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STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Tuesday, October 7, 2014 at 2 P.M.
Room 220, Burton M. Cross State Office Building
Augusta, Maine

2 PM Meeting called to order

- I. Welcome and introductions**
- II. Presentation (by phone) on Trade in Services Agreement (TISA) from Scott Sinclair, Canadian Centre for Policy Alternatives**
- III. Discussion of 2014 CTPC Assessment and possible CTPC actions**
- IV. Briefing from Representative Sharon Anglin Treat on recent USTR activities**
- V. Articles of interest (Lock Kiermaier, Staff)**
- VI. Discussion of next meeting date; public hearing required before the end of 2014**

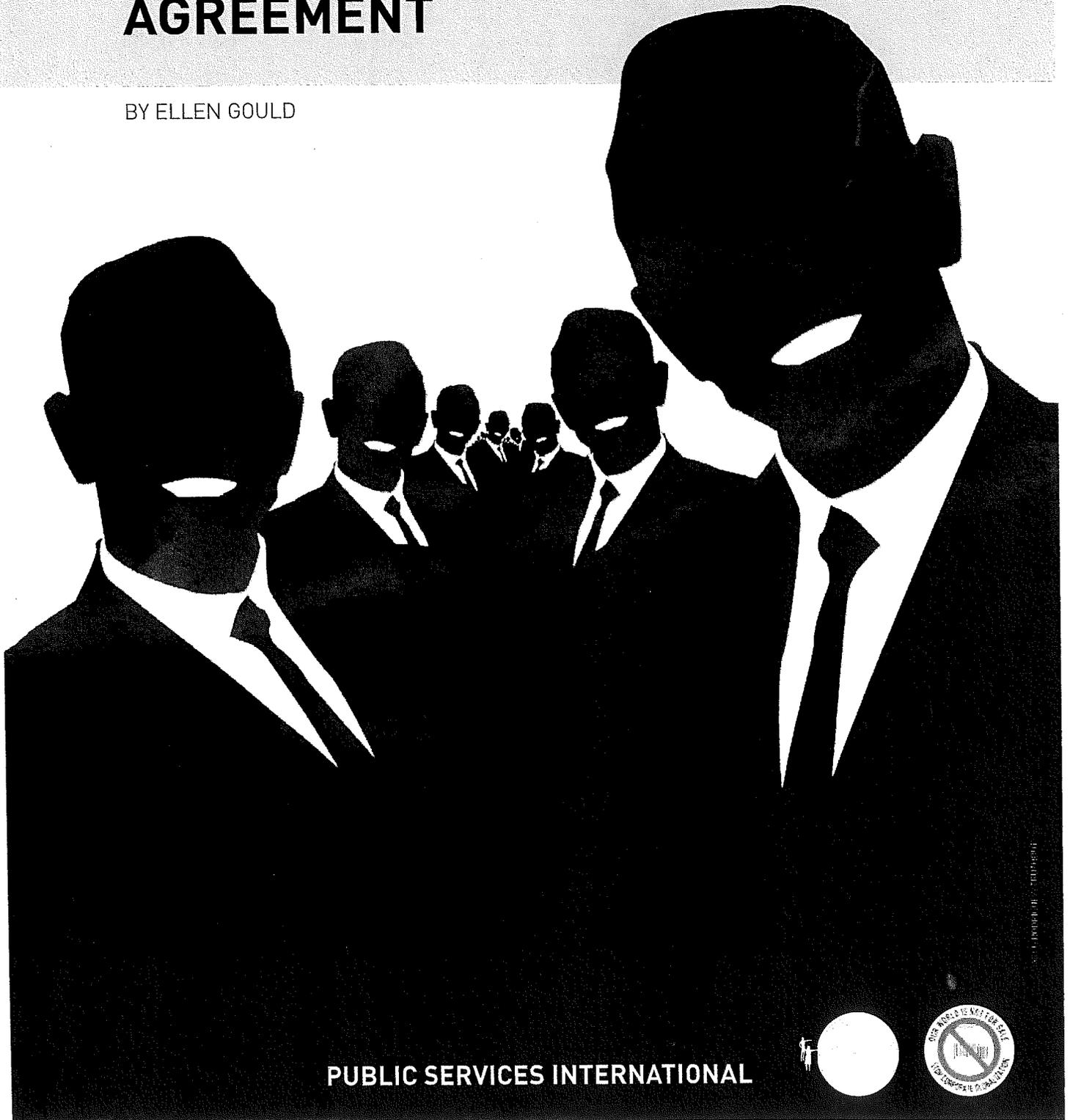
Adjourn

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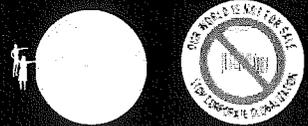
TISA - TRADE IN SERVICES AGREEMENT

THE REALLY GOOD FRIENDS OF TRANSNATIONAL CORPORATIONS AGREEMENT

BY ELLEN GOULD



PUBLIC SERVICES INTERNATIONAL



PHOTOGRAPH BY TRIP PHOTO

Written by Ellen Gould

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Published studies include: the "GATS and Financial Instability", "The Commodification of Services"; "How the GATS Undermines the Right to Regulate", "International Trade Agreements: An Update for the Union of BC Municipalities".

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FOREWORD

Treating democratic laws and regulations of elected governments, designed to protect the public interest, as barriers to trade is a fundamental misconception of the role of government.

Laws and regulations to protect workers, consumers, small business and the environment exist because the market does not produce these outcomes.

The global financial crisis made clear the catastrophic results of failing to adequately regulate the financial markets. From global warming to the Rana Plaza disaster, our world is confronted with national and global challenges highlighting the tragic consequences of failing to make and enforce decent rules for the benefit of all in our societies.



The power to regulate is also essential to provide fair competition for business and allows countries, cities and regions to pursue economic and cultural development.

The Trades in Services Agreement (TISA), currently being negotiated in secret, is among the alarming new wave of trade and investment agreements founded on legally-binding powers that institutionalise the rights of transnational investors and prohibit government actions in a wide range of areas only incidentally related to trade.

This report's companion document TISA versus Public Services* outlines the harm the TISA will also do to public services designed to provide vital social and economic necessities – such as health care and education – affordably, universally and on the basis of need. Outcomes the market cannot produce.

Shockingly, the TISA will prevent governments from returning public services to public hands even when privatisations fail. Incredibly, in the aftermath of the global financial crisis, the TISA also seeks to further deregulate financial markets.

It is a deliberate attempt to privilege the profits of the richest corporations and countries in the world over those who have the greatest needs and risks establishing a global oligarchy dictating the rules across the world.

We know that large corporate interests are heavily involved in the TISA negotiations.

With such high stakes for people and our planet, the secrecy surrounding the TISA negotiations 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 TISA negotiating texts must be released for public scrutiny and decision-making.

The TISA must not 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

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INTRODUCTION

Highly secretive talks began in 2012 to establish a new trade agreement, the Trade in Services Agreement (TISA). The group of countries¹ negotiating TISA have given themselves an insider joke for a name, the 'Really Good Friends of Services'², to signal how truly committed they are to promoting the interests of services corporations. But there is nothing funny about the sweeping, permanent restrictions on public services and regulation that could be the impact of their work.

