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Revised WTO Government Procurement Agreement to Enter Into Force April 6

By Daniel Pruzin

March 12 — Revisions to the World Trade Organization's Government Procurement Agreement (GPA) adopted in December 2011 will enter into force on April 6, the WTO announced.

On March 7, Israel became the 10th party to the GPA to ratify a protocol amending the agreement, thus reaching the minimum needed to ensure entry into force, the WTO said in a March 12 statement. Under the terms of the protocol, the amendments take effect 30 days after two-thirds of the parties to the GPA have notified their acceptance.

The U.S., the European Union (on behalf of its 28 member states), Liechtenstein, Norway, Canada, Taiwan, Hong Kong, Singapore and Iceland earlier notified their acceptance. Other parties to the GPA are Armenia, Aruba, Japan, South Korea and Switzerland.

The revised GPA “will open markets and promote good governance in the participating Member economies,” WTO Director-General Roberto Azevedo said.

“This is a very welcome achievement,” WTO Director-General Roberto Azevedo said in prepared remarks. The revised GPA “will open markets and promote good governance in the participating Member economies.”

“The fact this has been achieved so quickly shows the importance that the Parties attach to the GPA and is further evidence, after the successful Bali Package, that the WTO is back in business,” Azevedo continued. “The modernized text of the revised GPA and the expanded commitment to market access should prompt other WTO Members to consider the potential advantages of joining.”

Adopted in 1994, the GPA establishes rules guaranteeing fair conditions for international competition for government procurement contracts at the central and sub-central levels and prohibiting discriminatory treatment among local and foreign suppliers, as well as between foreign suppliers from different GPA countries. The GPA is a plurilateral agreement, meaning the market access concessions within it are only granted to suppliers in those countries that have acceded to the agreement.

New Provisions

The revisions adopted in December 2011 include new and improved market access commitments and provisions granting special and differential treatment for acceding developing countries. GPA ministers said at the time that the changes would bring \$80 billion to \$100 billion annually in new market access opportunities, promote good governance and deter corruption.

As part of the revised deal, the U.S. will subject 12 additional central government agencies to GPA disciplines, including the Social Security Administration and the Transportation Security Administration. Procurement by these agencies will be subject to GPA requirements if a procurement contract has a value of 130,000 SDR (\$201,000) for goods and services procurement and 5 million SDR (\$7.7 million) for construction contracts, the same thresholds that apply to other covered central government entities.

Thirteen U.S. states—Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia—are currently exempted from coverage under the U.S. schedule of GPA commitments.

WTO members currently negotiating accession to the GPA are Albania, China, Georgia, Jordan, Kyrgyzstan, Moldova, Montenegro, New Zealand, Oman and Ukraine.

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March 18, 2014

Protecting Public Health in the TPP Agreement
Results from a national survey of likely voters

To: Interested Parties

From: Stan Greenberg and Missy Egelsky, Greenberg Quinlan Rosner
Glen Bolger and Jim Hobart, Public Opinion Strategies

A new national survey conducted for the American Cancer Society Cancer Action Network¹ shows that voters want government to make protecting public health a top priority, including in negotiations over free trade agreements like the Trans Pacific Partnership (TPP).

General support exists for the United States entering into trade agreements with other countries, including 6-out-of-10 voters who favor the TPP. Yet concerns over negative health impacts trump the positive economic benefits of any free trade agreements, and the public strongly opposes the passage of any agreement that eschews public health considerations.

This emphasis on public health translates into a strong desire for government action on tobacco specifically. Voters revile the tobacco industry and stand firmly behind actions aimed at reducing smoking and tobacco use. A broad spectrum of voters side with public health advocates and support inclusion of a provision to protect countries' right to regulate tobacco as part of the TPP, and there is a key group of activists who are willing to be vocal in their support for efforts to include protections for public health in the TPP.

Key findings:

- **American voters place huge importance on government working to protect public health and safety.** Understanding the importance of protecting public health and safety is nearly universal, as 89 percent of voters say it is a very

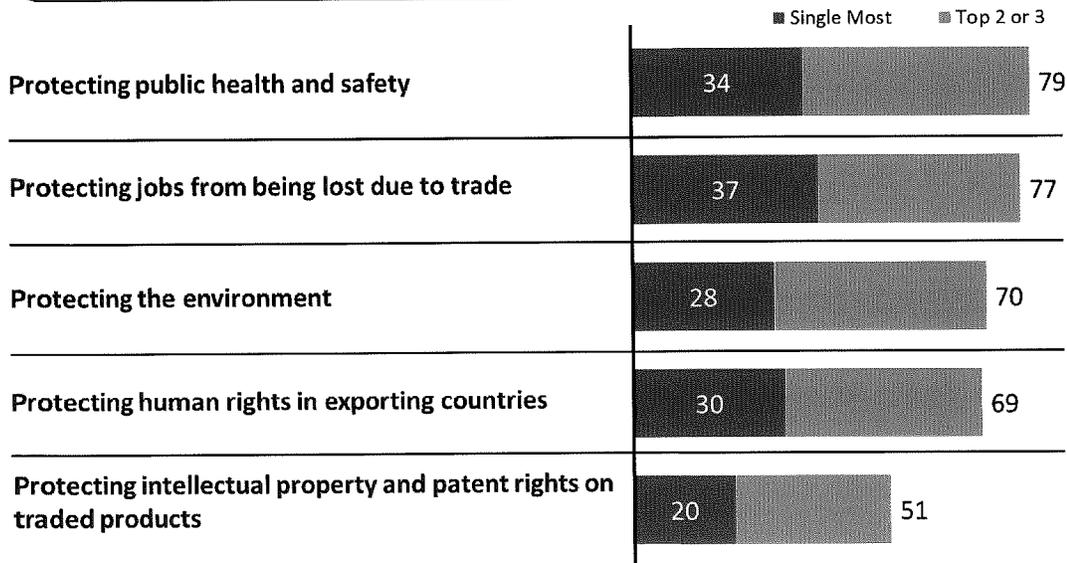
¹ These findings are based on a national survey written and conducted by Greenberg Quinlan Rosner and Public Opinion Strategies. The survey of 1,001 likely 2014 voters nationwide was conducted from January 30 – February 6, 2014. Unless otherwise noted, overall margin of error= +/-3.18 percentage points at 95% confidence

important (66 percent) or somewhat important (23 percent) priority for government.

- When it comes to negotiating trade agreements, the public views addressing public health issues as equally important as protecting jobs. Seventy-eight percent of voters rate protecting public health and safety among the top 3 priority issues in negotiating trade agreements; 77 percent rate protecting jobs in the top tier of priorities.

Figure 1: Priorities in Trade Agreements

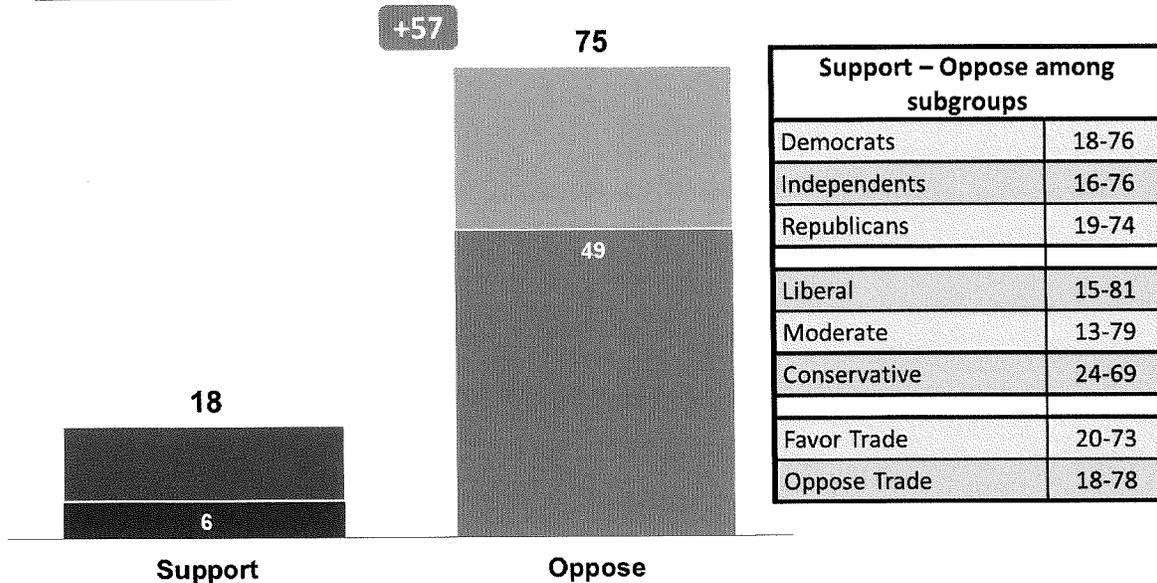
As you may know, trade agreements encourage trade by reducing or eliminating tariffs – the fees that governments charge each other to import goods. The agreements often address a wide range of issues including jobs, public health, and the environment. Please tell me whether you think that issue should be the SINGLE most important priority in negotiations on trade agreements, one of the TOP TWO OR THREE priorities, in the MIDDLE, or TOWARD THE BOTTOM of the list of priorities?



- **While voters support trade agreements—including the TPP—they oppose proposals that provide economic benefits at the expense of public health.** After a brief description of TPP, 60 percent of voters favor the proposal, while just 25 percent oppose and 15 percent are undecided. However, voters are simply not willing to support agreements that create negative impacts on public health, even if those agreements bring positive economic results for the United States and other countries. Three quarters of voters would oppose a trade agreement under those circumstances, a result that is consistent across partisan identification and ideological boundaries, as well as among those who favor trade agreements.

Figure 2: Opposition to Trade Agreements Based on Health Impacts

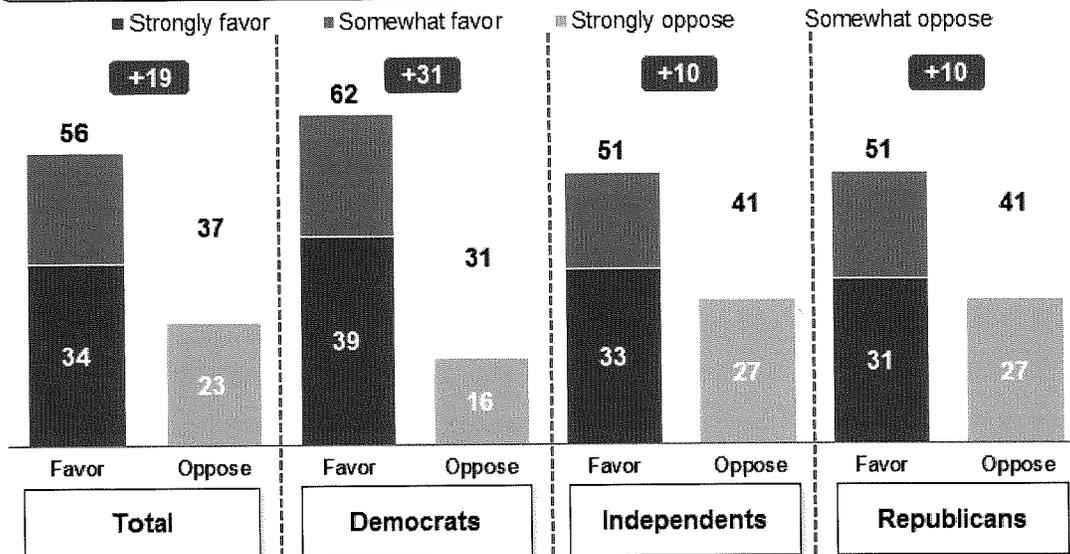
As you may know, the U.S. Congress votes to approve any final trade agreements. If there was a trade agreement that would provide positive economic benefits to the U.S. and other countries, but might have negative impacts on people's health, would you want the U.S. Congress to support or oppose that agreement?



- Voters express overwhelming animosity toward tobacco companies.** Three quarters of voters give tobacco companies negative ratings, compared to just 6 percent who give tobacco companies positive ratings. This rancor crosses partisan lines, as tobacco companies receive negative ratings from more than two thirds of Democrats, Independents, and Republicans alike. Even current smokers recognize tobacco companies as bad actors; they rate tobacco companies as more negative than positive by a nearly 2-1 margin (50 – 27 percent negative to positive).
- A strong majority of voters support including a provision to protect countries' rights to regulate tobacco as part of the TPP.** By a significant 56 – 37 percent margin, voters favor including language that limits the tobacco industry's ability to challenge laws regulating tobacco in countries. Intensity of support for the provision (34 percent) strongly outweighs strong opposition (23 percent). Majorities of Democrats, Independents, and Republicans support the provision; support also crosses gender, ethnic, and age lines. Even a plurality (48 percent) of current smokers believes that the TPP agreement should include the provision to protect each country's right to regulate tobacco.

Figure 3: Support for TPP Anti-tobacco Provision Crosses Party Lines

Now, I want to give you some more information on a proposal that has been made during negotiations on the TPP trade agreement. Public health advocates in the United States and in other countries want to make sure countries can reduce smoking and improve public health by passing laws that regulate the tobacco industry. The advocates support adding a provision to the trade agreement that protects the ability of the U.S. and other countries to pass laws to restrict tobacco advertising or require warning labels on cigarette packs. Without the provision, tobacco companies could take countries, including the U.S., to court to overturn those laws as violations of free trade. This is already happening in some parts of the world. From what you know, would you favor or oppose including this provision in the TPP trade agreement?

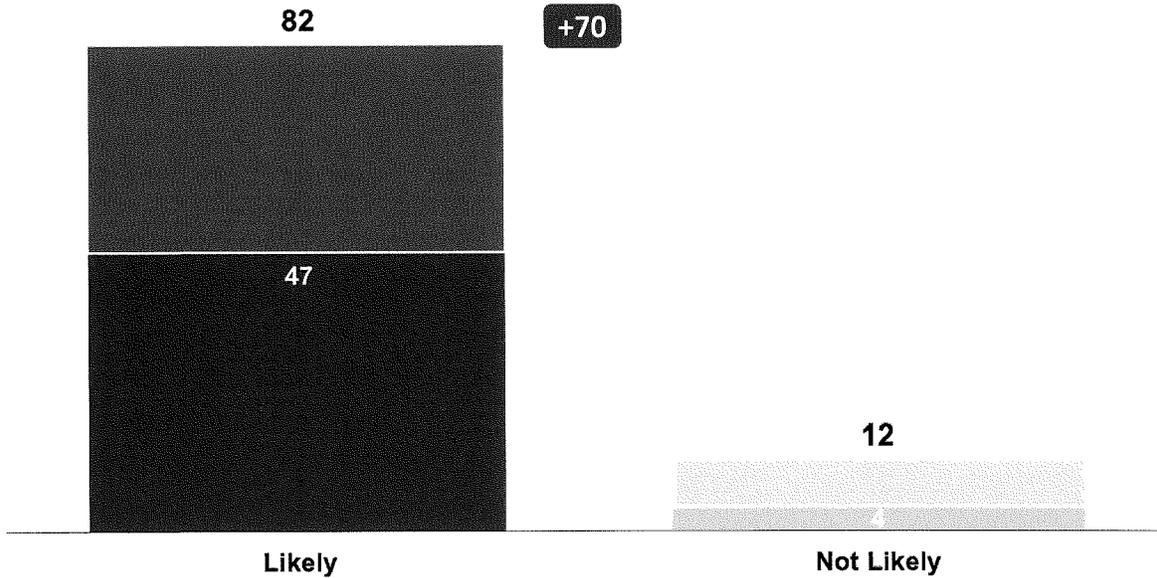


- **Activists² show a strong willingness to get involved and take action in support of the tobacco provision.** Overall, 82 percent of activists are likely to contact a lawmaker about the tobacco provision, including nearly half (47 percent) that say they are very likely, which is more than twice those who say they are not likely. Dads, very liberal activists, and unmarried men are the most likely to take action, but there is also substantial willingness among more educated and older male activists.

