations by the European Commission has led to a loss of legitimacy and widespread rejection by the public.¹² Only a consistent disclosure of all texts would make evident whether standards and safety regulations in the EU may be reduced. This cannot only be done at the end of the negotiations, but must be carried out continuously and comprehensively. **The European Commission must take into account the recent own initiative opinion of the European Parliament and its concerns regarding services of general interest and the ISDS when conducting its negotiations.**

A political dispute over an agreement for which the negotiations have been concluded is either not possible or very difficult, as the political costs of undoing the agreement are very high. However, the

¹⁰ Annex II to the services chapter.

¹¹This also applies to EU secondary legislation, such as regulations and directives, but not for EU primary law (Treaty on the Functioning of the EU, the EU Treaty), because the EU itself is a subject of public international law.

¹²The European Commission strengthened the democratic deficit and the fears of many citizens and NGOs by its decision not to approve the European Citizens' Initiative "Stop TTIP".

approval of the European Commission, the European Parliament and the Council of the European Union is not sufficient to legitimise the agreement, even if the trade policy is an exclusive competence of the EU. It is essential that all national parliaments of EU Member States are involved in the ratification process of the free trade agreements.

It is equally important to foster open debates and encourage citizens and civil society to express critical views and to give their input on the proposed changes, as they would have a considerable impact on the population of the European Union. **Decision-makers, at national and EU level, need to open up communication channels and provide information related to negotiations in full transparency, so as to allow the people of Europe to have their say on important changes that will affect them. This will also be important in the ratification stage after the negotiations are completed.**

7. CONCLUSION

The concerns put forward in this paper - as in the public debate - should be considered and taken seriously by the negotiators and policy makers at European and national level. Due to the far-reaching significance of the free trade agreements (in particular TTIP) in shaping the future of important sectors of our society, the negotiations must be carried out with diligence, foresight and responsibility. This clearly has priority over adherence to the announced deadline of the end of 2016. At the end of the negotiations, the resulting agreement should be reduced in key areas if this would be the better alternative for EU citizens.

Transparency, critical public participation and adherence to democratic principles are indispensable for the continuation of the process and the conclusion of a possible agreement.

In particular, the national parliaments of the EU Member States must be involved in the ratification.

In addition, the **main guidelines of the EU negotiating mandate**, for example which areas are to be liberalised, **must be openly discussed and decided on** - this cannot be done behind closed doors. Sensitive areas such as public services may not under any circumstances be used as bargaining chips to obtain concessions from the opposite side in other areas. This also applies to protective regulations in the fields of labour, consumer and environmental protection etc., which are more stringent in the EU than in the US. **The aim must be to bring all standards to a higher level.** This must of course also apply to the areas where the US has higher standards, such as in the financial market.

Furthermore, it should be ensured that the **sovereign rights of Member States to carry out legitimate regulatory measures are not limited, circumvented or eliminated** by clauses on investment protection or regulatory cooperation. In addition, agreements should include revision clauses that allow mistakes to be corrected.

In this paper, we have drawn attention to some possible effects that the free trade agreements could have on socially disadvantaged people. This approach should be deepened in an independent scientific investigation. This could be carried out based on experience with existing agreements (such as NAFTA) and conveyed to the EU. The goal of this type of analysis is to make the negotiators aware of the interests of people who are afflicted by poverty and social exclusion, and to influence the public debate and the on-going negotiations in this respect.

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