The idea for TISA originated with trade think tanks and lobbyists for transnational corporations unhappy with the pace of services negotiations at the World Trade Organization.³ The Coalition of Services Industries has been clear about how ambitious TISA negotiators should be in achieving privatization and deregulation. Testifying to the US government in his capacity as Coalition chair, Samuel Di Piazza, a senior banker with Citigroup, stated that TISA countries should 'modify or eliminate regulations' within their borders. According to Di Piazza, banks, insurance companies, media and other corporations that do business globally should be able to operate in an environment where the determinants are 'market-based, not government-based'. Di Piazza's vision of the future under TISA is one without publicly delivered or regulated services, where "*free market principles can govern the investment in, and delivery of, services on a transnational scale.*"⁴

The sweeping deregulation the Coalition is seeking would eliminate policy space for governments at all levels. For example Walmart, a member of the Coalition of Services Industries, sees TISA as a way to free itself of local government zoning regulations and restrictions on store size. Walmart also wants TISA to end the restrictions on sales of alcohol and tobacco, an area often under the jurisdiction of state and provincial governments.

" Walmart, a member of the Coalition of Services Industries, sees TISA as a way to free itself of local government zoning regulations and restrictions on store size. Walmart ⁵"

Eliminating government's role in the delivery of services, getting rid of regulations, and allowing transnational corporations free rein sounds like the platform of a libertarian political party, a radical agenda that should be debated in public and that voters should have a say over at the ballot box. Instead, the Really Good Friends of Services have imposed unprecedented levels of secrecy on their negotiations, suppressing the public's ability to discuss the serious issues at stake. The positions TISA governments

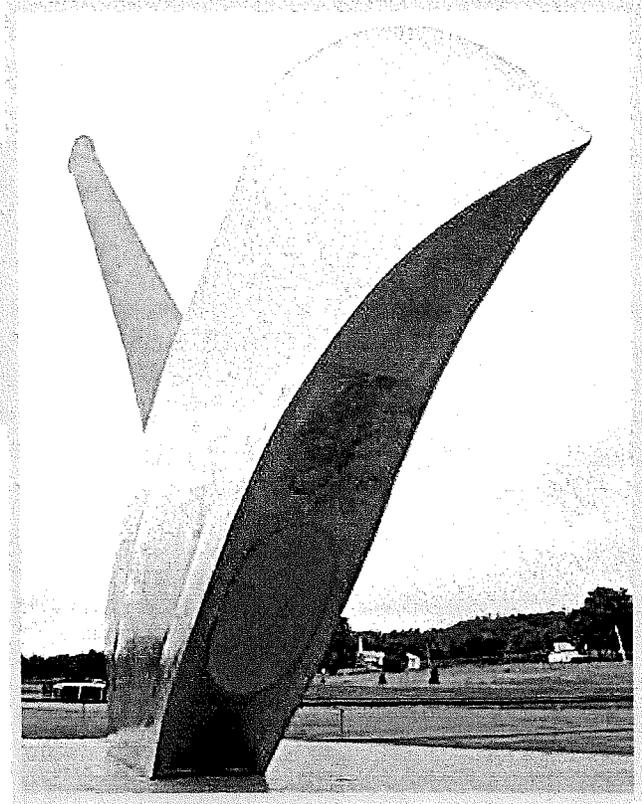
take at the bargaining table – how much they push privatization and deregulation, whether they make concessions in sensitive areas like health, education, culture, water supply, and banking regulation - will not be made public until five years after the agreement comes into force⁶. This extreme secrecy seems designed so that trade officials can negotiate without regard to domestic concerns and to relieve politicians of any accountability for their role in creating TISA.

Why are transnational services corporations confident they can get their agenda of deregulation and privatization through TISA? The following analysis focuses on how TISA could be used to accomplish their deregulatory agenda, and is meant to complement the study 'TISA versus Public Services'⁷ that examines how TISA would foster privatization. TISA can be viewed as a one-two punch against the public interest, since it will promote privatization but also provide grounds to attack regulation of privately delivered services.

The objective of this paper is to help overcome the secrecy and complexity surrounding the TISA negotiations in order to bring the agreement into the public sphere for democratic debate. Although the Really Good Friends of Services (with the sole exception of Switzerland) have refused to make public any negotiating documents, enough information can be gleaned from negotiators' speeches, trade journals, and from leaked documents to indicate the threat TISA poses to public interest regulation.

SHARPENING THE AXE:

FROM THE GATS TO TISA



TISA is a strategy to bypass stalled talks to expand services rules and obligations at the WTO, so to understand TISA it is necessary to review some of the issues in those negotiations. Transnational corporate lobbyists have complained that the WTO services agreement, the General Agreement on Trade in Services (GATS), has not achieved the significant change they were counting on when the agreement came into force in 1995. They are also dissatisfied with the ongoing GATS negotiations mandated to continuously expand the reach of that agreement.

Developing countries are blamed for holding the GATS negotiations hostage to progress in other sectors. However, developing countries have argued that while they have been asked to make significant new concessions at the services bargaining table, they have not seen movement at the WTO in areas, such as agriculture, where they have a competitive advantage. WTO negotiations are supposed to produce 'reciprocal and mutually advantageous' results for all members and in particular work to ensure that developing countries secure a share in the growth of international trade.⁸ Even including services in the WTO in the first place was a major concession developing countries made when the organization was founded, given that corporations based in OECD countries account for the lion's share of the world's trade in services.

To get around this impasse at the WTO, a group made up of mainly OECD countries founded the Really Good Friends of Services with the idea of going far beyond the multilateral GATS or any regional or bilateral agreement that has yet been signed, pressuring more countries to sign on to TISA, and then getting the agreement incorporated into the WTO. As former US Trade Representative Ron Kirk told a gathering of industry representatives, TISA "*presents significant new opportunities to examine the achievements of services agreements so far; consolidate the most important and effective elements into a single framework; and extend that framework to a broader group of countries.*"⁹ The TISA

negotiations are essentially a replay of the negotiations that produced the GATS, but this time without the delegations present in the room that might have pushed back against the more extreme demands of the transnational services lobby.

Despite industry criticism that the GATS is too weak, that agreement already has strong deregulatory provisions. For example, in 2004 a WTO panel found that US regulations prohibiting Internet and other forms of remote gambling were a GATS violation. US lawyers had argued before the panel that the right to regulate stated in the preamble to the GATS "*implies the power to set limitations on the scope of permissible activity*".¹¹ Most citizens might think that was an obvious, minimum standard for what their government should be able to do.

THE GATS-PLUS FEATURES OF TISA THAT COULD HAVE THE STRONGEST DEREGULATORY IMPACTS ARE:

- A coercive negotiating structure that will pressure governments to subject as many service sectors as possible to the agreement and trigger application of a set of new restrictions on regulation;
- GATS-plus provisions that will create more grounds for challenges to regulations;
- Elimination of the GATS article that allows countries to change what they have committed to if they can get other parties to agree.