² These findings are based on a national online survey written and conducted by Public Opinion Strategies and Greenberg Quinlan Rosner. The survey of 600 activists, defined as anyone who took part in a grassroots effort in conjunction with the American Cancer Society, was conducted from February 5 – 10, 2014.

Figure 4: Activists Very Likely to Take Action

And, how likely would you be to take some type of action, such as calling or emailing a lawmaker or signing a petition, that would demonstrate your support for this provision?



- **Members of Congress who vote for the TPP without the tobacco provision could face electoral blowback with activists.** Activists were asked if they were more or less likely to vote for a member of Congress who voted for the TPP *without* the provision. By a significant 66 – 19 percent margin, activists were less likely to vote for a member of Congress.

American voters express strong convictions on the need for government to take action to protect public health. They support making protecting public health—and particularly actions to stand up to the tobacco industry—a top priority in negotiating trade agreements like the TPP. Furthermore, activists not only express support for the provision, but demonstrate a willingness to take action in order to see it included.

HTTP://WWW.TTIP2014.EU/BLOG-DETAIL/BLOG/-61.HTML

16 APRIL 2014

Grand majority of Parliament votes in favour of a regulation on investor-state lawsuits - Greens sharply criticise the result

Greens are against the inclusion of ISDS in trade agreements, as the EU is currently planning in the agreements with Singapore, Canada and the United States

SKA KELLER, MEP, EUROPEAN GREEN/EFA GROUP

Investor-state dispute settlement (ISDS) has come into the focus of critics since the start of negotiations on a free trade agreement with the US (TTIP). ISDS means that foreign investors can sue the states hosting their investments in front of international courts when they see their rights and profit expectations violated. Often it is environmental or social legislation of a state which investors claim to be in violation of their investment expectations. Currently, for example, Vattenfall is suing the German federal government for 3 billion euros because of the German nuclear phase-out. Since Lisbon, the EU has gained the competence on investment policy, and thus also on ISDS policy. This Regulation establishes rules on whether EU or Member States act as a defendant in ISDS proceedings and who pays in the case of successful investor claims.

Greens are against the inclusion of ISDS in trade agreements, as the EU is currently planning in the agreements with Singapore, Canada and the United States. We also demand a revision of the myriad of bilateral investment agreements between Member States and third countries which in many cases contain ISDS. However, we were defeated in the INTA Trade Committee on our proposal that the ECJ be assigned the function of a filter to decide on the admissibility of a claim before it can be taken up by an international arbitration tribunal. However, in the legally non-binding considerations of the Regulation, we were able to establish that foreign investors as a rule should not have any greater rights than domestic investors, which would indeed mean that ISDS is ruled out. This is a strong criticism of ISDS but unfortunately will not have any legal consequences.

Moreover, in the negotiations for this regulation the position of the Member States has largely prevailed. Greens think that the outcome violates the Lisbon Treaty and the competence of the Union with regard to investment policy. Member States will have ample discretion to defend themselves and settle cases, even if the reason for the claim is an EU regulation. Moreover, ISDS creates case law which will prejudice the future of the EU investment policy. Therefore, before the voting took place, Ska Keller as the Green shadow on the regulation asked to postpone the vote, seconding a similar request put forward by the GUE Group.

Already several EU Member States have been sued under the financial crisis of international investors. The new Directive does not go to these problems but complicates the responsibilities even further. After pressure from us Greens and the public, the Commission has [launched a consultation on ISDS](#) in the TTIP. We sharply criticize that the Commission and the Council have pressed on adopting regulation on ISDS now without at least waiting until the end of the consultation.

For all these reasons, Greens voted against the Zalewski Report.

TISA

versus

Public Services



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Acknowledgements:

The authors wish to acknowledge the assistance and advice of Larry Brown, Penny Clarke, Marc Maes, Teresa Marshall, Daniel Poon, Oliver Prausmuller, Sanya Reid-Smith and Stuart Trew. We also wish to thank Gary Schneider for his skilful editing. Scott Sinclair also wishes to thank those officials who participated in confidential research interviews in Geneva in early October 2013.

The authors also wish to acknowledge the ongoing support of colleagues in the Trade and Investment Research Project of the Canadian Centre for Policy Alternatives. This report was commissioned by the Public Services International (PSI), but the views expressed are not necessarily those of PSI. Daniel Bertossa from PSI offered invaluable support and advice throughout the project.

**Published April 28, 2014
by Public Services International
www.world-psi.org**

Foreword

Treating public services as commodities for trade creates a fundamental misconception of public services. The Trade in Services Agreement (TISA), currently being negotiated in secret and outside of World Trade Organization rules, is a deliberate attempt to privilege the profits of the richest corporations and countries in the world over those who have the greatest needs.

Public services are designed to provide vital social and economic necessities – such as health care and education – affordably, universally and on the basis of need. Public services exist because markets will not produce these outcomes. Further, public services are fundamental to ensure fair competition for business, and effective regulation to avoid environmental, social and economic disasters – such as the global financial crisis and global warming. Trade agreements consciously promote commercialisation and define goods and services in terms of their ability to be exploited for profit by global corporations. Even the most ardent supporters of trade agreements admit that there are winners and losers in this rigged game.

The winners are usually powerful countries who are able to assert their power, multinational corporations who are best placed to exploit new access to markets, and wealthy consumers who can afford expensive foreign imports. The losers tend to be workers who face job losses and downward pressure on wages, users of public services and local small businesses which cannot compete with multinational corporations.

The TISA is among the alarming new wave of trade and investment agreements founded on legally-binding powers that institutionalise the rights of investors and prohibit government actions in a wide range of areas only incidentally related to trade.

The TISA will prevent governments from returning public services to public hands when privatisations fail, restrict domestic regulations on worker safety, limit environmental regulations and consumer protections and regulatory authority in areas such as licensing of health care facilities, power plants, waste disposal and university and school accreditation.

This agreement will treat migrant workers as commodities and limit the ability of governments to ensure their rights. Labour standards should be set by the tripartite International Labour Organization (ILO) and not be covered by trade agreements.

Incredibly, in the aftermath of the global financial crisis, the TISA also seeks to further deregulate financial markets. We know that large corporate interests are heavily involved in the TISA negotiations.

We know that that the last time such a comprehensive services agreement (GATS) was negotiated – global public protest ignited. And we know that great efforts are currently being made to keep the TISA negotiations secret.

With such high stakes for people and our planet, this is a scandal. Who in a democratic country will accept their government secretly agreeing to laws that so fundamentally shift power and wealth, bind future governments and restrict their nation's ability to provide for citizens?

The Trades in Services Agreement negotiating texts must be released for public scrutiny and decision-making. The TISA must not cover any public services or restrict any government's ability to regulate in the public interest. There should be no trade in public services.



Rosa Pavanelli
General Secretary
Public Services International

2

Introduction

Governments around the globe are currently engaged in the biggest flurry of trade and investment treaty negotiations since the “roaring nineties,” when the belief in the virtues of liberalized market forces was at its peak. The shock of the 2008 global financial crisis appears to have been forgotten. Official enthusiasm for more intrusive, “21st century” treaties is at a level not seen since the creation of the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) in the mid-1990s.



Each agreement becomes the floor for the next, in a state of perpetual negotiation and re-negotiation. Hard-won exceptions to protect public services or insulate financial services regulations from investor-state challenge, for example, become targets...in the next set of talks.

There is a virtual alphabet soup of new trade and investment agreements under negotiation – the TPP, TTIP, CETA, PA, TISA and more. Despite the bewildering array of acronyms, all of these negotiations tend to pursue a similar, corporate-driven agenda. Each agreement becomes the floor for the next, in a state of perpetual negotiation and re-negotiation. Hard-won exceptions to protect public services or insulate financial services regulations from investor-state challenge, for example, become targets for elimination in the next set of talks. Moreover, this frenzy of negotiating activity remains cloaked in a veil of secrecy.

The negotiating dynamic is fundamentally skewed towards corporate interests. Public interest advocates seeking to exempt essential sectors or key public policies from these treaties must win every time, while the corporate lobbyists targeting these policies need win only once. With the stroke of a pen, a single neo-liberal government can essentially lock all future governments into a policy strait-jacket.

Official platitudes about “expanding trade” and “growing the economy” only mask the reality that these types of agreements are increasingly about far more than trade.

Current treaties have developed into constitutional-style documents that tie governments’ hands in many areas only loosely related to trade. These include patent protection for drugs, local government purchasing, foreign investor rights, public services and public interest regulation, which can have consequences in areas such as labour, the environment and Internet freedom.

*Free Trade of the Americas Agreement protest in U.S.
Photo: flux*

Trade negotiators continue to insist that nothing in such treaties *forces* governments to privatize, yet there is little doubt that the latest generation of trade and investment agreements limits many key options for progressive governance.

The negative impacts on public services include: confining public services within existing boundaries by raising the costs of expanding existing public services or creating new ones; increasing the bargaining power of corporations to block initiatives when new public services are proposed or implemented; and locking in future privatization by making it legally irreversible.¹

Countries involved in the TISA negotiations

The newest addition to the mix of trade and investment treaties is the Trade in Services Agreement (TISA). It is being negotiated by a self-selected club of mostly developed countries along with a small but rising number of developing nations. Currently, the talks include 23 governments representing 50 countries. The current negotiating parties are Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey, the United States, and the European Union, representing its 28 member states.

These countries are responsible for more than two thirds of the global trade in services, but over 90% of this share is comprised of services trade by developed countries (that is, members of the Organization for Economic Cooperation and Development).² Talks on the TISA began in 2012, with a soft deadline of 2014 for completion. The participants, who have been the strongest proponents of services liberalization in the WTO's Doha Round services negotiations, call themselves the "Really Good Friends of Services". Through the TISA process, this "coalition of the willing" hopes to side-step the stalled Doha services negotiations and complete their unfinished agenda of trade-in-services liberalisation.



*Korean farmers protest WTO.
Photo: free range jace*

Early in the new millennium, campaigns to stop the GATS expansion mobilized public and political pressure to counter excessive demands for the liberalization of public services. Today, however, the secretive negotiation of a new, aggressive successor to the GATS poses an even more serious threat to public services.

TISA Negotiators are mandated to achieve "highly ambitious" liberalization of trade in services. Most of the nations involved have already undertaken far-reaching services liberalization and are already bound by a dense web of services liberalization agreements (see Table 1). Chile, for example, has agreements covering trade in services with 17 of the 22 other TISA parties.

Pushing this agenda even further, as the TISA mandate dictates, would involve truly radical liberalization, exerting strong pressure on the few remaining excluded sectors and surviving exemptions for key programs and policies. Most observers, however, agree that the real intent of the TISA is not just radically deeper liberalization among the current participants. Ultimately, the goal is to broaden participation by including the key emerging economies – China, Brazil, India and South Africa – and smaller developing countries under the agreement.

In a significant development, China has asked to join the talks.³ At this point, it is difficult to predict whether China's participation might dampen or heighten the ambition of the TISA. The U.S. is reluctant to admit China unless it commits to a "very high level of ambition."⁴ China's position on services in two ongoing negotiations – to expand the WTO Information Technology Agreement (ITA) and to join the WTO Agreement on

Treaties and public service exemptions

There is an inherent tension between public services and agreements governing trade in services. Public services strive to meet basic social needs affordably, universally and on a not-for-profit basis. Public services are usually accompanied by regulation that consciously limits commercialization and chooses not to treat basic services as pure commodities. Trade agreements, by contrast, deliberately promote commercialization and redefine services in terms of their potential for exploitation by global firms and international service providers.

There is an inherent tension between public services and agreements governing trade in services. Public services strive to meet basic social needs affordably, universally and on a not-for-profit basis. Public services are usually accompanied by regulation that consciously limits commercialization...

In most instances, trade treaties do not force governments to privatize. But they do facilitate privatization and commercialization in several ways. The first is by raising the costs of expanding existing services or creating new ones. Current trade treaties codify, by various means, the deeply regressive concept that foreign commercial service exporters and investors must be 'compensated' when a country creates new public services or expands existing ones.

While governments retain the formal right to expand or create public services, the treaties make doing so far more difficult and expensive. These treaties also increase the bargaining leverage of private economic interests, specifically foreign investors and commercial service providers, who can threaten trade law actions when new public services are proposed or implemented. Finally, by making it difficult for future governments to change course and reverse privatizations, even failed ones, privatization is locked in.

The basic TISA text reproduces GATS Article I:3, which excludes services "provided in the exercise of governmental authority" from the scope of the agreement. If it were left to governments to define what services they considered to be in the exercise of governmental authority, Article I:3 could have been a broad exclusion that preserved governments' flexibility to protect public services. Unfortunately, services provided in the exercise of governmental authority are narrowly defined as "any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers." This provides little or no effective protection for public services.

In practice, public services are delivered to the population through a mixed system that is wholly or partly funded, and tightly regulated, by governments at the central, regional and local levels. Public services – such as healthcare,

Government Procurement – have been loudly condemned by the U.S. government and business groups as inadequate. Yet, to date, China has "categorically rejected" demands from the U.S. that it meet certain preconditions, such as an improved offer in the ITA talks, before being allowed to join the TISA talks.⁵

If admitted to the TISA talks, China's interests can be expected to clash with those of the U.S. and the EU in service sectors where it is highly competitive, such as maritime transport and construction services. Recently, as part of its latest five-year plan, China

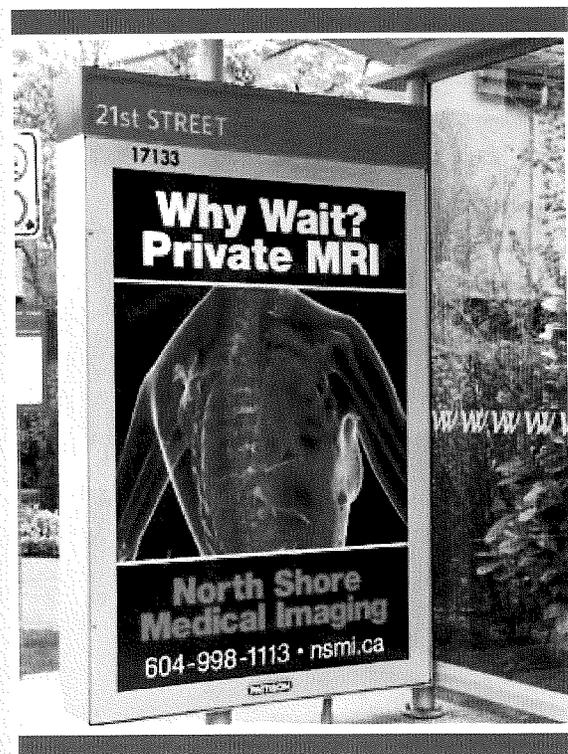
social services, education, waste, water and postal service systems – can be a complex, continually shifting mix of governmental and private funding. Even within the same sector, these systems can involve a mixing, or co-existence, of governmental, private not-for-profit and private for-profit delivery. The scope of these public services and the mix varies greatly within each country. An effective exclusion for these services needs to safeguard governments' ability to deliver public services through the mix that they deem appropriate, to shift this mix as required, and to closely regulate all aspects of these mixed systems to ensure that the needs of their citizens are met.

