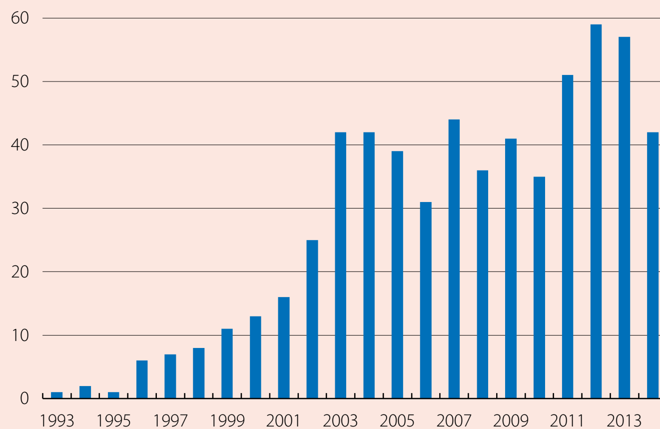
# The controversies of the TTIP: insurmountable difficulties?

In March 2014, the European Commission started a public consultation regarding one of the many elements that will form part of the Transatlantic Trade and Investment Partnership between the United States (US) and the European Union (EU), usually known as the TTIP. This is the customary procedure when the Commission is promoting new regulations in the EU that affect a large number of groups. The response was much greater than expected: 150,000 answers were received and the content of 97% of these could be classed as being against the text under consultation. How is such a huge response possible? Was a matter of principles being discussed? Or was the TTIP as a whole perhaps being subjected to a public referendum?

***Cases brought before existing ISDS procedures ****

*(Number)*




***Note:*** ** Known cases.*
***Source:*** *"la Caixa" Research, based on UNCTAD data.*

Not at all. The issue being debated is the Investor-State Dispute Settlement or ISDS procedure. This is a court of arbitration set up *ad hoc* to resolve conflicts between investors and states, something that usually forms part of free trade treaties that also cover investment. The aim is to provide legal security via an efficient system to resolve claims and it is therefore eminently technical in nature. Nevertheless, the huge response received highlights important aspects in the debate surrounding the TTIP. Firstly, this scepticism is unlikely to be limited to the ISDS alone and probably affects the treaty as a whole. The controversy is partly due to the expected economic effects of the treaty per se. However, and as reviewed in depth in the article «The economic impact of the TTIP» in this Dossier, the economic benefits seem to clearly outweigh the costs. Surely this means that most of the argument is not economic but political in nature. Specifically, the greatest concern is that large companies may end up deciding national legislation and the ISDS is precisely one of the instruments that could bring this about.

As has already been mentioned, the ISDS mechanism is customary in trade agreements as it provides legal security for investment flows, offering a means to resolve any disputes between investing firms and the state in question. The main apprehension is the possibility of investors using such courts of arbitration to oppose legislation adopted by states that could harm investors' economic interests and that the particular interests of companies may prevail even when the legislation in question is for the public good. In short, the big cause for concern is foreign firms being able to influence national sovereignty. This risk is potentially amplified by the fact that, even before a company resorts to the ISDS, a state may be dissuaded from adopting the intended regulation in order to avoid what could end up being a complex, costly and uncertain procedure. Other operational aspects of the ISDS have also been criticised, in particular its composition and transparency. With regard to its composition, it should be noted that the court is made up of three members who are experts in the field in question, usually lawyers, two of whom are chosen by the parties involved in the dispute (investor and state) plus a third who acts as a judge and is agreed upon by the litigant and the state. The problem with this composition is that there are no clear incompatibilities between cases so that the lawyer defending the litigant in one case can act as a member of the court in another. The issue of transparency refers to the fact that, to date, the cases are not public. However, even acknowledging such reservations are warranted, the real situation of ISDS procedures reduces their relevance. It is important to remember that ISDS procedures already exist and in large numbers (3,000 at a global level, of which 1,400 are in EU member states). Paradoxically, in spite of their number, the cases reaching these courts are few (in 2014, for example, only 42 were heard) and they are more often used by European companies (in the same year, 64% of plaintiffs were European compared with 7% from the US).[1] The proposed elimination of the ISDS procedure contained in the TTIP would not protect EU regulators as much as expected either. If the company of a country wishes to take a state to court with which it does not have an established ISDS, the procedure followed is to bring the complaint via an ISDS procedure between a third party country and this state.

The solution to minimise the possible undesirable effects of the ISDS procedure is therefore not so much to eliminate it but to improve its design. A useful precedent in this area are the tougher provisions regarding ISDS procedures included in the

1. One problem resulting from the cases heard is that not all of them are made public and, consequently, the cases known are only a fraction of the total. However, the small number of known cases compared with existing ISDS procedures suggests that the total number of cases reaching arbitration is relatively small.

Comprehensive Economic and Trade Agreement between the EU and Canada (CETA). This treaty, in its preamble, reaffirms the right of the state to adopt regulations (in the case of the TTIP this premise could be reinforced, including it not only in the preamble but also in the articles). The CETA also provides a precise definition of the situations when courts of arbitration can be used, includes a clause of complete, mandatory transparency for cases and creates a code of conduct for court members that reduces hypothetical conflicts of interest. In fact, if the TTIP refines the design of ISDS procedures, it could lay the foundations for the creation of the new courts established over the coming years (it should be noted that the EU is currently negotiating 12 free trade treaties with different trading partners) and might end up being the benchmark for other countries establishing such courts.

Apart from the ISDS procedure, another area in which there are fears that companies might affect national regulations is that of product standards. As is known, the TTIP obviously intends to harmonise the different requirements and standards that products must meet in order to be sold. Regarding this proposal, European citizens tend to perceive as controversial the difference between high product standards in the EU compared with lower levels in the US and the process has been interpreted as one that will inevitably lead to downgraded harmonisation. Apart from the question of whether this difference in standards on both sides of the Atlantic actually exists, what is important from a conceptual point of view is to remember that the product standards of each economy partly reflect the preferences of its consumers and partly result from the influence exercised by local suppliers on legislation.

In general terms, as has been seen in the article «The TTIP: a mega-agreement that is just as economic as it is geostrategic» in this Dossier, there are two harmonisation strategies to align standards: full harmonisation and mutual recognition of regulatory regimes. Directly or indirectly, both can incur substantial costs in well-being terms for those countries integrating commercially if the national regulations fully reflect their local preferences and these are highly diverse. To lessen this risk, the articles of the proposed TTIP suggest that both strategies are possible although the EU has stressed that, regarding existing regulations, only sectors with very similar standards will be harmonised while leaving out those sectors that could be classed as «irreconcilable». In practice, therefore, a large part of the concerns aroused by the issue of product standards will merely be potential risks if the TTIP articles are designed adequately.

In fact, this conclusion goes beyond the scope of harmonisation of product regulations and is applicable to the TTIP as a whole: ensuring that the desired results of the Treaty come about without too many undesired effects will largely depend on the detailed design of its articles. The precedents, such as the aforementioned treaty with Canada and the proposed TTIP articles should be encouraging. Nonetheless, it must be admitted that a large part of the upset in public opinion that seems to be caused by the TTIP comes from the fact that it is taking place within a scenario with few benchmarks. As a trade agreement, the TTIP is different from existing treaties as it will integrate two leading economic powers and will include areas that go far beyond the mere circulation of goods, such as investment and intellectual copyright. Although legitimate concerns caused by the TTIP can be put down to its unusual nature, we should not waste this opportunity to enrich debate by considering in more depth the treaty's role in the fundamental issue of what kind of EU we want in the future.

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