But in its ruling, the panel made clear how the GATS limits the right to regulate:

*"Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."*¹²

"In 2004, a WTO panel ruled that US regulations prohibiting internet and other forms of remote gambling were a GATS violation. WTO"

The panel ruling should provide a clear warning to the Really Good Friends of Services that they cannot expect to establish radical TISA restrictions on regulations that go far beyond provisions in the GATS and then not see these legal weapons turned on their own regulations in a trade challenge. The Friends' declared intention to create a 'GATS-plus' agreement makes it likely that they will have to 'modify or eliminate regulations' as the Coalition of Services Industries has demanded. If they do not deregulate, TISA members may find themselves before a dispute panel being set straight about the extent to which TISA limits their regulatory sovereignty.

A COERCIVE NEGOTIATING STRUCTURE



STEFANO ZAPPALÀ

"All laws and regulations designed to achieve domestic regulatory objectives would be subject to the obligation of national treatment. In addition, national treatment would apply to all future such regulations governing the services sectors."

"Trade in Services - Communication on Behalf of the United States."

GATT document L/5838, 9 July 1985

In its original campaign to have services included as one of the WTO agreements, the US tried to get a 'top-down' structure, meaning that all service sectors would be automatically covered unless countries specifically excluded them. Although the GATS ended up having some provisions that do govern all services, the US demand for a top-down agreement was rejected in two key areas – 'market access' and 'national treatment'.

The GATS market access obligation prohibits numerical limits on either the supply or suppliers of a service. The national treatment obligation requires countries to treat services and service suppliers of other parties to the agreement no less favourably than they treat their own. With the GATS bottom-up structure, countries choose which services they will commit to market access and national treatment rather than starting from a place where every service is governed by these obligations unless it is expressly excluded.

In TISA, however, the US has achieved¹³ its long-term goal of having national treatment apply in a top-down way to services. This top-down structure means TISA countries will have to list all the services they want to exclude from national treatment, a list-it-or-lose-it proposition that increases the possibility that national treatment may end up applying to services governments meant to protect.

The deregulatory impact of TISA's top-down approach to national treatment is especially serious given

that national treatment targets more than just those regulations that overtly favour local companies. Under national treatment, identical treatment of foreign and local companies is not enough – they have to be given the same conditions of competition. This requirement creates uncertainty for governments since it is not always clear when regulations are creating unequal conditions of competition.

In addition, regulations that discriminate in favour of services supplied by governments¹⁴, non-profits or co-operatives violate national treatment. Fedex, for example, in its submission on TISA to the US Trade Representative, is seeking a 'level playing field' for public and private delivery services and the elimination of 'regulatory advantages historically conferred upon national post offices'. National post offices have mandates to serve parts of the market, such as remote areas, unprofitable 'playing fields' that Fedex and other transnational courier businesses are not interested in serving. Eliminating regulations that give advantages to national postal offices handicaps their ability to meet their public interest mandates.

“ Fedex is seeking the elimination of 'regulatory advantages historically conferred upon national post offices'. Fedex¹⁵ ”

National treatment provisions can also be used to challenge regulations requiring local representation in the governing bodies of service corporations. The Coalition of Services Industries argues that TISA should prohibit governments *“from requiring service providers to meet nationality requirements for Board members”*.¹⁶ Even credit unions and co-operatives would not be allowed to require their board members come from the local community. If TISA parties do not explicitly exclude these regulations when they make their top-down national treatment commitments, then they must eliminate them or risk a trade challenge.



As well as changing national treatment to a top-down structure, other mechanisms are being used to pressure governments to subject as many services as possible to the full force of TISA. The Really Good Friends group are modeling TISA on the GATS, but including new provisions that will impose draconian constraints on the right to regulate. The U.S. WTO Ambassador Michael Punke said in 2012 that the Really Good Friends of Services had agreed to apply standstill and ratchet to national treatment and they may also apply these provisions to market access.¹⁷

The standstill clause would require governments to lock in the policies that exist when they sign the agreement. If, for example, foreign companies had been granted rights to provide health insurance, TISA would entrench this as their permanent right. As the US insurance lobby put it, "*commitments should, at a minimum, match the level of access that exists in the market today.*"¹⁸

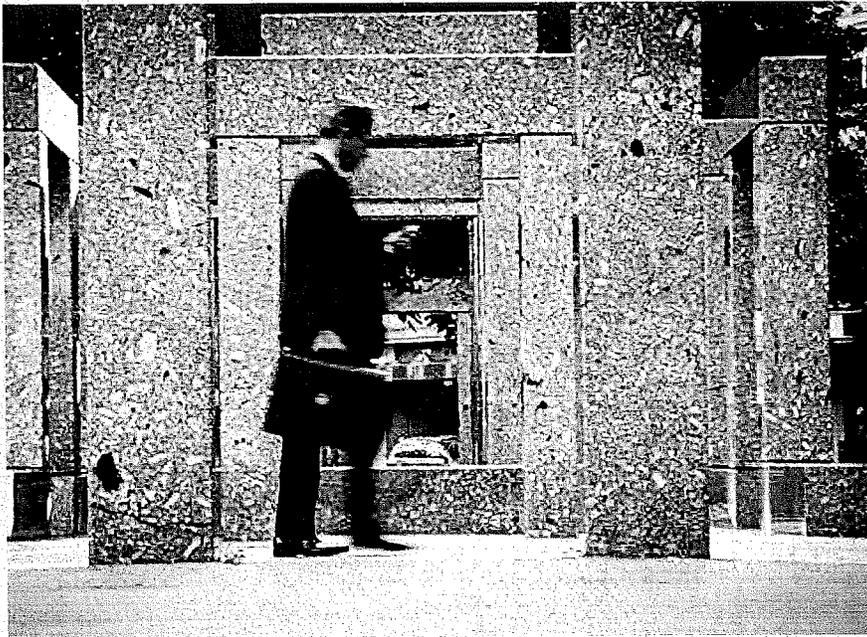
TISA's proposed ratchet provision¹⁹ would automatically make permanent any experiment governments made in deregulation – with no ability to reverse course if the experiment proved disastrous. An example is the current Norwegian government's plans to liberalize the sale of alcohol. Norway has traditionally been a strong advocate for alcohol control policies designed to reduce the incidence of alcohol-related harm. However, Norway's government is considering changes that would threaten the government monopoly on alcohol sales. The government has proposed allowing direct sales of alcohol to consumers from producers and loosening Norway's restrictions on alcohol advertising.²⁰ Decreasing the availability and advertising of alcohol have proven to be effective ways to reduce alcohol-related harm, so the

Norwegian government may want at some future point to reverse such changes. But under a ratchet clause, every step Norway might take to liberalize alcohol sales could be locked in permanently.

TISA's standstill and ratchet clauses may act to dissuade more countries from joining the Really Good Friends group. Flexibility in the GATS allows countries to keep from committing sectors that they may have already opened up to foreign corporations. Since many developing countries had been forced to extensively privatize and deregulate under International Monetary Fund structural adjustment programs when the GATS was originally being negotiated, they did not want this to be automatically locked in by the GATS. Instead, developing countries could seek gains in areas of interest to them – construction, maritime services, employment of temporary workers working overseas – in exchange for making commitments covering the services they had already privatized and deregulated.