Because the governmental authority provision does not adequately safeguard public services, governments have had to rely on other means to insulate public services from the commercializing pressures of the GATS. One course of action is to make no commitments in a sector.⁸ Unfortunately, the TISA's "top-down" approach to national treatment is designed to limit this flexibility.⁹

Another approach is for governments to take horizontal limitations (that is, exemptions) against specific obligations.¹⁰ An example is the EU's public utilities exception, which provides that "services considered public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators."¹¹ Such exceptions can be effective at protecting existing public service models within particular countries, but are not flexible enough to accommodate the dynamic nature of public services.¹² In any event, these country-specific limitations, which dilute the avowed ambition of the TISA, will be targeted for elimination or erosion by other TISA participants.

A final option is for a government to withdraw commitments, although compensation must then be negotiated with other WTO member governments. This provision, GATS Article XXI, allows governments some flexibility to correct past mistakes and expand public services in a GATS-consistent manner. Indeed, both the EU and the U.S. have invoked this article to modify their GATS schedules. However, the option of withdrawing commitments conflicts with the TISA's ratchet and standstill obligations.¹³ Accordingly, there will almost certainly be no such provision included in the TISA.

In short, the already formidable challenges in safeguarding public services under the GATS will be greatly exacerbated by the TISA.



*Trade treaties help to privatize public health services.
Photo: flux*

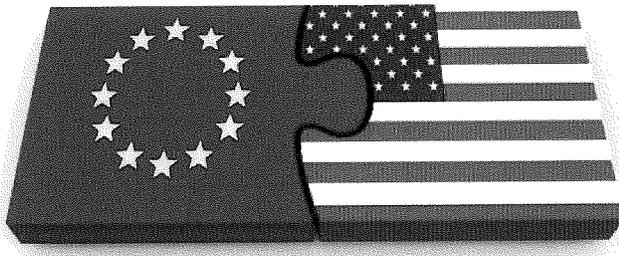
expressed a new interest in deeper services liberalization and increased services exports. China's key sectoral priorities include: "financial services; shipping and logistics; commercial trade; professional services such as law and engineering; culture and entertainment; and social services including education and healthcare."⁶ The Chinese government's newfound enthusiasm for services liberalization could well intensify the pressure for TISA to reduce policy flexibility for public services and public interest regulation, particularly in priority sectors such as health care and education.⁷

6

Why are negotiations held outside the WTO?

While the TISA negotiations are taking place in Geneva, home of the WTO, they are being conducted entirely outside the framework of the WTO. The TISA is clearly being driven by developed countries and multinational services corporations frustrated with the WTO's Doha Development Agenda, launched in 2001.

...the TISA group of countries, headed by the U.S. and the EU, has broken away to focus exclusively on achieving their key offensive interests in services.



Despite gaining agreement on a limited package of reforms at the ninth WTO ministerial meeting in Bali in December 2013, the Doha Round negotiations remain stalled. This impasse has more to do with the inflexibility of the U.S. and the EU on agricultural and development issues than with developing countries' resistance to deeper services liberalization.¹⁴

Nonetheless, the TISA group of countries, headed by the U.S. and the EU, has broken away to focus exclusively on achieving their key offensive interests in services. This decision "to take their ball and go home" signals that, despite official assurances to the contrary, rich countries are fully prepared to turn their backs on the Doha Round if they don't get their way. The TISA negotiating sessions are not open to all WTO members – even

as observers – while the negotiating texts are kept secret. U.S. negotiating proposals, for example, are stamped classified for "five years from entry into force of the TISA agreement or, if no agreement enters into force, five years from the close of the negotiations."¹⁵

It is hard to imagine why developing countries that have been so undiplomatically excluded from the TISA negotiating process would willingly accept its results. Developed countries' high-stakes pressure tactics also call into question the future viability of the WTO as a negotiating forum.

Can TISA be integrated into the WTO system?

Negotiations among smaller groups of like-minded WTO member governments are fairly common practice within the WTO framework. For example, the 1996 Information Technology Agreement, which requires participants to eliminate their tariffs on a specific list of information technology and telecommunications products,¹⁶ did not require the participation or approval of all WTO members because members are free to cut tariffs as they wish.

But ultimately, the outcome of such a plurilateral negotiating process can only be WTO-consistent if the results are extended to all WTO members, including non-participants, on a most favoured nation (MFN) treatment basis. In essence, MFN treatment means that if you favour products from any country, you must favour those from all member countries. Hence, the tariff reductions taken under the ITA were applied on an MFN basis, meaning tariffs were eliminated on products from all WTO member governments, including non-participants.

The TISA negotiations are fundamentally different from previous plurilateral negotiations in the WTO context because key participants, particularly the U.S., are unwilling to automatically extend the results to all other WTO members on an MFN basis. Instead, the whole point of the TISA is to pressure major developing countries into joining the

agreement on terms dictated by the Really Good Friends group.

Under WTO rules, there are only two legitimate options for refusing to extend the results of a plurilateral negotiation to all members on an MFN basis. The first is to conclude a "Plurilateral Trade Agreement" within the meaning of Article II:3 of the WTO Agreement. An example of this is the WTO Agreement on Government Procurement which, while not compulsory, is open to all WTO member governments. Adding any such agreement to the WTO, however, would require the unanimous consent of all WTO member governments. Given the continued objections to TISA by South Africa, India and other key WTO member governments, this option is not politically feasible.¹⁷

The second option is to classify the TISA as an economic integration agreement or Preferential Trade Agreement under the terms of Article V of the General Agreement on Trades and Services (GATS). Before this could happen, the WTO would have to be notified and the agreement would be subject to review by the WTO Committee on Regional Trade Agreements. A number of conditions must be met for an agreement to qualify, including that it have "substantial sectoral coverage." This coverage is defined in terms of the number of services sectors, volume of trade affected and modes of supply.¹⁸ GATS Article V further stipulates that within this broad sectoral coverage, the agreement must "provide for the elimination of substantially all discrimination" through the "elimination of existing discriminatory measures" and/or the "prohibition of new or more discriminatory measures."¹⁹

Due to the rancour surrounding the breakaway TISA talks, this option can also be expected to face a rough ride in the obligatory WTO review process. In the past, the WTO has received notification of many Economic Integration Agreements covering services with little fanfare. The TISA would differ in that it only covers services, and is not part of a wider economic integration pact.²⁰

Even if the TISA passes such a review, its legality could ultimately be decided by the WTO Dispute Settlement Body. This could occur if a WTO member government that was not party to the TISA insisted that its services and service providers were entitled, on an MFN basis, to the same treatment as TISA participants.

Dispute settlement is another area of potential dissonance between the TISA and the WTO. As a stand-alone agreement, the TISA would require a separate settlement mechanism and bureaucracy. This creates the messy prospect of TISA interpretations of GATS provisions that diverge from those of the WTO Dispute Settlement Body.²¹

Some analysts have also noted that the TISA's enforcement mechanism could be rather weak, since retaliation would be limited to those services covered by the TISA, in contrast to the WTO process which allows cross-retaliation - that is, the withdrawal of benefits in other sectors.²² Certain TISA participants, including the U.S., Canada, and potentially the EU, already provide for investor-state dispute settlement in matters related to commercial presence in services. While there is no indication that TISA negotiators are actively considering this option, it would undoubtedly be attractive to elements of the corporate community. Such a step would, however, end any pretense of TISA compatibility with the WTO.

The European Commission, a strong proponent of TISA, officially maintains that the TISA can be fully compatible with WTO rights and obligations and, ultimately, multilateralized.²³ But it has also stated that: "It is not desirable that all those countries would reap the benefits of the possible future agreement without in turn having to contribute to it and to be bound by its rules. Therefore, the automatic multilateralisation of the agreement based on the MFN principle should be temporarily pushed back as long as there is no critical mass of WTO members joining the agreement."²⁴ This

ambiguous stance puts European member governments and citizens on the horns of an uncomfortable dilemma. One possibility is that the Commission is being deliberately disingenuous and tacitly accepts that the TISA will not be multilateralized within the WTO. The other is that the Commission believes the agreement will meet the stringent criteria of Article V and intends to pressure EU member states to eliminate “substantially all” of their current policy space reservations and protected non-conforming regulations governing services.²⁵

Clearly, there are grave legal uncertainties surrounding the TISA and its relationship to the WTO. These obstacles raise serious doubts about the claims by the European Commission and some other TISA participants that their goal is to multilateralize the TISA and ultimately to incorporate the agreement into the WTO system.

Whose idea was the TISA?

Given the potential adverse repercussions for the Doha Round and even the WTO



itself, why would TISA participants engage in such a high-stakes gamble? The most straightforward answer is that key TISA governments, led by the U.S., are responding to strong corporate pressure.

The TISA appears to have been the brainchild of the U.S. Coalition of Service Industries (CSI),²⁶ specifically its past president Robert Vastine. After his appointment as CSI President in 1996, Vastine became actively involved in services negotiations. The CSI initially endorsed the Doha Round and seemed to be optimistic in the early stages of negotiations, but when the target deadline passed in 2005, the CSI became increasingly frustrated. Vastine personally lobbied developing countries for concessions in 2005 and continued to try and salvage an agreement until at least 2009.

By 2010, however, it was clear that the WTO services negotiations were stalled. In mid-2011, Vastine declared that the Doha Round “holds no promise” and recommended that it be abandoned.²⁷ Vastine was also one of the first to suggest, as early as 2009, that plurilateral negotiations on services should be conducted outside the framework of the WTO.²⁸ Working through the Global Services Coalition (GSC), a multinational services lobby group, the CSI then garnered the support of other corporate lobbyists for the TISA initiative.²⁹

The TISA is a political project for this corporate lobby group. The GSC has openly boasted that the TISA was conceived “to allay business frustration over stalled Doha Round outcomes on services.”³⁰ Rather than moderate their demands for radical services liberalization in response to legitimate concerns, the GSC is pushing the WTO and the Doha Round to the brink. The group also appears to be largely indifferent to whether or how the TISA fits into the WTO or the existing multilateral system.

Instead, the strategy is to attain a sufficient critical mass of participants in the TISA so that multilateralization becomes a *fait accompli*. Indeed, the CSI’s preferred outcome is *not* to extend the results of the TISA on an MFN basis, but to secure a highly ambitious agreement among like-minded core participants. In this regard, the TISA would “form a template for the next generation of multilateral rules and levels of market access.”³¹

Developing and emerging market economies would then be targeted one-by-one to join the agreement as political conditions permit – that is, when neo-liberal or more compliant governments are in power. Sadly, such a crude strategy could actually succeed.

What is on the table?

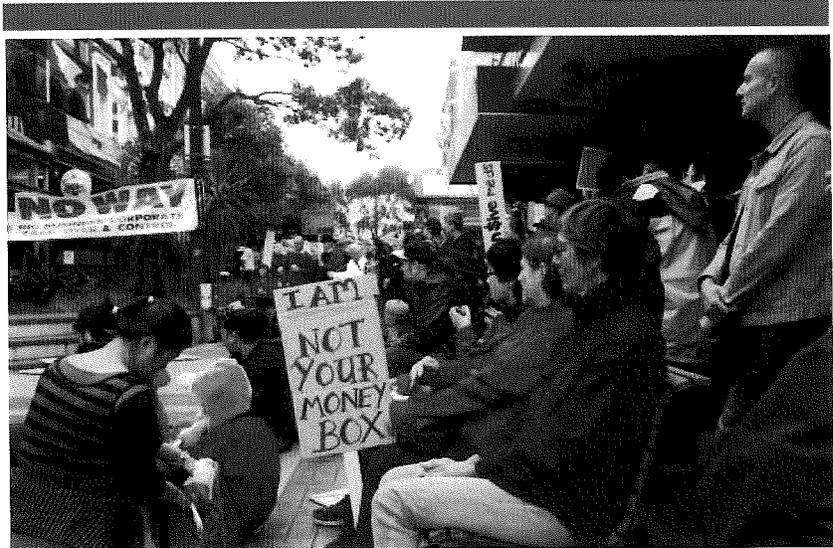
Unlike other trade and investment agreements, the TISA is focused exclusively on trade in services. Yet “trade in services” is a very broad category. The TISA, like the GATS, would apply to every possible means of providing a service internationally. This includes *cross-border services* (GATS Mode 1), such as telemedicine, distance education or internet gambling; *consumption abroad* (GATS Mode 2) in areas such as tourism or medical tourism; *foreign direct investment* (GATS Mode 3), such as a bank setting up a branch in another country or a multinational corporation providing municipal water or energy services; and the *temporary movement of persons* (GATS Mode 4), such as when nurses, housekeepers or corporate executives travel abroad on a temporary basis to provide services.

As part of the TISA mandate, each participant must match or exceed the highest level of services commitments that it has made in any services trade and investment agreement that it has signed. This “best FTA” approach is meant to ensure that the *starting point* of TISA negotiations (each government’s initial offer) reflects the furthest extent of concessions in any previous agreement.

But such commitments are only the floor. Countries are expected to go further, not only by making deeper commitments but also by agreeing to new restrictions and obligations that go well beyond the GATS. Michael Punke, U.S. Ambassador to the WTO, has called for a “highest common denominator” approach, suggesting that commitments for all TISA parties should be brought up to the highest degree of commitment of any other party.³²

Negotiators are reportedly agreed on a core part of the TISA text that conforms fairly closely to the GATS. One major difference, however, is that the TISA adopts a “negative list” approach to national treatment. The national treatment rule requires that governments give *foreigners* the best treatment given to *like domestic* investments, or services. Even measures that are formally non-discriminatory can violate these non-discrimination rules if they, in fact, adversely affect the “equality of competitive opportunities” of foreign investors or service providers.