Developing countries are invited by TISA's advocates to think of opening up their services sectors to OECD-based transnational corporations not as a concession and a sacrifice of their national interest, but rather as a 'precondition for enhancing domestic economic performances'.²¹ The same advocates emphasize the comparative advantages of US and EU companies and the potential to create more US and European jobs through TISA when they lobby their own governments.

It is difficult to see in general how guaranteeing US and EU companies more access to supply the gamut of services, including entertainment, retail sales, and the trading of financial derivatives in shadow markets serves as a 'precondition for enhancing domestic economic performance' in developing countries. How, for example, would it enhance development for TISA members to accede to Walmart's demand²² for deregulation of alcohol and tobacco sales?



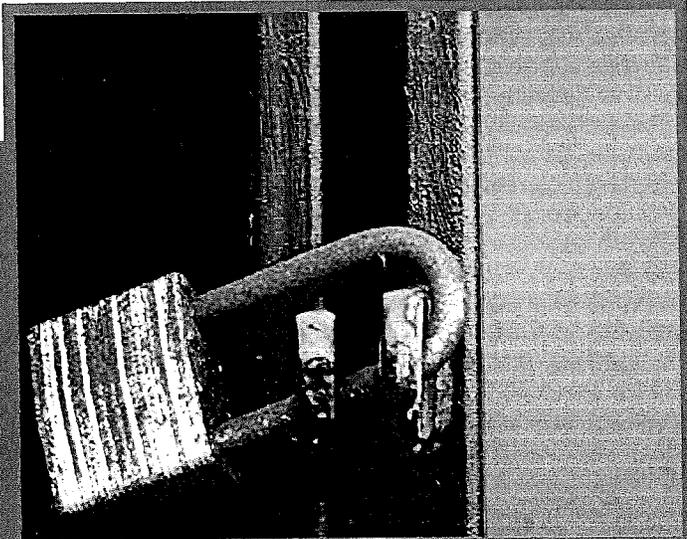
A key demand of the services lobby is that TISA should require any new service to be completely and automatically covered by TISA market access and national treatment commitments. According to the Coalition of Services Industries Testimony²³, *"TISA should ensure that 'any new services that become possible to trade as a result of technological innovation in a covered category can be provided without further negotiation."* Inclusion of a 'future-proofing' clause is another way TISA is being designed to limit the right to regulate far more than the GATS. This kind of provision has been defined as the 'quasi-automatic liberalization of new services that might emerge over time.'²⁴ It eliminates the ability of governments to decide whether they want to nurture a national capacity to develop the service or have it delivered by governments or non-profits. In addition, rather than being compelled to give foreign and local corporations the same rights to provide a new service, governments may actually want to completely ban services such as Internet gambling.

The addition of the standstill, ratchet and future-proofing clauses in TISA are being paired with the elimination of the GATS article that allows countries to withdraw commitments. GATS Article XXI states that *"A Member may modify or withdraw any commitment in its Schedule"* if they can negotiate substitute commitments satisfactory to the WTO membership. It is ironic that both the US and the

EC, whose trade officials are intent on eliminating this provision from TISA, are the WTO members that have actually used the flexibility in the GATS to withdraw commitments.²⁵ The US made an unintentional commitment of cross-border gambling under the GATS, but has negotiated to withdraw this commitment using the modification and withdrawal provisions of GATS Article XXI. The EC modified its commitments to accommodate the enlargement of the European Union.

TISA will not allow any new commitments that are possible to make in a world of technological innovation. It will also encourage the proliferation of national treatment commitments.

With TISA, governments will not be allowed to withdraw commitments even if they made them unintentionally, their commitments have had unforeseen, negative consequences, and they agree to provide compensation to other TISA parties. The top-down approach being adopted for national treatment commitments greatly increases the risk of commitments being made that countries end up wanting to withdraw.



RESTRICTING GOVERNMENT'S RIGHT TO REGULATE

FREDERIC POIROT

Corporations have high expectations for the deregulation they expect from TISA, confident that the agreement will compel the elimination of regulations regardless of whether they are discriminatory against foreign companies or not. For example, the National Retail Federation that lobbies for transnational retail corporations is expecting the Really Good Friends of Services to:

*“Work to ease regulations that affect retailing, including store size restrictions and hours of operation that, **while not necessarily discriminatory**, affect the ability of large-scale retailing to achieve operating efficiencies... [emphasis added]”²⁶*

It is hard to see what this industry demand for deregulation has to do with trade. Although regulations on store hours and size are applied to local retail stores and transnationals alike, international retail corporations want them eased simply because they do not like how they are affected.

Walmart has taken the position that TISA should prohibit restrictions not only on store size and hours of operation but also on the ‘geographic location’ of stores - a direct attack on all local government zoning authority.²⁷ The public interest in walkable neighbourhoods, reducing the noise and negative impacts on workers caused by extended store hours, preservation of heritage areas and other considerations could end up being sacrificed by the Really Good Friends in favour of Walmart’s commercial interests.

How could TISA achieve these deregulatory goals for the transnational services lobby? The existing

GATS obligations of national treatment and market access that are being incorporated into TISA²⁸ do not provide airtight legal arguments for challenging regulations like zoning. However, new grounds for challenging regulation are being negotiated as part of both the GATS and TISA talks. The structuring of TISA to coerce countries to make the widest range of commitments possible could result in the radical deregulation along the lines of what corporate lobbyists are seeking. National treatment and market access commitments could trigger imposition of a whole new set of constraints on the right to regulate.

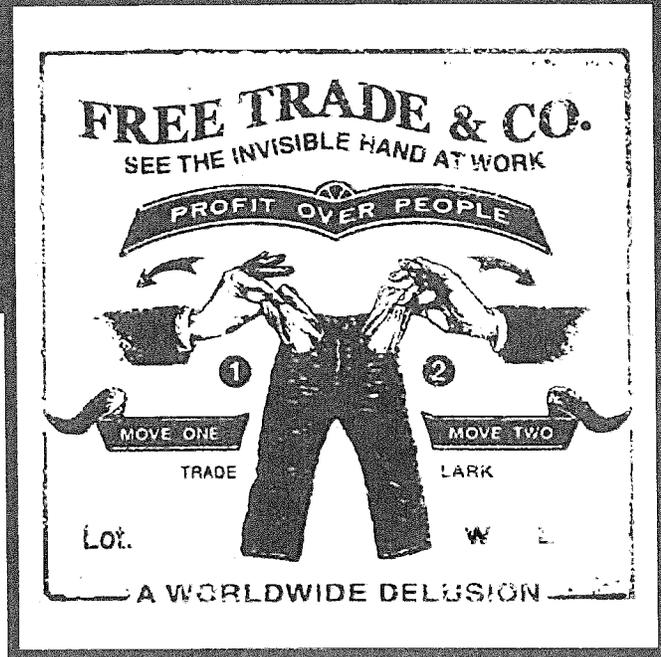
The imposition of new, binding restrictions on non-discriminatory domestic regulation is a controversial aspect of the GATS negotiations. WTO delegations are fighting each other in very undiplomatic terms over how severe these disciplines should be.²⁹ Any of the proposals on the table, however, would restrict the right to regulate.³⁰

TISA negotiators have also agreed to include “discussions for new and enhanced disciplines on the domestic regulation of services as part of any future deal”³¹ and corporations are lobbying to have TISA domestic regulation disciplines modeled on the most extreme language proposed at the GATS negotiations. In addition, if as intended³² TISA is incorporated into the WTO, domestic regulation disciplines negotiated through the GATS could apply to all of the extensive market access and national treatment commitments made under TISA. The GATS draft disciplines on domestic regulations state:

*“ These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services **where specific commitments are undertaken** [emphasis added]. ”*³³

The scope of affected regulation could be enormous. The standard for TISA commitments, according to US WTO ambassador Michael Punke, is the ‘highest common denominator’ of commitments made in any agreement by any of the Really Good Friends of Services.³⁴ Just considering some existing GATS commitments, and not even taking into account the ‘GATS plus’ bilateral agreements that have been signed, this standard likely means deregulation will have to be undertaken by the Really Good Friends of Services in extremely sensitive service sectors. For example, if they are going to agree to match the GATS commitments made by any party to the TISA negotiations, the Really Good Friends will have to commit primary and secondary education as Panama has done³⁵, hospital and medical services as Turkey has done³⁶, all of construction services including construction of schools, hospitals and highways as Taiwan has done³⁷, and all of film, radio, television, theatre, libraries and museums as the US has done.

IMPOSING DEREGULATION



CHRISTOPHER DOMBRES

Why are trade agreements now reaching into areas such as non-discriminatory regulation that are so unrelated to trade? Modern era trade and investment agreements are not as much about getting rid of tariffs as they are about restricting the policies governments are permitted to implement within their own borders. In explaining why TISA is *'not your father's trade agenda'*, Jonathan Kallmer, until recently a senior US trade official, argues that *"differential regulatory burdens, forced localization measures, government influence and control, and restrictions on cross-border data flows"* are now the principle concerns of transnational corporations. Kallmer says this is why *"the countries negotiating a TISA will focus substantially on regulatory issues."*³⁸

“ Modern era trade and investment agreements are not as much about getting rid of tariffs as they are about restricting the policies governments are permitted to implement within their own borders. ”

Because the GATS and TISA both define the establishment of services corporations overseas as a form of 'trade', how governments regulate these companies that set up operations in their countries becomes transformed into a trade concern. Trade negotiators are given license to bargain deregulation

over complex sectors where they may have no expertise. As promoters of TISA have pointed out, both domestic and foreign companies stand to benefit from the regulatory changes that services trade agreements impose.³⁹

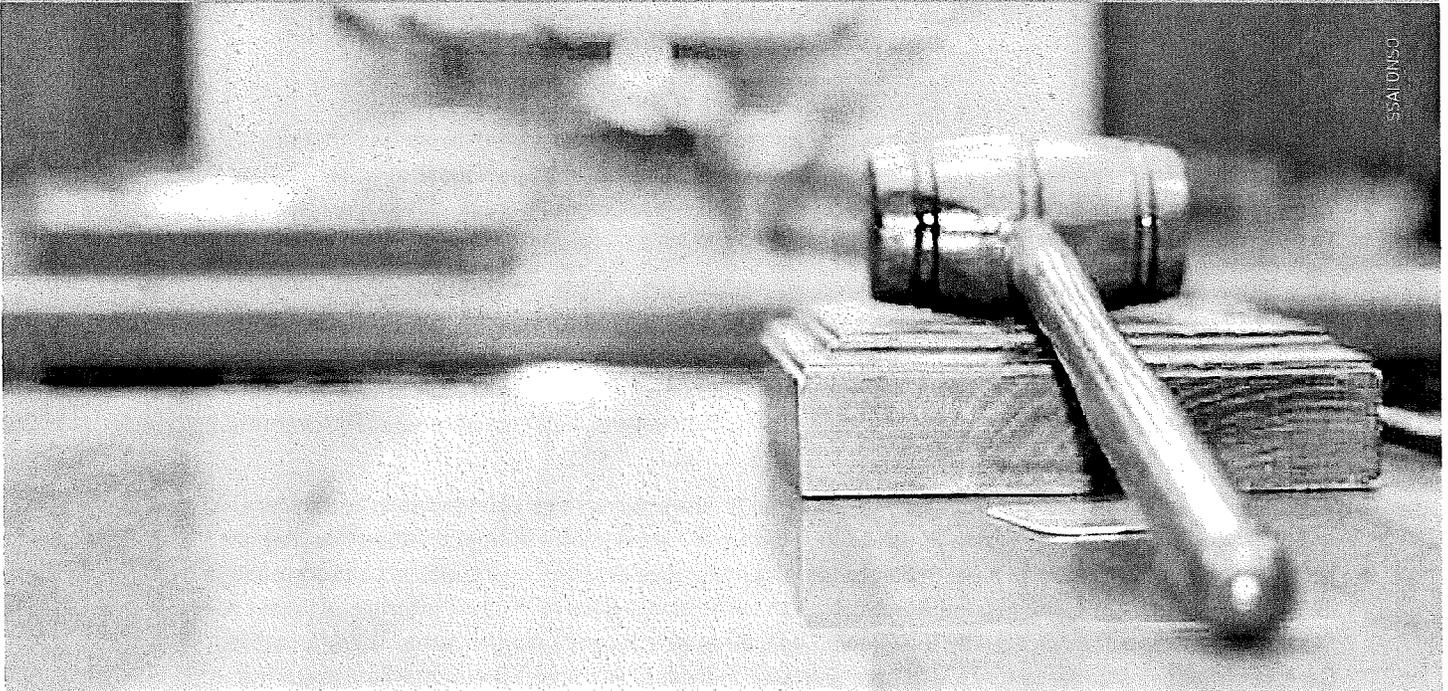
Depending on what wording for the disciplines is ultimately agreed to, WTO panels could decide regulations are GATS violations because they are 'unnecessary', 'excessively burdensome' to business, not 'relevant', not 'objective', were drafted without giving foreign businesses enough opportunities for input, or for a host of other reasons contained in draft versions of the disciplines⁴⁰. Since the new regulatory disciplines would greatly magnify the impact of making a GATS commitment in ways that are unpredictable, this has caused governments to pull back on the liberalization commitments they are willing to make. Brazil has reported there is *"an undeniable link in the level of comfort that regulators were going to have in domestic regulation and the offers they were willing and able to put on the table in the market access negotiations."*⁴¹

“ Trade negotiators are given license to bargain deregulation
over complex sectors where they may have no expertise. ”

The categories of regulations to be covered by GATS disciplines are defined so broadly that virtually any regulation would be included because they encompass anything 'related' to licensing, qualifications, and standards. To get a concrete understanding of what is at stake, it is useful to look at a WTO report that provides examples of regulations that could violate the disciplines. Among the examples of possible violations listed are: licensing and qualification requirements that differ among sub-federal states and provinces, 'not relevant' or 'onerous' language requirements, limits on fees charged for services, restrictions on zoning and hours of operation, 'expensive' licensing fees, and 'unreasonable' environmental and safety standards.⁴²

What country does not have at least some regulations like these that might be challenged as violations of the disciplines, especially if they commit extensive new service sectors - as they are being strong-armed to do under TISA's negotiating structure - that would trigger application of the disciplines?