Under the TISA, national treatment obligations would automatically apply to all measures and sectors unless these are explicitly excluded. This means that, for example, the French or Paraguayan health care sector would be covered by national treatment unless those countries successfully negotiated a country-specific exemption to exclude it. For example, under the TISA, like the GATS, national treatment would apply to subsidies, meaning that any financial support for public services would have to be



...under the TISA, like the GATS, national treatment would apply to subsidies, meaning that any financial support for public services would have to be explicitly exempted, or be made equally available to private, for-profit services suppliers.

WTO protest
against banks,
Geneva.
Photo: PSI

Remunicipalization

The neo-liberal turn in many countries during the 1980s and 1990s brought about the widespread privatization of important public services. Struggling municipalities, in particular, were attracted to promised savings from privatizing energy utilities, transit, waste management, healthcare and other areas of public responsibility. More recently, however, negative experience with profit-driven service delivery models has led many communities to re-evaluate the privatization approach.³⁸



Public municipal
water campaign,
Germany.
Photo:
Multinational
Observer

One of the most popular and powerful responses has been the emerging trend of remunicipalization, referring to the process of transferring a privatized public service back to the public sector. These reversals typically occur at the municipal level, although, in principle, remunicipalization can also occur at the regional or national level. Almost any public service can be remunicipalized.

Remunicipalization is already taking place in communities on every continent and in a wide

variety of circumstances. Demonstrating the breadth of this trend, a recently published book on water remunicipalization discusses cases in Argentina, Canada, France, Tanzania and Malaysia.³⁹

In the first four countries, the cases involved municipal governments, while in Malaysia it was the federal government itself. In each case, there was an increasing frustration with “broken promises, service cut-offs to the poor, [and a] lack of integrated planning”⁴⁰ by private water companies and the governmental response was to initiate a public takeover of the service. Although water remunicipalization has its challenges and each case is different, the authors ultimately conclude that “remunicipalisation is a credible, realistic and attractive option for citizens and policy makers dissatisfied with privatization.”⁴¹

The German energy sector is another notable example. Since 2007, hundreds of German municipalities have remunicipalized private electricity providers or have created new public energy utilities, and a further two thirds of German towns and cities are considering similar action.⁴² Dissatisfaction with private electricity

explicitly exempted, or be made equally available to private, for-profit services suppliers. This “list it or lose it” approach greatly increases the risk to public services and other public interest regulations now and in the future. Any public policy that a government neglects to protect, even inadvertently, is exposed to challenge and any country-specific exemption becomes a target for elimination in subsequent negotiations.

providers in the country is due mainly to a poor record in shifting to renewable energy. There is little market incentive to pursue green energy options, so the municipalities are taking the transition to renewables into their own hands. Local governments have also found that monopolistic or oligopolistic private energy companies tend to inflate energy prices, whereas remunicipalization brings prices down. Finland, Hungary and the United Kingdom are also engaged in remunicipalization projects. Other sectors involved in these projects include public transit, waste management, cleaning and housing.⁴³

Remunicipalization is significant because it demonstrates that past decisions are not irreversible. Decisions about how best to deliver a public service vary according to circumstances. The ability to respond to new information, changing conditions or shifting public opinion is an essential freedom for democratic governments concerned with how best to serve the public interest.

The TISA would limit and may even prohibit remunicipalization because it would prevent governments from creating or reestablishing public monopolies or similarly “uncompetitive” forms of service delivery. Trade treaties such as the TISA are extremely broad in scope. They don’t simply ensure non-discriminatory treatment for foreign services and service providers, they restrict or even prohibit certain types of non-discriminatory government regulatory measures.

Like GATS Article XVI, the TISA would prohibit public monopolies and exclusive service suppliers in fully committed sectors, even on a regional or local level. Of particular concern for remunicipalization projects are the proposed “standstill” and “ratchet” provisions in TISA. The standstill clause would lock in current levels of services liberalization in each country, effectively banning any moves from a market-based to a state-based provision of public services. This clause would not in itself prohibit public monopolies; however, it would prohibit the creation of public monopolies in sectors that are currently open to private sector competition.

Similarly, the ratchet clause would automatically lock in any future actions taken to liberalize services in a given country. Again, this clause would not in itself prohibit public monopolies. However, if a government did decide to privatize a public service, that government would be unable to return to a public model at a later date. The standstill and ratchet provisions preclude remunicipalization by definition.

Remunicipalization would only be feasible under TISA if it occurs in sectors that have been explicitly carved out of the agreement. The crucial point is not that remunicipalization is always appropriate, but rather that the authority to establish new public services and to bring privatized services back in to the public sector are fundamental democratic freedoms. The remunicipalization trend demonstrates the importance of preserving this policy flexibility, which is put at risk by over-reaching new agreements such as the TISA.

Governments had a deadline of November 30, 2013 to present their initial offers. By mid-February 2014, almost all participants had done so.³³ These opening offers then become the basis for further give-and-take negotiations to deepen coverage. But in addition to the basic text and the request-offer negotiations, TISA negotiators are also busy in many other areas.

Beyond the GATS

TISA negotiators are working on GATS-plus rules and restrictions that could push trade treaty restrictions into new, uncharted territory. While the precise contents of these “new and enhanced disciplines” remain closely guarded secrets, the most important ones are outlined below:

Standstill and ratchet provisions

Among the TISA’s most threatening characteristics are its obligatory standstill and ratchet provisions. The standstill obligation would freeze existing levels of liberalization across the board, although some parties will undoubtedly try to negotiate limited exemptions in sensitive sectors. The TISA’s ratchet clause requires that “any changes or amendments to a domestic services-related measure that currently does not conform to the agreement’s obligations (market access³⁴, national treatment, most favored nation treatment) be made in the direction of greater conformity with the agreement, not less.”³⁵ This ratchet provision, which has reportedly already been agreed to, would expressly lock in future liberalization, which could then never be reversed.³⁶

Suppose, for example, that a TISA government implemented, even on a temporary or trial basis, a system of private insurance for health services previously covered under a public health insurance system, at either the national or sub-national level. In the absence of a reservation that explicitly exempts the country’s health insurance

In the absence of a reservation that explicitly exempts the country’s health insurance sector, that government – or any future government – would not be able to bring those services back under the public insurance system without violating the TISA. Similar conflicts have already arisen under bilateral investment treaties...

sector, that government – or any future government – would not be able to bring those services back under the public insurance system without violating the TISA. Similar conflicts have already arisen under bilateral investment treaties, where foreign private insurers have challenged the reversal of health insurance privatization and liberalization in Slovakia and Poland.³⁷

In addition, the TISA will obligate governments to automatically cover all “new services,” meaning those that do not even exist yet. Under such far-reaching

rules, current neo-liberal governments can lock in a privatization scheme for all future generations. These are precisely the types of constitutional-style restrictions that must be avoided if democratic authority over public services is to be safeguarded.

Domestic regulation

One of the key pieces of unfinished business under the GATS concerns domestic regulation. The GATS Article VI:4 called for further negotiations to ensure that “qualification requirements and procedures, technical standards and licensing requirements” do not constitute “unnecessary” barriers to trade in services. With the WTO process stagnated, TISA participants intend to come up with their own domestic regulation text.

Multinational service corporations have long complained of regulatory obstacles that keep them from operating freely in foreign services markets. Binding domestic regulation rules in the TISA would provide corporations with a means to challenge new or costly regulations, even those that treat domestic and foreign services and service providers even-handedly. The proposed restrictions on domestic regulatory authority

would expressly apply to *non-discriminatory* government measures affecting services. In other words, the new “disciplines” would restrict domestic laws and regulations – such as worker safety requirements, environmental regulations, consumer protection rules and universal service obligations – even when these regulations treat foreign services or services suppliers no differently than their domestic counterparts.

The types of measures to which these proposed new restrictions on regulatory authority would apply have been defined very broadly in the GATS and the TISA. *Qualification requirements and procedures* encompass both the educational credentials and professional/trade certification required to provide a specified service and the ways that the qualification of a service provider is assessed. *Technical standards* include the regulations affecting “technical characteristics of the service itself” and also “the rules according to which the service must be performed.”⁴⁴ *Licensing requirements* apply not only to professional licensing but to any requirements related to government permission to companies to provide a service in a market. It would therefore extend to, for example, the licensing of health facilities and laboratories, university and school accreditation, broadcast licenses, waste disposal facilities, power plants and more. Indeed, these very broad definitions would leave few aspects of services regulations unaffected by the proposed restrictions.

WTO member governments have been working to finalize such disciplines within the GATS context for many years. Key participants, notably Brazil and the U.S., have taken a cautious approach and have managed to water down some of the most dangerous elements of the GATS domestic regulation text. One of these was a “necessity test” that would have required regulations, in the judgement of dispute panels, to be no more burdensome than necessary to achieve their intended objective. The latest WTO draft does, however, still include requirements that domestic regulations be “pre-established”, “transparent”, “objective”, “relevant”, and “not a disguised restriction on trade.” Depending on the interpretation of these key terms, the WTO template could interfere with regulatory authority over services. Simply transferring these draft disciplines into the TISA would be harmful to public interest regulation.⁴⁵

It is highly probable, however, that the TISA will contain restrictions on domestic regulation that are even more intrusive than those under discussion in the GATS process. A core group of TISA countries including Chile, Hong Kong, Mexico, New Zealand, South Korea and Switzerland continue to push for the TISA to apply a necessity test to regulations affecting services. The U.S. is reportedly opposing the application of a free-standing necessity test in the CETA, and is advocating that the TISA’s domestic regulation restrictions apply only to central governments, exempting state and local regulation.⁴⁶ But the current U.S. position is driven mainly by the concerns of its regulatory departments and state governments. It is far from clear that U.S. negotiators will maintain their current position, especially since corporate pressure to handcuff regulatory authority will intensify as negotiations proceed.

Trade negotiators and their corporate backers often claim that such proposed restrictions recognize the “right to regulate” and to introduce new regulations, but this is misleading. The supposed “right to regulate” can be exercised only in accordance with the treaty



Protesting the influence of banks on trade agreements, France.
Photo: PSI

obligations, including the proposed restrictions on domestic regulation.⁴⁷ Even if governments remain free to determine the ends of regulatory action, the means will be subject to challenge and dispute panel oversight.⁴⁸

If these restrictions are agreed to, literally thousands of non-discriminatory public interest regulations affecting services would be exposed to TISA oversight and potential challenge. These regulations could include water quality standards, municipal zoning, permits for toxic waste disposal services, accreditation of educational institutions and degree-granting authority. The proposed restrictions would affect not only regulations in newly committed sectors under the TISA, but also regulations affecting services already committed under the GATS, or any previous FTA signed by a TISA party. TISA governments would instantly see their existing services commitments deepened and their right to regulate curtailed.

The chill effect: public auto insurance

The threat of legal action under international trade treaties creates a “chilling effect”, which can deter governments from acting in the public interest and interfere with the creation or expansion of public services. An example is the fate of a popular proposal for public automobile insurance in the Canadian province of New Brunswick in 2004-5.

Provincial public auto insurance is typically provided through a not-for-profit crown corporation, which provides basic mandatory insurance and optional vehicle damage coverage. This aspect of the system is a public monopoly. Private agents and brokers continue to play a significant role in the distribution of the public product. Substantial premium savings are achieved through “lower administrative costs and the not-for-profit mandate of a sole provider Crown corporation.”⁵² With more affordable rates and better coverage for elderly and young drivers, public auto insurance is popular among voters.

In the mid-1990s, Canada made GATS market access and national treatment commitments covering motor vehicle insurance. The GATS market access rule disallows monopolies in sectors where governments have made commitments, unless they are listed as exceptions in a country’s schedule. Canada listed an exception for public auto insurance monopolies, but it only protected existing public auto insurance systems in four provinces. Canadian negotiators failed to provide the flexibility to create new systems in other provinces.⁵³

After an election fought mainly on this issue, the New Brunswick government appointed an all-party committee which recommended that the province proceed with public auto insurance. The private insurance industry, however, vigorously opposed these plans. They pointed to the inconsistency with Canada’s GATS commitments and also threatened to take action under NAFTA’s investor-state dispute settle mechanism to gain compensation for lost profits.⁵⁴ Despite widespread political and public support, the proposed policy never went ahead.

A special GATS procedure would have allowed the Canadian government to withdraw its 1997 financial services commitments covering auto insurance. Canada would then be expected to increase its GATS coverage in other sectors to compensate affected WTO member governments for any lost “market access” in insurance. The TISA standstill provisions, however, are intended to eliminate this limited GATS flexibility, interfering even more severely with the expansion of such public services.

Movement of natural persons (Mode 4)

Under trade agreements such as the TISA, the term “movement of natural persons” refers to services provided by nationals of one country who travel to another member country to provide a service. This mode of international trade in services, known as Mode 4, applies to people. The term “legal persons” is used when referring to corporations. In keeping with the overall push for an ambitious agreement – not to mention the strict thresholds for allowing an economic integration agreement under GATS Article V – there has been pressure from some participants for “highly improved” market access commitments on the cross-border movement of services providers as part of the TISA.⁴⁹

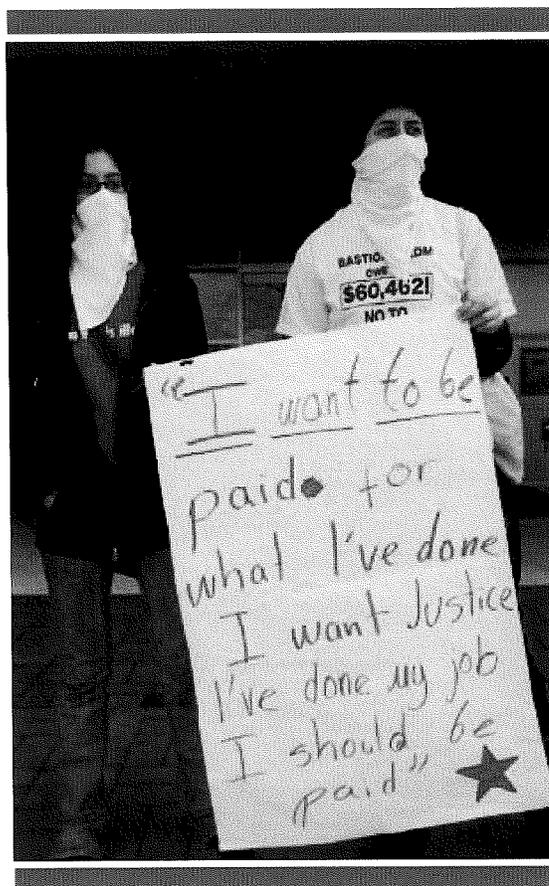
Mode 4 commitments enable firms from one country to temporarily send their employees - including executives, consultants, tradespeople, nurses, construction workers, etc. - to another country for the purpose of supplying services. The TISA, like the GATS, would prohibit so-called economic needs tests, including labour market tests, unless these measures are expressly exempted in a country’s schedule of commitments. In most countries, before hiring temporary foreign workers, a prospective employer is obliged to demonstrate that there is a shortage of suitably trained local workers. But under Mode 4 commitments, such economic needs tests are forbidden. Governments could not require, for example, that foreign companies conduct labour market surveys to first ensure that no local workers are available to perform the necessary work before engaging temporary foreign workers.