WHO DECIDES WHETHER YOUR LAWS ARE 'UNNECESSARY' OR 'UNREASONABLE'?



SSA/TUNSO

Proposals on the table at the GATS negotiations would create a variety of grounds to challenge domestic regulations, including if they were not 'necessary' or not 'reasonable'. If a necessity test is agreed to, 'WTO dispute panels would become the ultimate arbiter of whether government regulations over services such as water supply, education, health, and cultural services are really necessary' to realize a government's objectives. The Really Good Friends group includes some of the most aggressive supporters – such as Australia and Switzerland – as well key opponents – such as the US and Canada – of a necessity test.

Despite how controversial the necessity test has been at the GATS negotiations, promoters of imposing a necessity test are viewing TISA as affording another opportunity to push this through.⁴³ The countries

- Chile, Hong Kong, New Zealand, Mexico, and Switzerland - that took the most intransigent position insisting that a necessity test be inserted into GATS disciplines have submitted papers on domestic regulation to the TISA talks.⁴⁴

“ WTO dispute panels would become the ultimate arbiter of whether government regulations over services such as water supply, education, health, and cultural services are really necessary. ”

Corporate lobbyists have necessity testing of regulations as a priority in their demands. For example, the Global Federation of Insurance Associations has declared that TISA should require that universal service obligations cannot be *“more burdensome than necessary for the kind of universal services defined by the member.”*⁴⁵

Universal service obligations are regulations requiring that the poor and hard-to-serve populations such as residents of rural areas have access to services. A necessity test incorporated into either TISA or the GATS could make regulations on universal access to services subject to a trade challenge if there were alternatives that were less burdensome to business.

In deciding the necessity of a universal services regulation, dispute panels would weigh whether a government’s objective in achieving universal access to a service was important enough to justify how significant its impact was on trade. They would also judge whether the regulations were effective in achieving universal access. In addition, they would decide whether there were alternatives that were less of a burden to business and reasonably available that governments could have pursued.⁴⁶ Government regulations can fail a necessity test on any of these grounds.

What would be the results of a necessity test applied to universal service obligations in health care? If Really Good Friends countries rise to the highest common denominator of liberalization like they are being urged to do, they would have to commit health insurance services as the US has already done in its GATS commitments. The Obama Administration’s Affordable Care Act⁴⁷ is an example of what could fail the necessity test advocated by the Global Federation of Insurance Associations. The Affordable Care Act imposes standards for health care plans for individual and small group markets requiring them to include ‘essential health benefits’ such as care for pregnant women and newborns, generally an expensive patient group to serve.⁴⁸ The Act also stipulates that insurance providers cannot deny coverage due to pre-existing conditions.⁴⁹

Although the US government’s objectives in extending health insurance to the uninsured could be accepted by a dispute panel as important, the Affordable Care Act’s standards could be judged too burdensome to business in light of alternatives the US could have pursued. Groups like the Heritage Foundation have argued there are more market friendly alternatives to the Act. The Heritage Foundation has proposed flat tax credits be given to individuals so they can buy health insurance in the open market.⁵⁰ If TISA imposes a necessity test on non-discriminatory regulations, as the insurance industry is calling for, trade panels will essentially be empowered to decide what kind of options countries are allowed to adopt in critical areas like health care.

Developing countries cannot expect to fare any better than OECD members when there is a trade challenge to their regulations. Although WTO dispute panels are in theory supposed to take into consideration the special challenges faced by developing countries, in practice panels have still insisted that developing country regulations have to be made consistent with their trade agreement commitments.

“ The Obama Administration’s Affordable Care Act⁴⁷ is an example of what could fail the necessity test advocated by the Global Federation of Insurance Associations. ”

For example, in defending against a US challenge to its telecom regulations based on GATS telecommunications regulatory disciplines, Mexico argued the panel should take account of Mexico’s special concern as a developing nation to promote universal access to telecommunications services and to improve its networks.⁵¹ But the WTO panel ruled against Mexico, stating that “*contrary to Mexico’s position, the general state of the telecommunications industry*” and the “*coverage and quality of the network*” were not relevant to a decision on whether regulations setting interconnection rates were reasonable.⁵² The panel concluded that Mexico’s telecommunications regulations were neither ‘reasonable’ nor ‘necessary’.⁵³

When trade panels come out with these kinds of findings, trade officials can express surprise that their own country’s regulations have been ruled to violate the trade agreements they have worked to create and expand. For example, the US Trade Representatives Office called the WTO panel ruling against the US ban on cross-border gambling “*shocking and troubling*”.⁵⁴

However, when the offensive interests of exporters are the overriding preoccupation of trade officials and citizens’ concerns are given short shrift, the stage is set for unanticipated trade challenges. Speaking at a 2012 conference of the transnational services lobby held on TISA, Ron Kirk, the US Trade Representative at the time, even asked for business to help government “*combat groups who are anti-trade*.”⁵⁵ Kirk’s misuse of the term ‘trade’ invokes the pretence that these agreements are about nothing more than trade, and misrepresents critics in the same way.

SECTORAL DISCIPLINES



According to the European Commission, TISA negotiators will develop a series of regulatory disciplines for particular sectors, including postal and financial services.⁵⁶

Going by what the delivery services lobby is seeking, the changes to postal and courier services could be significant. The Express Association of America, representing transnational giants like UPS and FedEx, says⁵⁷ its expectations of TISA are that it will:

- Eliminate regulations that favour public postal services,
- Eliminate licensing requirements for express delivery providers, and
- Eliminate requirements for express delivery providers to contribute to universal service funds.

This lobby group states that TISA “provides an opportunity to review the postal policies of the negotiating partners...” But given the extreme secrecy surrounding the negotiations and its coercive negotiating structure, TISA is the wrong forum for national postal policies to be revised. Change on the scale that the transnational express delivery lobby is seeking should be debated in legislatures and not decided behind the closed doors of the TISA negotiations.

In terms of financial services, a leaked draft of TISA’s Annex on Financial Services⁵⁸ indicates it generally adopts the provisions of the Understanding on Commitments in Financial Services.⁵⁹ This understanding is a WTO agreement some of its members have signed with enhanced rules and commitments to liberalize financial services. Among the deregulatory provisions in the Understanding are: a prohibition against limiting the ability of foreign financial service providers to provide any new financial service; a standstill limiting non-conforming policies to existing ones; and a requirement that members of the agreement endeavour to limit or eliminate any measures, even though non-discriminatory, that “affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member’s market.”