This is another sensitive topic for the U.S., which has resisted making additional Mode 4 commitments throughout the Doha Round negotiations on services. Nevertheless, Mode 4 expansion is a high priority for U.S.-based services corporations. As a former high-ranking executive of Citibank who serves as chairman of the Coalition of Service Industries explains: “It’s clearly a priority for lots of countries, and it’s clearly a sensitive issue in the United States. ... But we expect the U.S. to engage on the issue, and we’re hoping that some progress can be made there.”⁵⁰

Significantly, Mode 4 commitments provide no path to workers for immigration, residency or citizenship in the host country. Foreign workers must return to their country after the work is completed or the term of their stay in the host country expires. This precarious situation makes these workers very dependent on the goodwill of their employer. If they lose their employment, they must immediately leave the host country. Despite this, U.S. negotiators have reported that there have been no proposals to include enforceable labour standards or labour rights protection in the TISA.⁵¹

Cross-border data flows and privacy

TISA negotiators are also developing “new and enhanced disciplines” that relate to the Internet, electronic commerce and cross-border data flows. The “data” in question includes personal user information, financial information, cloud computing services and digital goods. U.S. industry lobbyists argue that the free exchange of data is “necessary for global business operations” and that governments have imposed too many



*Migrant workers will be denied rights under the TISA.
Photo: flux*

“arbitrary and excessive measures” designed to constrain U.S. firms.⁵⁵ The U.S. Trade Representative has also stated that data protections in many countries are “overbroad” and inhibit the possibility of “truly global service.”⁵⁶

If U.S. negotiators achieve their goals, the TISA will contain provisions that extend market access and national treatment commitments to the Internet and prohibit “forced localization” – the requirement that foreign companies store any data they collect within the country they are operating in. The first point appears settled in principle, since most negotiators consider e-commerce and cloud computing, for example, to be emerging service sectors automatically covered under the TISA. The second point remains controversial. The EU currently enforces rules that prevent companies from transferring data outside of the 28 member states, with some exceptions. By contrast, the U.S. has very lax privacy laws. In the U.S., corporations can collect extensive personal information about their users which can then be sold or used for commercial purposes with almost no restrictions. The EU is only willing to open up data flows in the TISA if the U.S. can demonstrate stricter domestic privacy controls. However, it is difficult to imagine the U.S. making a compelling case for privacy in the wake of recent revelations of extensive spying by its National Security Agency, exposed by whistleblower Edward Snowden.⁵⁷

The TISA will apply to the Internet as it does to other service sectors, forcing liberalization in a way that disproportionately benefits the industry’s established major players. These massive corporations are almost exclusively American. If the U.S. gets its way, the TISA will also undermine user privacy by permitting the uninhibited collection and transfer of personal data.

Sectoral regulatory disciplines

One of the most wide-open aspects of the TISA negotiations is the blanket authority for negotiators to develop rules “on any other issues that fall within the scope of Article XVIII of the GATS.” Article XVIII was the basis for the 1996 Telecoms Reference Paper and the 1997 Understanding on Financial Services Commitments, which were driven by developed countries dissatisfied with the level of commitments and regulatory restrictions in these sectors under the original GATS.

TISA negotiators are currently working on new sectoral agreements covering the regulation of financial services, telecommunications, electronic commerce, maritime transport, air transport, road transport, professional services, energy-related services and postal and courier services. These talks are aimed at developing binding, “pro-competitive” regulatory templates for a wide range of services sectors in order to facilitate the entry of foreign commercial providers and to privilege multinational corporate interests.

For example, such rules generally acknowledge the right of governments to apply universal service obligations in privatized sectors. Yet even these vestiges of public service values are subjected to necessity tests and other pro-market requirements biased towards global service providers.⁵⁸ The TISA is also explicitly designed as a “living agreement” that will mandate trade negotiators to develop new regulatory templates for additional sectors far into the future.

The scope of such highly customized sectoral agreements is limited only by the imagination of services negotiators and corporate lobbyists, and made even more worrisome by the near total secrecy surrounding such negotiations. Needless to say, this is totally unacceptable. Services negotiators have a core mandate to increase foreign trade and commerce. They should not be permitted to develop prescriptive regulatory frameworks that would restrict and potentially override public interest regulations that protect consumers, workers or the environment.

Protecting public services

The availability of affordable, high-quality public services should be a key goal of economic development, to which international trade is but a means. Public service systems are dynamic and flexible. Accordingly, safeguards for public services in trade treaties must support this dynamism and innovation, not lock in liberalization or make privatization irreversible. In particular, trade treaty rules should not interfere with the restoration or expansion of public services, where experiments with private provision fail or are rejected by democratically elected governments.

It is technically feasible to carve out public services from trade agreements. Indeed, modern trade agreements invariably contain a broad, self-judging exemption for matters any party considers related to their national security.⁵⁹

Accordingly, if the political will existed, it would be a reasonably straightforward matter for trade and investment treaties to exclude those services which a party considers to be provided within the exercise of its governmental authority.⁶⁰ Such a provision, and the universal public services it could facilitate, would be desirable and beneficial to the majority of citizens who are too often left behind in the pitiless arena of global competition.

Legitimate treaties to promote international trade must fully preserve the ability of governments to restore, revitalize or expand public services. On many levels, the TISA fails this critical test. Indeed, the TISA's very ethos – extreme secrecy, aggressiveness, hyper-liberalization, and excessive corporate influence – contradicts public service values.

The already formidable challenges in safeguarding public services under the GATS and other treaties will only be exacerbated by the TISA negotiations. The excessive breadth of the TISA means it also poses risks to other vital public interests, including privacy rights, Internet freedom, environmental regulation and consumer protection.

There is an urgent need for public sector unions to join with civil society allies on this issue. Working together, they can expose the official secrecy surrounding the TISA and counter the corporate pressure driving the talks.

Within those countries already participating in the TISA, governments must be pressed for full consultation and disclosure. Local and state governments, whose democratic and regulatory authority could be seriously affected, are key players in any moves to restrain national governments' zeal for the TISA. Governments that are not participating in the TISA must be lobbied not to join and to resist pressure to do so. Non-TISA governments should also be encouraged to speak out against the corrosive impact of these negotiations on multilateralism, and to block any efforts by TISA parties to access WTO institutional resources or the Dispute Settlement Body.

Strong alliances built on public interest rather than corporate profitability will be the cornerstone of efforts to reverse this out-of-control race to radical economic liberalization.



*Rallying for public services, Canada.
Photo: flux*

Endnotes:

- 1 See Sinclair, Scott. (2014). "Trade agreements, the new constitutionalism and public services." In Stephen Gill and A. Claire Cutler (Eds.), *New Constitutionalism and World Order* (pp. 179-196). Cambridge University Press.
- 2 Sauvé, Pierre. (May 2013). "A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TISA)." *Swiss National Centre of Competence in Research (NCCR) Trade Regulation, Working Paper 29*. Bern, Switzerland: Swiss National Science Foundation. p. 8. Online at: <http://www.nccr-trade.org/publication/a-plurilateral-agenda-for-services-assessing-the-case-for-a-trade-in-services-agreement-tisa>.
- 3 On the other hand, Singapore, an original member of the RGF grouping, has withdrawn from the TISA negotiations. Singapore already has RTAs, or is in negotiations, with nearly every other TISA participant except for the European Union. Singapore is also in separate negotiations with Canada, Japan and Mexico. In Singapore's view, with major emerging countries absent from the table, the TISA talks were not a priority.
- 4 At the WTO Public Forum in early October 2013, U.S. Trade Representative Michael Froman pledged to "consult closely with our Congress, with our stakeholders, with the other parties in the negotiations as part of a due diligence process to ensure that any new party to the TISA negotiations shares the same level of ambition for the negotiations as the existing parties." Pruzin, Daniel. (November 12, 2013). "TISA Round Sees Progress on Proposals, Commitments to Make Market Access Offers." *WTO Reporter*. Bloomberg Bureau of National Affairs.
- 5 Inside U.S. Trade. (November 22, 2013). "China Categorically Rejects U.S. Preconditions To Participation In TISA." *World Trade Online*, 31(46).
- 6 Rabinovitch, Simon. (September 27, 2013). "China unveils blueprint for Shanghai free trade zone." *Financial Times of London*.
- 7 As noted, China has specifically identified these social service sectors as priority areas for expanding commercialization.
- 8 Canada, for example, has taken no GATS commitments in health, education, social services or culture. "Canada's Commitments to the GATS." Foreign Affairs, Trade and Development Canada. Online at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/wto-omc/gats-agcs/commit-engage.aspx?lang=eng>.
- 9 Under a "top-down," or "negative listing" approach, the national treatment obligation applies generally. Governments must therefore negotiate explicit exemptions to exclude specific sectors or protect otherwise non-conforming policy measures.
- 10 A "limitation" is a note in a country's schedule of commitments that limits, or qualifies, the application of an obligation within a covered sector -- for example, by exempting an existing, otherwise inconsistent policy measure.
- 11 See European Commission. (February 28, 2011). "Reflections Paper on Services of General Interest in Bilateral FTAs." Brussels: European Commission Directorate-General for Trade.
- 12 Krajewski, Markus. (November 14, 2013). "Public Services in EU Trade And Investment Agreements." Draft paper prepared for the seminar *The politics of Globalization and public services: putting EU's trade and investment agenda in its place*. Brussels. p. 22. Online at: http://www.epsu.org/IMG/pdf/Draft_report_Markus_Krajewski_mtg14Nov2013.pdf.
- 13 See discussion of "ratchet and standstill" in section below.
- 14 Khor, Martin. (May 2010). "Analysis of the Doha negotiations and the functioning of the World Trade Organization." Geneva: South Centre. Online at: <http://www.southcentre.int/research-paper-30-may-2010>.
- 15 This level of secrecy exceeds even that found in the Tran-Pacific Partnership, where negotiating documents are classified for "four years from entry into force of the TPP agreement or, if no agreement

enters into force, four years from the close of the negotiations.” See Sinclair, Mark (TPP Lead Negotiator, New Zealand). Undated letter. Online at: <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf>.

Switzerland’s TISA proposals are, as required by Swiss law, publicly accessible at: <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>. But proposals made jointly by Switzerland with other TISA parties are not publicly available.

16 World Trade Organization. Information Technology Agreement. Online at: http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm.

17 See, for example, the remarks of Wamkele K. Mene, Counsellor, Permanent Mission of South Africa to the WTO, October 2, 2013 at the WTO Public Forum. A video of Counsellor Mene’s opening remarks is accessible at: <http://www.youtube.com/watch?v=gpkch2CE2SI>.

18 World Trade Organization. General Agreement on Trade in Services. Article V. See note 1 to Article V:1(a): “This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.” Online at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

19 World Trade Organization. General Agreement on Trade in Services. Article V. Online at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

20 GATS Article V stipulates that in evaluating whether an agreement liberalizing trade in services meets the required conditions for an exemption from MFN treatment: “consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.” This suggests that the TISA could be held to higher standard of review than regional EIAs. World Trade Organization. General Agreement on Trade in Services. Article V. Online at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

21 “Irrespective of the solutions to be found for the institutional structure of the TISA, and in view of facilitating its later multilateralization, *the emergence of two sets of jurisprudence, one by the organs of the WTO, and a parallel one by a procedure established under the TISA, is to be avoided by all possible means.*” Switzerland State Secretariat for Economic Affairs. (April 11, 2013). “Submission by Switzerland: Chapter on Dispute Settlement Procedures.” Federal Department of Economic Affairs, Education and Research. Online at: <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>.

22 Inside U.S. Trade. (May 10, 2013). “TISA Negotiators Begin Mode 4 Talks; New Proposals Expected In June.” *World Trade Online*, 31(19).

23 See European Commission. (June 2013). “The Trade in Services Agreement (‘TISA’).” Online at: http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf.

24 See European Commission. (June 2013). “The Trade in Services Agreement (‘TISA’).” Online at: http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf.

25 For a list of the EU member states’ extensive national treatment limitations, see the EU GATS schedule. Online at: <http://www.esf.be/pdfs/GATS%20UR%20Commitments/EU%20UR%20SoC%2031.pdf>.

26 The Coalition of Service Industries describes itself as “the leading business organization dedicated to the development of U.S. domestic and international policies that enhance the global competitiveness of the U.S. service sector through bilateral, regional, multilateral, and other trade and investment initiatives.” Following Vastine’s resignation in 2012, the organization is now headed by Peter Allgeier, the former U.S. Ambassador to the World Trade Organization and Deputy U.S. Trade Representative.

27 Inside U.S. Trade. (July 28, 2011). “Business Groups Say Countries Should Rethink, Or Abandon, Doha Round.” *World Trade Online*, 29(30).

28 Inside U.S. Trade. (February 13, 2009). “USTR Sees Difficulty In Obtaining Improved Services Offers In Doha Round.” *World Trade Online*, 27(6).

29 The Global Services Coalition is an umbrella lobby group that includes the U.S. Coalition of Services Industries, the European Services Forum, the Australian Services Roundtable, the Canadian Services Coalition, the Hong Kong Coalition of Service Industries, the Japan Services Network, the Taiwan Coalition of Service Industries, and TheCityUK, which promotes the U.K. financial services industry.

30 Global Services Coalition. (September 10, 2013). "Letter to Karel de Gucht, Commissioner for Trade, European Commission." Online at: <http://www.esf.be/new/wp-content/uploads/2013/10/GSC-Letter-on-TISA-to-Karel-de-Gucht1.pdf>.

31 Coalition of Services Industries. (Feb. 26, 2013). Letter to Douglas Bell, Office of the United States Trade Representative. p. 5. Online at: https://servicescoalition.org/images/CSI_ISA_Comment_Letter_FINAL.pdf.

32 Devarakonda, Ravi Kanth. (March 17, 2012). "An Assault on Multilateral Trade Negotiations." Inter Press Service. Online at: <http://www.ipsnews.net/2012/03/an-assault-on-multilateral-trade-negotiations>.

33 Bradner, Eric. (February 14, 2014). "U.S. financial proposal for TISA could come next week." *Politico*.

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35 Pruzin, Daniel. (November 12, 2013). "TISA Round Sees Progress on Proposals, Commitments to Make Market Access Offers." *WTO Reporter*. Bloomberg Bureau of National Affairs.

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39 Pigeon, Martin, David A. McDonald, Olivier Hoedeman, and Satoko Kishimoto (Eds.). (2012). *Remunicipalisation: Putting Water Back into Public Hands*. Amsterdam: Transnational Institute.

40 McDonald, David A. (2012). "Remunicipalisation works!" In Pigeon et al. (Eds.), *Remunicipalisation: Putting Water Back into Public Hands*. Amsterdam: Transnational Institute. p. 9.

41 Hoedeman, Olivier, Satoko Kishimoto, and Martin Pigeon. "Looking to the Future: What Next for Remunicipalisation?" In Pigeon et al. (Eds.), *Remunicipalisation: Putting Water Back into Public Hands*. Amsterdam: Transnational Institute. p. 106.

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43 Hall, David. (2012). *Re-municipalising municipal services in Europe*. Public Services International Research Unit.

44 See World Trade Organization. (March 1, 1999). "Article VI:4 of the GATS: disciplines on domestic regulation applicable to all services." Note by the Secretariat.

- 45 See remarks by Sanya Reid Smith, Legal Advisor, Third World Network at the WTO Public Forum on October 2, 2013. Online at: http://www.youtube.com/watch?v=2_pPqnbXpA4.
- 46 This information is based on confidential interviews with a variety of TISA participants and observers conducted by Scott Sinclair in Geneva in early October 2013.
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- 48 See Sinclair, Scott. (June 2006). "Crunch Time in Geneva: Benchmarks, plurilaterals, domestic regulation and other pressure tactics in the GATS negotiations." Ottawa: Canadian Centre for Policy Alternatives. Online at: http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2006/Crunch_Time_in_Geneva.pdf.
- 49 Pruzin, Daniel. (March 28, 2013). "Turkey Outlines Mode 4 Demand for Trade in Services Agreement Talks." *WTO Reporter*. Bloomberg Bureau of National Affairs.
- 50 Samuel Di Piazza, chairman of the U.S.-based Coalition of Services Industries and former vice chairman of the institutional clients group with Citibank. Quoted in Pruzin, Daniel. (March 28, 2013.) "Turkey Outlines Mode 4 Demand for Trade in Services Agreement Talks." *WTO Reporter*. Bloomberg Bureau of National Affairs.
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- 56 United States Trade Representative. (2013), "2013 Section 1377 Review On Compliance with Telecommunications Trade Agreements." p. 4. Online at: <http://www.ustr.gov/sites/default/files/04032013%202013%20SECTION%201377%20Review.pdf>.
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Public Services International
Internationale des Services Publics
Internacional de Servicios Públicos
Internationale der Öffentlichen Dienste
Internationell Facklig Organisation för Offentliga Tjänster
國際公務勞選

April 30, 2014

Ambassador Michael Froman
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Submitted electronically via correspondence@ustr.eop.gov, STATA@USTR.eop.gov

Dear Ambassador Froman:

The undersigned organizations appreciate our ongoing dialogue with your staff on prescription drug concerns related to the pending Trans-Pacific Partnership (TPP) trade agreement negotiations. While this dialogue has clarified a number of issues where we had questions, we continue to have substantive concerns that the TPP proposal, as we understand it, contains ill-advised provisions that could adversely affect U.S. prescription drug programs. We are writing today to reiterate these concerns in more detail, which center on the direction of the pharmaceuticals annex and how it would impact Medicare, as well as problematic provisions that the U.S. has proposed for inclusion in the intellectual property chapter. It remains our firm belief that the alteration of our nation's policies on Medicare reimbursement and patent standards should not be subject to binding provisions in international agreements like the TPP drafted through a process with little public transparency.

In general, we continue to be alarmed that the pharmaceuticals annex puts too much emphasis on drug industry priorities, and does not give equal weight to consumer priorities such as prescription drug affordability, safety, efficacy, and cost-effectiveness. To address this imbalance, we shared specific suggestions with your staff that we hope you will seriously consider adopting as part of the U.S. formal negotiating position on the annex. We strongly believe that consumer priorities, not drug industry priorities, should be the U.S. government's primary concern and encourage you to make every effort to address the current inequity in this regard as negotiations proceed.

We were pleased to learn from your staff that the current U.S. position is not to make the TPP pharmaceuticals annex provisions applicable to the operation of state Medicaid prescription drug programs, the Medicare Part D prescription drug program, or public health programs that utilize price negotiation such as the VA health program. However, national coverage determinations under Medicare Part B would be an expressly covered program and, consequently, would be subject to the annex's transparency and review commitments and bound by its policy restrictions. We strongly oppose this move that we believe could result in challenges to the payment methodology for Part B covered prescription drugs currently set at 106 percent of the average sales prices (ASP). Since shifting to the ASP in 2005, Medicare Part B drug spending has increased modestly at 2.7 percent per year, compared with increases of 25 percent per year between 1997 and

2003.¹ As an area where the U.S. government establishes pricing decisions, we are very concerned the current TPP proposal could be used by pharmaceutical companies to challenge the current Medicare B payment methodology, or its application in specific cases, which has had a measure of success in slowing spending growth.

As we have noted before, the TPP proposal could also limit the development of future policies. There is growing evidence that the ASP+6 percent payment methodology could be further improved to enhance cost containment efforts,² which will take on even greater importance as the high cost of specialty drugs including biologic medicines will make up an increasing percentage of overall drug costs in the future.³ The recent release of comprehensive Medicare Part B physician reimbursement data underscores the need to reexamine payment methodologies for Medicare Part B covered prescription drugs.⁴ According to the data, the high cost of prescription drugs is behind the highest billing trends, and these costs are borne directly by Medicare beneficiaries through increased cost sharing.^{5 6 7}

Given this, we believe it is critically important that Congress retain the ability to adjust reimbursement policies for Medicare Part B covered prescription medicines unhindered by policy restrictions in the TPP. We are concerned a number of savings proposals could be restricted or foreclosed if the annex covers Part B, including current proposals that would:

- Lower the percentage paid by Medicare for Part B drugs from 106 percent to 103 percent of the ASP;
- Restore the legal authority for CMS to use a “least costly alternative” policy among competing Part B drugs;
- Require manufacturer discounts or rebates for Part B drugs; and

¹ Medicare Payment Advisory Commission (MedPAC). 2012a. *Health Care Spending and the Medicare Program: A Data Book*, June 2012.

² J. Wilkerson, “Blum: CMS Eyes Cancer Drug Pay Reforms, Part D Spending Targets In ACOs,” *InsideHealthPolicy*, December 11, 2012; P. Whoriskey, D. Keating, and L.H. Sun, “Data Uncover Nation’s Top Medicare Billers,” *Washington Post*, April 9, 2014.

³ Express Scripts, *2013 Drug Trend Report*, April 2014; CVS Caremark, *2014 Drug Insights Report*, April 2014.

⁴ Centers for Medicare and Medicaid Services (CMS), “Medicare Provider Utilization and Payment Data: Physician and Other Supplier,” (April 2014), available at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Physician-and-Other-Supplier.html>

⁵ Whoriskey, P., “These maps tell you everything that is wrong with our drug pricing system,” *Washington Post* (April 11, 2013), available at: <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/11/these-maps-tell-you-everything-thats-wrong-with-our-drug-pricing-system/>.

⁶ Whoriskey, P., Keating, D., and L.H. Sun, “Cost of drugs used by Medicare doctors can vary greatly by region, analysis finds,” *Washington Post* (April 9, 2013), available at: http://www.washingtonpost.com/business/economy/cost-of-drugs-used-by-medicare-doctors-can-vary-greatly-by-region-analysis-finds/2014/04/09/69ac93f0-c024-11e3-b574-f8748871856a_story.html.

⁷ Department of Health and Human Services, Office of the Inspector General (OIG), “Review of Medicare Part B Avastin and Lucentis Treatments for Age-Related Macular Degeneration,” (September 2011), available at: <http://oig.hhs.gov/oas/reports/region10/11000514.pdf>; This OIG investigation revealed that Medicare beneficiaries would have saved \$275 million in 2008 and 2009 had the federal government reimbursed for the least costly alternative among available macular degeneration medicines.

- Allow Medicare to negotiate drug prices in Part B for those drugs where the Medicare program purchases the majority of a particular drug or accounts for a large share of drug spending.

We strongly urge you to consider the implications of the pharmaceuticals annex for consumers as well as the financial sustainability of the taxpayer-funded Medicare program. *Any final agreement in the TPP must make it clear that parties may adopt substantive savings proposals to lower consumer costs and reduce government spending under their healthcare authorities without restriction or the possibility of challenge through international forums.*

As we have discussed with your staff, we are also concerned by proposals in the intellectual property chapter that would greatly expand international minimum standards for domestic patent protection beyond that included in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This proposal, as we understand it, would lower the standards of patentability, which could hamper the efforts that TPP parties have made to curtail the problem of "evergreening" drug patents, particularly for products that do not demonstrate a clear, significant clinical advantage or efficacy over the reference product. We are also concerned the proposal would establish new requirements in international law to grant patents on diagnostic, therapeutic, and surgical methods, as well as new forms and uses of known products. These and other provisions could restrict the range of policy options that could be adopted by Congress to address the serious problem of patent "evergreening."

Our concerns also stem from the fact that expanding patentability criteria would be counter to ongoing efforts to reform U.S. patent standards to address the increase in overly broad patents that contribute to "patent trolling." More importantly, such efforts would directly contradict the development and implementation of restrictions on patentability, including the recent U.S. Supreme Court decision (*Association for Molecular Pathology v. Myriad Genetics, Inc.*) that isolating naturally occurring genes is not patent eligible subject matter.

For all these reasons, we request you withdraw proposed intellectual property chapter language that goes beyond the WTO TRIPS Agreement and would lower patentability criteria or restrict how governments can define patentable subject matter and patentability criteria.

Thank you for considering our comments. We look forward to your response to the issues raised in this letter. If you or your staff members have any questions, please do not hesitate to contact us.

Sincerely,

AARP
AFL-CIO
American Federation of State, County and Municipal Employees
Alliance for a Just Society

Alliance for Retired Americans
Center for Medicare Advocacy, Inc.
Center on Budget and Policy Priorities
Consumers Union
Medicare Rights Center
National Committee to Preserve Social Security and Medicare
National Senior Citizens Law Center

Policy Review

Blog by Joshua Stanton and Kara Sutton, Bertelsmann Foundation

<http://www.policyreview.eu/optimism-fading-on-both-sides-trans-atlantic-trade-talks/>

posted: May 2014

Optimism fading on both sides trans-Atlantic trade talks

As US and EU negotiators look ahead to the fifth round of negotiations for a Transatlantic Trade and Investment Partnership (TTIP) at the end of May, the excitement surrounding the talks has been replaced with a sober sense of reality, write Kara Sutton and Josh Stanton.

Washington and Brussels are struggling to find common ground on a number of sensitive issues, which raises questions about the feasibility of reaching a TTIP deal on “one tank of gas”.

The latest Bertelsmann Foundation – Atlantic Council TTIP Stakeholder survey, which polled more than 300 American and European public- and private-sector stakeholders in early 2014, reflects this more grounded view. The stakeholder survey provides a guide for negotiators to better understand the significant issues in their talks and the reasons for pursuing TTIP. The survey can consequently help keep negotiators on track and define potential goals of an agreement.

The poll’s results show that optimism about concluding a deal remains strong – 85 percent of European and American respondents say they believe a deal will be reached. But stakeholders are less sanguine about the scope of an eventual agreement. Fifty-seven percent of respondents believe a moderate agreement,

one that omits more contentious issues, is the likely outcome. Twenty-nine percent see a comprehensive agreement ahead. Regarding a timeframe for a pact, only seven percent of respondents see an agreement taking effect in 2014. A majority views 2016 or beyond as the likely time for a completed TTIP.

This shift in timeframe and the low optimism about comprehensiveness is likely due to sensitivities about certain sectoral issues, such as genetically modified organisms (GMOs) and an investor-state dispute settlement (ISDS), which have created tension in the talks. Stakeholders have subsequently adjusted their views of the provisions in a final agreement. While respondents recognize the importance and ease of reducing tariffs in the trans-Atlantic market, many see traditional free-trade-agreement (FTA) issues as less significant to TTIP. For example, respondents found agriculture, labor standards and environmental standards to be less important than many 21st-century issues such as data privacy.

An even closer look at the results reveals that issues outside the negotiating room also influence stakeholder views. The NSA scandal, for instance, has only increased scrutiny of the role of data protection and privacy standards in the negotiations. Stakeholders rate such issues among the most important and difficult for an agreement. In other words, any comprehensive accord must include precisely those issues on which compromises will be the most challenging.

Current events have also added a strategic element to TTIP. The Ukraine crisis has already turned stakeholder attention towards the role energy-export liberalization could play within a deal. With much of Europe looking to US oil

and gas as viable alternatives to dependence on Russian resources, survey respondents view energy-export liberalization among the more important TTIP-related topics. On this issue, however, agreement is seen as less difficult to achieve.

US and EU officials repeatedly seize upon the narrative of TTIP as a driver of jobs and economic growth. The survey's results, however, show that stakeholders recognize the impact of a deal on external issues. Negotiators and leaders on both sides of the Atlantic certainly need to continue underscoring the potential for jobs and growth, but TTIP discourse needs to go further. Nearly 61 percent of Europeans and 46 percent of Americans believe that their governments have not done enough to communicate the costs and benefits of a prospective agreement. Proper communication must incorporate the strategic components of a potential agreement as well as its economic impact.

The issues that stakeholders emphasize – regulatory cooperation, data protection and privacy, and energy-export liberalization – are undoubtedly important to a final agreement and will likely boost jobs and growth. But each issue can also strengthen trans-Atlantic ties and define new best practices for the global trade system. TTIP is key also for this reason.

As the survey shows, strategic elements of TTIP resonate strongly with stakeholders and give further impetus to the importance of concluding a strong and successful agreement. Leaders and negotiators should understand stakeholders' priorities and ensure that an accord incorporates them rather than allowing talks to stagnate over more controversial yet insignificant areas.

TTIP's fate ultimately lies with the degree to which stakeholders are

satisfied with the agreement and its potential impact. As talks enter a "post-honeymoon" phase, negotiators will seek compromises on politically sensitive issues. Understanding stakeholders' views will be necessary to overcome the challenges ahead.

Joshua Stanton is project manager, trans-Atlantic relations and Kara Sutton is project manager, legislative relations at the Washington DC-based Bertelsmann Foundation

<http://mlcalliance.org/pdf/newsletter-may-2014.pdf>

INTERNATIONAL TRADE AGREEMENTS AND MAINE LOBSTER

by Melissa Waterman

Let's talk trade. We all know what it means to sell something. I have a widget, you want a widget, I sell you my widget for an agreed-upon price. What happens, though, when I want to sell you my widget and you live in another country?

That's when things get complicated. Nations use a tax called a tariff to protect those native industries they consider important. For example, the Japanese eat rice and rice cultivation is a part of the country's cultural heritage.

So Japan has long had in place tariffs on imported rice to protect local growers from foreign competition.

Those tariffs make rice produced in other countries, such as the United States, much more expensive for Japanese people to buy.

Countries also have different health, safety, and environmental standards for items that they make which affect the cost of production.

Sustainability, for example, is a hot topic in the United States and Europe. Consumers want to know that the fish they buy in the grocery store was caught sustainably or that the shrimp they purchase meets certain safety standards. Creating and then enforcing those standards adds to the cost of the final product.

So what happens among countries who want to sell things to each other but which may have tariffs and different standards for their products?

They make trade agreements.