Canada has pushed for the adoption of the 1994 Understanding on Commitments in Financial Services by all Really Good Friends of Services.⁶⁰ Canada should not be considered a credible champion, though,

of liberalization of financial services. Its own experience in the financial crisis in fact argues against liberalization. Canada maintains a regulation, called the 'widely held rule', which effectively insulates it from the impacts of the Understanding on Commitments in Financial Services. This rule, placed as a limitation on Canada's GATS financial services commitments⁶¹, acts to deter the entry of serious competition to its domestic banks by requiring that banking assets not be concentrated in too few hands. It has been described as a regulatory 'poison pill' that in effect makes it impossible for foreign banks to enter the Canadian market because they cannot buy out a domestic bank and take over its nation-wide network of branches.

IMF analysts, in their paper on why Canada survived the 2008 financial crisis relatively unscathed, actually credit such barriers to entry for Canada's relative stability during the crisis. The IMF paper stated that "*Limited external competition reduces pressures to defend or expand market share, again reducing incentives to take risks.*"⁶² Findings like these, however, go against the grain in trade circles and are not discussed so Canada is able to continue to advocate financial liberalization to others at the TISA negotiations while keeping its own banking sector closed.

The draft TISA Annex on Financial Services goes beyond the Understanding on Commitments in Financial Services. The US has proposed adding very stringent requirements for 'transparency' in financial regulations. These provisions would not only require governments to make their financial regulations public, they would also require advance notice of proposed financial regulations be given to TISA members and private interests who would have a right to comment. Governments would have to provide written responses to submitted comments. Such provisions would be especially beneficial for US transnational financial corporations who are far more capable of taking advantage of opportunities to intervene than the banks of developing countries. Another US proposal would set a 120-day standard for TISA members to approve applications to supply financial services, a standard developing countries in particular may not be able to meet unless review of applications is done in a superficial way.

In addition to postal and financial services, TISA negotiators reportedly are also working on disciplines for telecommunications, electronic commerce, maritime transport, air transport, road transport, professional services, and energy-related services. According to Scott Sinclair and Hadrian Mertins-Kirkwood, "*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.*"⁶³

"Such provisions would be especially beneficial for US transnational financial corporations."

POTENTIAL IMPACTS ON DATA PRIVACY



KOE B

TISA's provisions on standstill, ratchet, future-proofing, negative listing for national treatment, and elimination of the possibility of withdrawing commitments would deliver what transnational service corporations are seeking – certainty that regulations would never be introduced that would reduce their profits. The obstacles these provisions pose for regulations to ensure data privacy, however, illustrate why they are not in the public interest.

A major plank of the US negotiating position in the TISA talks – and one that is flagged as the highest priority by the US Chamber of Commerce⁶⁴ – is to restrict initiatives to 'localize' data storage and restrict cross-border flows and processing of data. Cloud-based technology firms are mostly US-based, and US firms dominate the information and communications technology sector in general.

Lobbyists for US financial and securities firms are seeking a TISA imposition of a 'necessity test' on data privacy regulations: *The agreement should include a commitment that when an act, policy or practice of a relevant authority seeks to restrain cross-border data transfers or processing, that that authority must demonstrate that the restriction is not an unnecessary restraint of trade or investment in light of alternative means by which to achieve the objective of protecting the identity of the customer, security of the data or the performance of prudential oversight.*⁶⁵ Such a provision in TISA would put the onus on governments to come up with industry-friendly regulations on data privacy.

Foreign governments' requirements that data be stored within their countries is a major complaint of the US insurance, computer software, and credit card industries. Their lobby group argues that local storage requirements *"impose added costs and operational burdens on insurance suppliers and interfere with data outsourcing arrangements, offline back office operations, and the use of*

cloud computing. They do not serve any prudential purpose that could not be achieved through less burdensome measures.”⁶⁶

However, concerns have been raised in many countries about inadequate data privacy protections in the US. After the Snowden revelations of NSA access to personal data in a range of areas and snooping on personal communications of the Brazilian president, Brazil's government considered requiring Google and Facebook to create data storage centres in Brazil.⁶⁷

Some Canadian provinces require that electronic medical records must be kept within the jurisdiction. Guidelines to meeting provincial data privacy requirements point out that if US-based companies are given contracts to manage electronic medical records, these companies could be required by the U.S. Patriot Act to disclose confidential information. Clauses in contracts for IT companies forbidding disclosure of information in private health records or requiring notification when US government agencies asks for this information are overridden by the Patriot Act.⁶⁸

“ Transnational service corporations are seeking certainty that regulations would never be introduced that would reduce their profits.”

“ Lobbyists for US financial and securities firms are seeking a TISA provision that would put the onus on governments to come up with industry-friendly regulations on data privacy. ”

With TISA's standstill provision, any local storage requirements not in place at the time the agreement was signed would be a violation of the agreement regardless of whether a country had made a commitment in areas like cross-border management of health data. With TISA's ratchet provision, any loosening of data privacy regulations under one government could not be reversed by another. Introduction of legislation in another TISA party that endangered data privacy, such as passage of the Patriot Act in the US, could not be addressed by the withdrawal or modification of TISA commitments. Exceptions for privacy protection that may be included in the agreement could be subjected to a necessity test, where governments could be required by dispute panels to adopt 'less burdensome' approaches than requirements for local data storage.

CONCLUSION



DREW MAUGHAN

The Coalition of Services Industries 2012 summit on TISA crystallizes much of what is wrong with the agreement. Ministers of trade sat on a panel moderated by a FedEx executive, supporting all the features of TISA that corporate lobbyists had asked for – its standstill and ratchet provisions, liberalization based on the most far-reaching free trade agreements, and a quick conclusion to negotiations. The New Zealand ambassador actually thanked US business for their efforts in getting the negotiations going. The US ambassador stated there was such a strong consensus among the trade negotiators present at this conference of corporate lobbyists that they should just retire to the bar and sign the agreement.⁶⁹

The Mexican ambassador, Fernando De Mateo, concluded by saying:

“The real fight is often in our own capitals, not Geneva, because we need to have our regulators on board in order to move quickly. The business community can help by talking to them.”

In effect, trade officials are asking for corporate pressure to keep regulators from raising concerns about TISA’s impact on the public interest.

TISA is a significant step towards realizing the Coalition of Services Industries’ highly politicized goal of having free market principles *“govern the investment in, and delivery of, services on a transnational scale.”*

“ Governments who are being urged to join the Really Good Friends in signing TISA should evaluate whether they are comfortable with this degree of governance by corporations. ”

NOTES

1. Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey, and the United States make up the Really Good Friends of Services.
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5. Testimony, Walmart, 'Walmart ISA Comments 2013', response to USTR 'Request For Comments On An International Services Agreement' Docket Number: USTR-2013-0001. Online at: <http://www.regulations.gov/#!documentDetail;D=USTR-2013-0001-0028>
6. Even if the negotiations do not produce an agreement, negotiating documents will still be kept secret for five years. The leaked TISA Financial Services Annex states that the US government will not declassify the document until: '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.' Online at: <https://wikileaks.org/tisa-financial/WikiLeaks-secret-tisa-financial-annex.pdf>
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11. Ibid, para. 3.146
12. Ibid, para 6.316.
13. Consistent with its legislation requiring transparency in trade negotiations, the Swiss government has posted its initial TISA online and it conforms with a top-down approach to national treatment. The offer is online at: <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>

14. TISA may include the same exemption as in the GATS for 'services provided in the exercise of governmental authority' but this exemption is so narrow – eg. it does not cover public services where there is private competition – that it provides uncertain protection for public services.
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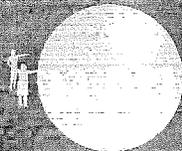
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TISA

versus



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Internacional de Servicios Públicos
Internationale der Öffentlichen Dienste
International Federation of Public Employees
国際公務員連合会

By Scott Sinclair and Hadrian Mertins-Kirkwood

flux
March against the GATS

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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

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.