Trade agreements

One trade agreement with which most Americans are familiar is the North American Free Trade Agreement, an international treaty agreed to by Canada, the United States, and Mexico in 1994. The agreement basically eliminated tariffs on products traded among the three countries. Its major focus was on agricultural products but it also affected other sectors such as textiles, electronics, and automobiles.

Twenty years after the agreement went into force, the question of whether NAFTA has been a boon to the United States is much debated. In a paper published by the Council on Foreign Relations earlier this year, Mohammed Aly Sergie noted that after NAFTA came in, trade flows among the three countries increased greatly, from roughly \$290 billion in 1993 to more than \$1.1 trillion in 2012. Today the United States trades more in goods and services with Mexico and Canada than it does with Japan, South Korea, Brazil, Russia, India, and China combined. Most of that growth comes from increased trade between the United States and Mexico. In 1993, the trade balance was a \$1.7 billion U.S. surplus; in 2012, the U.S. ran a \$61.4 billion deficit (we bought more from Mexico than Mexico bought from us).

Currently the United States is in talks with the countries around the Pacific to enter into a trade agreement. Australia, Brunei, Chile, Malaysia, Mexico, New Zealand, Canada, Peru, Singapore, Vietnam, Japan, and the United States are in the fourth year of negotiating the Trans-Pacific Partnership (TPP) agreement. But this trade agreement includes numerous provisions that go beyond NAFTA. The treaty has 29 chapters, dealing with everything from financial services and telecommunications to standards for food products.

The United States has also begun negotiations

with the European Union for a separate trade agreement, called the Transatlantic Trade and Investment Partnership (TTIP). This agreement would remove trade barriers in a range of sectors in order to make it easier to buy and sell goods and services. In addition to removing tariffs, the TTIP will address other issues, called non-tariff barriers, such as protection of intellectual property, technical regulations, and environmental and health standards.

Asia: Trans-Pacific Partnership (TPP)

Maine House representative Sharon Treat knows a lot about the pros and cons of U.S. trade agreements. Formerly a state senator, Treat is co-chair (with Sen. Troy Jackson) on the Maine Citizen Trade Policy Commission. The commission was created in 2003 expressly "to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment and working conditions."

Maine is one of only three states in the country with such a commission. Treat also is an official Advisor to the U.S. Trade Representative, Michael Froman. There are about 700 such advisors across the country, organized in 28 committees, who offer input to the Representative on everything from agriculture to the environment. Many of those individuals come from large corporations and firms. Foreign policy analysts generally concur that if agreed to, the TPP would provide a strong economic bulwark for the United States against China. But, argues Treat, that agreement will primarily benefit large multinational corporations while it may prove costly to smaller businesses. "When you talk to [the negotiators] and read the text that has leaked you realize that they very much see themselves as standing in the shoes of very large corporations, the big pharmaceutical,

insurance, and banking corporations,” Treat said. “Those corporations want to reduce the level of regulation applied to them. They are very clear about that.”

The TPP alarms people for a number of reasons. First, the elements of its 29 chapters are secret. The details are not made public until the negotiations are concluded. Second, it’s a really big agreement that addresses many non-tariff barriers, such as copyright law, drug standards, and investor-state relations. In fact, of its 29 chapters, only five deal with traditional trade issues such as tariffs.

One chapter is the Phytosanitary chapter. Phytosanitary regulations refer to health and safety standards for food items. The United States has a strong seafood inspection program through the U.S. Food and Drug Administration and through the National Oceanic and Atmospheric Administration. “One goal of this chapter is to make it easier to sell foreign-caught seafood in the U.S. without requiring strict compliance with U.S. food safety standards. If a Vietnamese company shipping to the U.S. meets Vietnamese standards for food safety then it’s OK to come in to the U.S.,” Treat said. “This is definitely not going to improve sales of seafood from Maine because we’ll always be more expensive.” The theory is that the agreement will cause those countries with lower Phytosanitary standards to raise them to a higher level. In practice, Treat said, that may not occur due to lax enforcement of those standards.

The TPP also could affect labeling standards for many products. Treat explained that the negotiators are drawing on earlier trade agreements under the World Trade Organization (WTO). The WTO, to which the United States is a party, has overturned U.S. labeling standards for “dolphin-safe tuna” and ruled against

the U.S. in a case brought by Canada that successfully challenged U.S. country-of-origin labels for beef. "In the U.S. we have standards for what is dolphin-safe tuna. We require the fishing industry to ensure there is no by-catch of dolphin," Treat said. However, the WTO found such standards to discriminate against Mexico, which has its own tuna fishing industry that does not use the same fishing requirements. "We don't know how the labeling issue will be handled [in the TPP] but we do know that they will build on previous agreements and strengthen them," Treat said. The investment provisions in the TPP also worry Treat. Through a provision called investor-state dispute settlement, companies can sue a nation for implementation of regulations unfavorable to that company. The company would not go to court to do so; instead it would go to an international arbitration panel. This process means that U.S. laws on health, safety or the environment that are seen as adversely affecting trade could be challenged by large corporations outside of the U.S. court system. "If a company doesn't operate in a certain country, it could create a subsidiary and then sue against laws that it does not like," Treat said.

The effect the TPP might have on Maine seafood producers and exporters is unclear. Removing tariffs on seafood exports to countries such as Korea or Malaysia would surely be a financial benefit. But it might also leave the door open to a flood of cheaper seafood imported to this country. "The question I have is, what would a good agreement look like?" Treat said. "What in this agreement would make things better?"

European Union: Transatlantic Trade and Investment Partnership (TTIP)

The Transatlantic Trade and Investment Partnership would

reduce tariffs on many U.S. and European items. Currently EU tariffs on lobster vary from 8% to 20%. But the TTIP would also address many of the same issues contained in the TPP, such as copyright laws, investor-state arbitration, and food standards. Canada recently concluded a trade agreement with the EU, which will remove tariffs on seafood and agricultural products.

Treat is concerned about the impact so-called "harmonization" of laws and regulations implicit in the agreement would have on Maine and other U.S. states. Under U.S. law, states must meet federal regulations for such things as clean water or food quality. However, states have the right to pass their own laws that are stricter than federal law. For example, California long ago passed air quality standards for automobiles that are much stronger than EPA regulations. According to documents leaked from the TTIP negotiations, there is a major effort by European Union negotiators to preempt state regulations. "They want to make sure that state regulations are no different than those of the U.S. government," Treat explained. "In addition, some European regulations are stronger than those here. U.S. companies don't like that."

Treat sees additional concerns for Maine and other states which have small, regionally recognized products. "We are marketing Maine as a place with sustainable agriculture, sustainable fisheries. The way things are going, we need to look very closely at anything that supersedes state or federal laws," she cautioned. Provisions within TTIP negotiations could restrict or even eliminate criteria that favor local or regionally grown foods as barriers to trade.

Fast Track Power

Since the mid-1970s, the U.S. President has the power to negotiate

international treaties and offer them to Congress, which must vote on them without amendment. The authority was provided as a way to reassure other nations that an agreement reached by the U.S. Trade Representative, on behalf of the executive branch of government, could actually make it through Congress in a finite period. The President's trade promotion authority, nicknamed fast track authority, expired in 2007. The Obama administration has asked Congress to pass a bill renewing fast track authority in order to conclude the TPP. That, however, has not happened. "There is a bill in Congress right now to reinstate fast track authority but it will not come to the floor before the November elections," Treat said. Both Democrats and Republicans in Congress have voiced their unease with reauthorizing such authority. According to critics, fast track authority is yet another way to keep the public from knowing what is in these trade agreements. "It limits review, speeds up the time frame [for voting], allows no changes, and requires an up or down vote," Treat explained. With fast track authority, the President would send an international trade agreement to the appropriate Congressional committees for review. Those committees then have 45 days to report the bill out of committee. The House and the Senate then must vote within 15 days after the bill is reported. Once the treaty is up for debate, it can be debated for no more than 20 hours (no filibusters are permitted). The whole process can take no more than 90 days. "Congress will probably look at authorizing legislation after the November election. If it passes then it is a push for the TPP. If it doesn't pass, then it will be a rockier road to get that agreement through," Treat said.

Keeping track of these trade agreements

as they are developed is difficult since the text of each agreement is not made public. Those interested can visit the official Web site www.ustr.gov/tpp to learn more about the TPP. For information about the TTIP, visit <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

The Maine Citizen Trade Commission is drafting a report on the TTIP and Maine food policy. The commission will be holding a hearing on the topic in June. For further information about the commission, visit the Web page, www.maine.gov/legis/opla/citpol.htm.
Trade continued from page 5

<http://www.commondreams.org/view/2014/05/05-6>

Published on Monday, May 5, 2014 by [Think Forward Blog](#)

The Anti-Localization Agenda in TTIP

by [Karen Hansen-Kuhn](#)

When U.S. and EU officials talk about the Transatlantic Trade and Investment Partnership (TTIP), they say it will bring the two economies together as leaders in the global economy. Just this week, European Commission President [José Manuel Barroso](#) told the U.S. Chamber of Commerce that, “TTIP should become the economic pillar of the EU and US alliance. It should be our joint attempt to shape a fast changing world and to set the standards of the future. It should act as a platform to project shared EU-U.S. values worldwide with regard to open markets and rule of law.”(Credit: Creative Commons / alexmartin81)

But what do they mean, and how would that work? Negotiating a series of bilateral or regional trade deals seems like a direct challenge to multilateralism, and something likely to further weaken the already anemic World Trade Organization. TTIP and the 15 bilateral or regional trade deals being negotiated by the EU create a cobweb of interlocking agreements that in many ways serve to lock in global norms on issues like investment, intellectual property, food safety and other issues that go well beyond what WTO members have agreed to even consider at the multilateral level.

TTIP is being negotiated in secret, so we're forced to rely on general comments and bits of leaked text to try to figure out what's really happening. One such paper came our way recently, a leaked document describing a proposed chapter on “Localization” in TTIP. That chapter, if enacted, would formally commit the EU and U.S. governments to work together to challenge trade barriers in countries that are not part of TTIP. It pushes back on practices in other countries, especially larger emerging economies like Brazil or India, to promote their own local economic development. This could include domestic content requirements, such as those in India's solar energy program, which USTR is already challenging at the WTO ([a move rejected by U.S. environmental groups](#)), or other measures designed to promote national industrialization strategies. Under the TTIP proposal, the U.S. and EU would work together to use diplomatic or perhaps even economic pressure to convince other countries to play by their rules.

In a new commentary, entitled "Trading away localization in TTIP", we explore this issue, drawing on submissions from corporations on their priority targets for “localization” barriers to trade. “Free markets” do not exist anywhere in the world. Decisions are shaped by the very unequal power of corporations vs. local businesses, massive economies such as the US and EU vs. emerging economies such as Brazil and India. This is true within the U.S. and EU, as well as within developing countries, especially the emerging economies whose own transnational corporations are entering into this complex arena. The danger is that if this coordinated attack on localization were formalized in TTIP, along with the broader protections for corporations embedded in provisions on investment, intellectual property rights, and public procurement, it would further tilt the scales in favor of corporate interests. This would create one more obstacle

to national or local governments' efforts to channel economic activity towards broader social goals.

Upsetting that balance, and consciously steering economic policies in the direction of democratically determined local priorities, is at the heart of sustainable and equitable development. That process works best when it happens in a transparent process with active public participation by the broadest possible range of stakeholders. The proposal for a chapter on localization barriers appears to be at an early stage. The U.S. and EU should discard this dubious proposal. Instead, they should find ways to embrace localization, rather than embarking on this dangerous new path.

Read IATP's new commentary, ["Trading away localization in TTIP."](#)

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http://vtdigger.org/2014/05/16/states-small-businesses-shut-international-trade-negotiations/?utm_source=VTDigger+Subscribers+and+Donors&utm_campaign=274577c5f3-Weekly+Update&utm_medium=email&utm_term=0_dc3c5486db-274577c5f3-392497054

STATES AND SMALL BUSINESSES SHUT OUT OF INTERNATIONAL TRADE NEGOTIATIONS

HILARY NILES MAY. 16 2014, 10:17 PM 5 COMMENTS

A pending international trade deal will affect businesses in Vermont and there's little the state can do about it, lawmakers said Friday.

A [new transatlantic trade agreement](#) being secretly negotiated between the U.S. and the European Union could challenge state laws and policies ranging from tobacco regulation to GMO labeling to procurement practices and more.

"People don't know enough about it to be upset," Sen. Ginny Lyons, D-Chittenden, said Friday. "And the reason they don't know enough is because there's no transparency to the process."

Lyons was one of several lawmakers from Vermont, Maine and New Hampshire attending an International Trade & the Environment forum on Friday and Saturday in Montpelier. The event was presented by the National Caucus of Environmental Legislators. The goal of some speakers Friday was to raise awareness of how international trade agreements can affect state and local laws.

Brent Raymond, Vermont's international trade director, is privy to only very limited information about the trade agreements and other negotiations made through the World Trade Organization.

He said in an interview Friday that he's conflicted about the prospects of the agreement. He believes global trade can be done well, Raymond said, but he's got serious concerns about this negotiating process.

"I have concerns about big tobacco's influence on TPP (Trans-Pacific Partnership) and WTO," Raymond said. Tobacco companies in the past have sued countries with strict cigarette marketing regulations, claiming the rules have hurt their business.

In addition to tobacco's influence, he's not seeing small businesses in the mix, in spite of the fact that small businesses — from import/export companies to six person machine shops — are increasingly competing in the global marketplace.

"I just don't feel like they're adequately represented by the representatives of the U.S. to these discussions," Raymond said. "The larger multinationals weigh in a lot and have a heavy amount of influence."

International trade representatives will hold their fifth round of meetings May 19-23 in Arlington, Va. They'll also take questions and solicit input from stakeholders on the Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and EU. A different international agreement, the Trans-Pacific Partnership (TPP) also is pending. Both are compared to the North Atlantic Free Trade Agreement, but on a much larger scale.

Both negotiations take place in secret.

Maine state Rep. Sharon Treat said she's virtually the only member of the U.S. Trade Representative's [Intergovernmental Policy Advisory Committee](#) who continually speaks up about the potential impact of the trade agreements on states.

Treat can comment on trade documents in advance of negotiations, but is not allowed to share them or even seek counsel from subject-matter experts. And the committee is not updated after the negotiating process, so she never knows what's actually being discussed, she said.

This concerns her because international trade agreements have the potential to trump state and local laws. The agreements don't nullify state laws outright, but they open a door for international corporations to challenge state laws as being anti-competitive.

Raymond said, for example, that Vermont's net-metering program could be considered a "subsidy."

A foreign energy company that wants to enter the Vermont market may conclude that net metering constitutes an unfair market restraint. They could sue — or threaten to sue — and challenge the state not in U.S. court but in a closed-door international arbitration tribunal.

"So states' rights on a lot of different fronts are potentially at risk," Raymond said. "The problem is we don't know what's being negotiated."

<http://www.foodsafetynews.com/2014/05/food-safety-standards-could-be-threatened-in-u-s-eu-trade-agreement/#.U5n9wu9eHIU>

CRITICS SAY FOOD SAFETY STANDARDS COULD BE THREATENED BY U.S./EU TRADE AGREEMENT

By [Lydia Zuraw](#) | May 16, 2014

Some call it the Transatlantic Trade and Investment Partnership (T-TIP) agreement. Others call it the Trans-Atlantic Free Trade Agreement (TAFTA).

Either way, it's the trade deal currently under negotiation between the U.S. and the European Union (EU) for which the fifth round of talks start next week in Arlington, VA.

While proponents of the agreement say it will grow economies and increase jobs, consumer advocates argue that hasn't been the case with the North American Free Trade Agreement (NAFTA). Instead, they worry about food safety, environmental, public health and labor standards being undermined as "trade barriers."

The content of the negotiation talks is not made public, and even members of Congress have only limited access to relevant documents. There are, however, about 600 "corporate advisers" who have been allowed to review and comment on negotiation texts.

Under previous trade negotiations, such as NAFTA, texts were made available after each round of talks. The Center for Food Safety (CFS) and other consumer advocates are calling for a revival of this precedent.

This lack of access to texts has many people irked, and, as a result of the relative secrecy, the little we do know about T-TIP has come from leaked documents or position statements put out by industry.

One of the goals noted in a leaked [EU position paper](#) was for parties to "engage in such cooperation without unnecessary restrictions, including any institutional, statutory or other barriers/ inflexibilities." It also calls for the creation of a Regulatory Cooperation Council (RCC) to have oversight in the regulatory systems of the U.S. and the EU.

At a briefing to Congress on Thursday, Gynnie Robnett, Outreach Coordinator at the Center for Effective Government and coordinator of the Coalition for Sensible Safeguards, said the first

goal would place a “high burden of proof on governments to show the necessity of particular regulations,” and she said she thinks of the RCC as an international version of the U.S. government’s Office of Information and Regulatory Affairs (OIRA).

Food Issues As Trade Barriers

Another speaker at the briefing, CFS International Director Debbie Barker, said that “food issues under negotiations provide an ... entrée point to really demonstrate to people that trade agreements are really relevant to their lives every day. It affects the food they eat and that they feed their children.”

She went on to say that food issues in T-TIP “are extremely contentious. This is probably the area in T-TIP that has the potential to stop the agreement.”

A [CFS bulletin](#) released Wednesday and authored by Barker explains that the proposed agreement is more focused on trade barriers than quotas and tariffs.

“Many analysts believe that a central aim of the negotiations is to dismantle many food safety regulations that corporations view as impediments to trade and profitmaking,” the report states.

It also lists the effects these barriers could have on food issues on each side of the Atlantic. Because the EU uses the precautionary principle as its regulatory foundation, it has more to lose from T-TIP in terms of food and farming issues.

In referring to the principle, the [1992 Rio Declaration on Environment and Development](#) states: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The precautionary principle “sets the bar higher for safety standards” in Europe, Barker told **Food Safety News**.

So, according to the CFS report, the EU’s bans on GE crops, meat from livestock treated with non-therapeutic antibiotics and growth hormones, ractopamine, and chemically washed poultry, plus standards for things such as animal welfare, organic equivalency, chemicals and nanotechnology, would all be in jeopardy under T-TIP.

In the U.S., standards for feed ingredients that include ruminant materials known to transmit mad cow disease could be relaxed, the zero-tolerance policy for Listeria and E. coli could be eliminated, GE-labeling initiatives across the U.S. could be threatened if the EU lowers its labeling requirements, “Buy American” policies could be on their way out, and Europe’s milk standards could be recognized as equivalent to U.S. Grade A.

“Yes, we’re concerned about citizen rights and the sovereignty of other countries, but, in effect, that also makes it harder for us in the U.S. then to be rallying or campaigning for higher

standards here,” Barker told **Food Safety News**. “Once something gets set on an international level or in a trade agreement, the domestic regulatory agency can say that would be trade illegal.

“If we lower standards elsewhere, we are also, in effect, inhibiting chances of us raising our standards.”

These barriers to trade have the potential to lead to a situation like the current dispute Canada has with the U.S. regarding country-of-origin labeling.

“When you think of the time, the expense, the energy that our country is having to do in international tribunals to defend what should be domestically led standards — that, in itself, regardless of the outcome — is troubling,” Barker said.

Regulatory Mechanisms

“TTIP is not a conventional trade agreement; it’s a regulatory agreement,” said Baskut Tuncak, an attorney with the environmental health program at the Center for International Environmental Law, during the congressional briefing. “It’s a regulatory agreement that’s designed to prevent differences between the U.S. and EU, including the states of the U.S. and federal government.”

A major concern for advocates is the proposed Investor-State Dispute Settlement (ISDS) mechanism in T-TIP that gives foreign investors and corporations the opportunity to challenge sovereign governments on their domestic policies outside of a normal domestic judicial system.

And it’s not just a theoretical fear, they say. During the congressional briefing and in her report, Barker referenced the case of the U.S.-based Ethyl Corporation suing Canada in 1997 for banning a toxic gasoline additive called MMT.

The Canadian government ultimately settled the case, repealed their ban, paid \$13 million in compensation and issued a public apology.

“It wouldn’t matter if a substance was liquid plutonium destined for a child’s breakfast cereal,” a lawyer for Ethyl said at the time of the settlement. “If the government bans a product and a U.S.-based company loses profits, the company can claim damages under NAFTA.”

Within the U.S. federal system, advocacy groups have ways to contribute concerns about the regulatory system — comment periods, for example — “however, a permanent regulatory council like T-TIP will definitely enhance corporate influence over standard-setting and it will make it much, much more difficult for consumer and other civil society groups to monitor or even know what’s being discussed and to provide immediate input involving the food that we’re all eating,” Barker said.

“Trade agreements should set at least a minimum standard for critical issues such as food safety and then also allow countries to set even higher standards to protect citizens and environments,” she added.

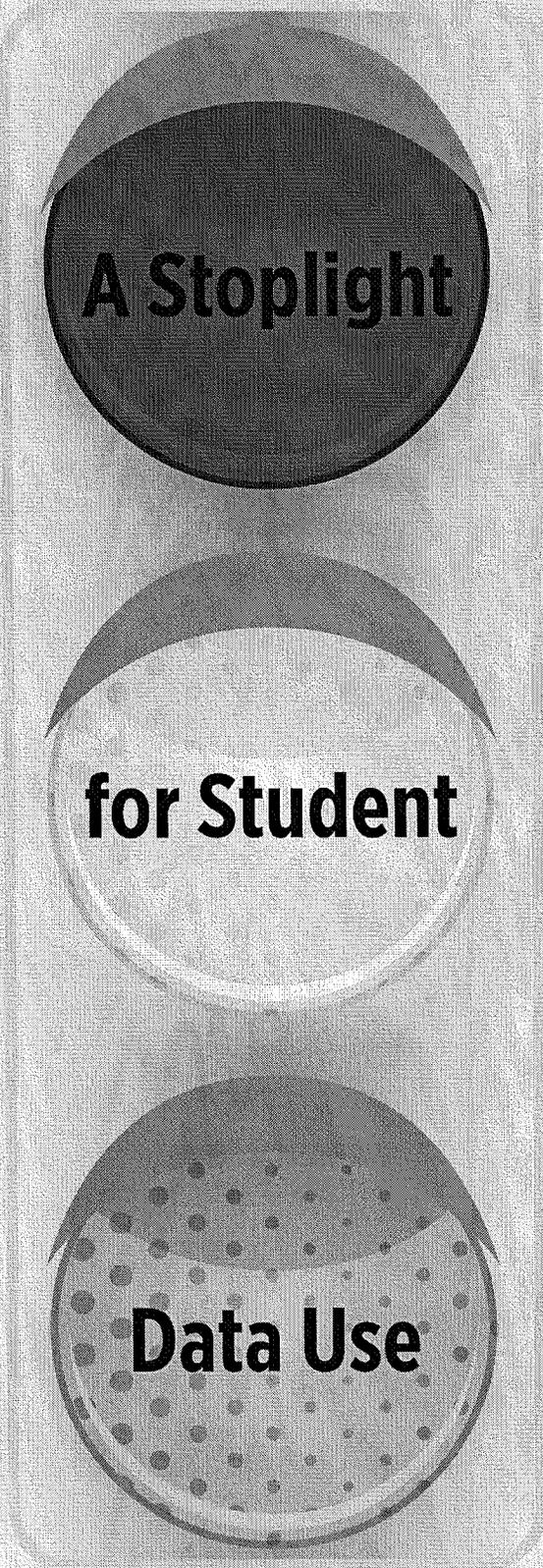
Globalization of Food Systems

Barker's report also briefly addresses the issues of trade on climate change.

“Given the state of the planet and the urgent need to reduce [greenhouse gas] emissions, economic imperatives should aim to bolster local production mainly for local consumption, localize energy sources as much as possible, and root capital primarily in local or regional economies,” the report states.

“T-TIP is part of this global economic trade system in food that just doesn't make sense on an environmental level, on a nutritional level and on a food security level,” Barker told **Food Safety News**.

© Food Safety News



A Stoplight

for Student

Data Use



*Using Data
to Improve
Student
Achievement*

Making FERPA as Simple as **Green, Yellow, or Red**

Student information helps educators, students, parents, and policymakers make informed decisions and provide tailored education to ensure each student is on track to succeed. Data use can be transformative, and protecting student privacy is an essential component of effective data use.

The foundational federal law on student privacy, the Family Educational Rights and Privacy Act (FERPA), establishes student privacy rights by restricting with whom and under what circumstances schools may share students' personally identifiable information. This tool summarizes some of the main provisions of FERPA, and identifies when students' personally identifiable information may be shared under the law. However, this tool should be used as a guide to help you understand when you need to take a closer look at the law or consult an expert. It should not be considered a comprehensive review of FERPA-authorized disclosures and should not be considered a substitute for appropriate legal counsel.



For more information, check out these sections of FERPA:

§99.30 Under what conditions is prior consent required to disclose information?

§99.31 Under what conditions is prior consent not required to disclose information?

View the full text of the law at http://bit.ly/FERPA_law.

FERPA RULES OF THE ROAD

Stop

NO ONE
Can sell student education record data.

EMPLOYERS
Can't be given a student's personally identifiable information, unless applicants or their parents (if applicants are under age 18) give consent.

AUTHORIZED THIRD PARTIES
Can't use personally identifiable information from educational records to market to kids and families.

PARENTS
Can access their child's education data if the child is younger than 18 and not enrolled in postsecondary education.

STUDENT'S TEACHER
Can access the student's data to meet educational needs.

HEALTH & SAFETY
Student data can be shared for reasons of health and safety in certain emergencies.

Go

ANOTHER SCHOOL
Can receive data if the student seeks or intends to enroll in that school, including a postsecondary institution.

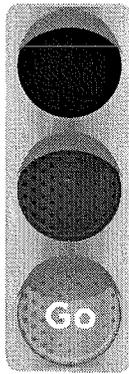
SCHOLARSHIP & FINANCIAL AID PROVIDERS
Can receive data when the student has applied for or received financial aid from that entity.

Slow Down

SCHOOL OFFICIALS & AUTHORIZED THIRD PARTIES
Must have a legitimate educational need for student data before they can view them.

AUTHORIZED THIRD PARTIES
Can use data only for the original purpose for which the data were shared, and each third party is under the direct control of either the school district or the state education agency.

RECIPIENTS
Must maintain strict data use and security requirements where applicable. This includes using data only for the purposes for which they were disclosed and destroying the data when no longer needed for the specified use.



DISCLOSURE TO PARENTS: FERPA requires that the parent of a student who is younger than 18 and not enrolled in postsecondary education be able to review his or her child's records.

DISCLOSURE WITH PARENTAL CONSENT: FERPA permits a school to disclose student record data if a parent provides written consent.

DISCLOSURE WITHOUT PARENTAL CONSENT: FERPA establishes a limited number of ways in which student record data can be disclosed without prior parental consent. These disclosures include the following:

- Disclosure is permitted to **school officials, including teachers, who have legitimate educational interests** in the data.
- FERPA permits schools to disclose **directory information**, which is personally identifiable information contained in a student's education record that would not generally be considered harmful or an invasion of privacy if disclosed, such as name, address, name of parent, etc. Directory information may not include a student's Social Security number or identification number. Schools that elect to disclose directory information must notify parents of their policy to do so, and parents have the right to opt out of these disclosures.
- Data can be shared with officials of **another school, school system, or institution of postsecondary education where the student seeks or intends to enroll or where the student is already enrolled** so long as the disclosure is for purposes related to the student's enrollment or transfer.
- The disclosure is in connection with **financial aid for which the student has applied or which the student has received.**
- The disclosure is in connection with a **health or safety emergency**, under certain conditions.



**No Detours for Parents to
Access Education Records**

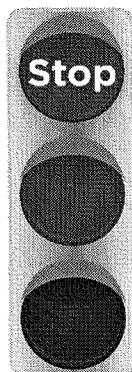
FERPA provides parents with the right to access and review their children's education records and to challenge information contained therein.

Schools cannot charge parents for access to or copies of their child's education record if the cost effectively prevents the parent from exercising his or her right to review it.



DISCLOSURE WITHOUT PARENTAL CONSENT: FERPA establishes a limited number of ways in which student data can be disclosed without prior parental consent. These disclosures include the following:

- Personally identifiable information can be shared with **third parties that provide outsourced services to the schools, if access to the data is necessary to provide that service.** For example, schools may use a contractor to conduct school assessments, provide student support services, or maintain the school's database. These parties must remain under the direct control of the school with respect to the use and maintenance of data and can use the data only for the purpose for which they were disclosed.
- Data can be shared with **authorized representatives of certain state or local education officials to audit or evaluate a state- or federally supported education program or to conduct a compliance or enforcement activity under related federal laws.** Authorized representatives must safeguard personally identifiable information and must destroy the information once they are finished using it for its intended purpose. §99.31 (a)
- Personally identifiable information can be shared with **researchers who conduct studies for or on behalf of schools and school districts** to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction, subject to a required written agreement between the education agency and the research organization. Personally identifiable information can be shared only with researchers with a legitimate interest in the data and **cannot be released publicly.** Data may be used only for the purpose for which they were disclosed and must be destroyed when no longer needed for the study.



DISCLOSURE NOT ALLOWED: Most other disclosures of students' personally identifiable information are not permitted under FERPA.

- This means that under FERPA, schools **may not share student data for commercial purposes or marketing without parental consent.**
- FERPA also **does not permit the sharing of student data to make decisions regarding a student's (or former student's) employment** unless the job applicant (or parent) consents to a disclosure.



The Data Quality Campaign (DQC) is a nonprofit, nonpartisan, national advocacy organization committed to realizing an education system in which all stakeholders—from parents to policymakers—are empowered with high-quality data from the early childhood, K-12, postsecondary, and workforce systems. To achieve this vision, DQC supports policymakers and other key leaders to promote effective data use to ensure students graduate from high school prepared for success in college and the workplace.

For more information, visit www.dataqualitycampaign.org or email info@dataqualitycampaign.org.