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.

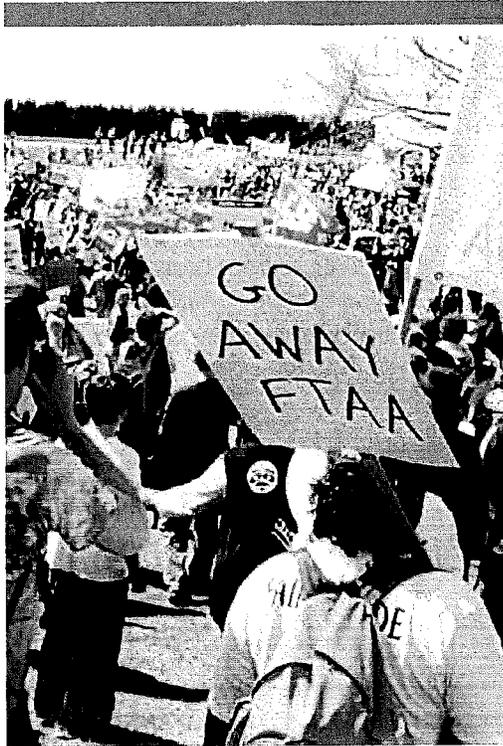
The negotiating dynamic is fundamentally skewed towards corporate interests. Public interest advocates seeking to exempt essential sectors or key public policies from these treaties must win every time, while the corporate lobbyists targeting these policies need win only once. With the stroke of a pen, 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.

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



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.

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

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 1:3, 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 1:3 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.

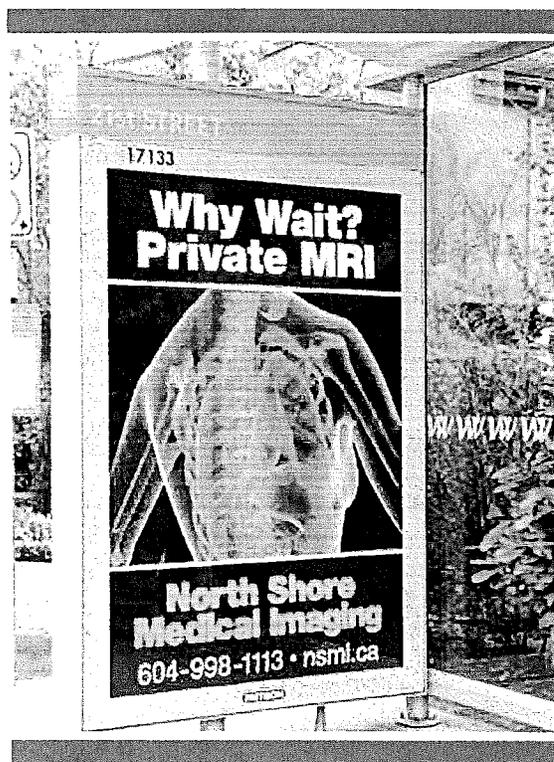
Because the governmental authority provision does not adequately safeguard public services, governments have had to rely on other means to insulate public services from the commercializing pressures of the GATS. One course of action is to make no commitments in a sector.⁸ Unfortunately, the TISA's "top-down"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

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

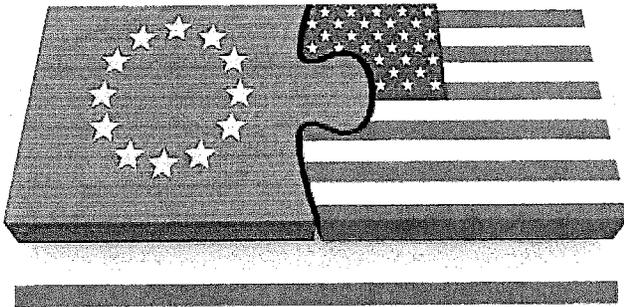


*Trade treaties help to privatize public health services.
Photo: flux*

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 rancor 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.

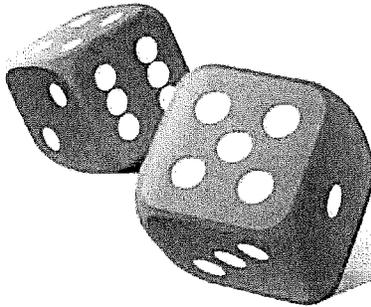
The European Commission, a strong proponent of TISA, officially maintains that the TISA can be fully compatible with WTO rights and obligations and, ultimately, multilateralized.²³ But it has also stated that: "It is not desirable that all those countries would reap the benefits of the possible future 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?

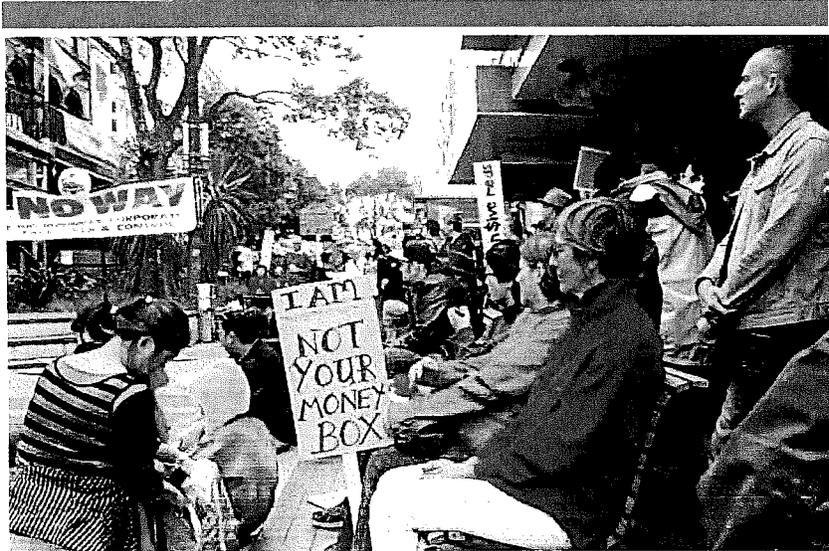
Unlike other trade and investment agreements, the TISA is focused exclusively on trade in services. Yet “trade in services” is a very broad category. The TISA, like the GATS, would apply to every possible means of providing a service internationally. This includes *cross-border services* (GATS Mode 1), 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

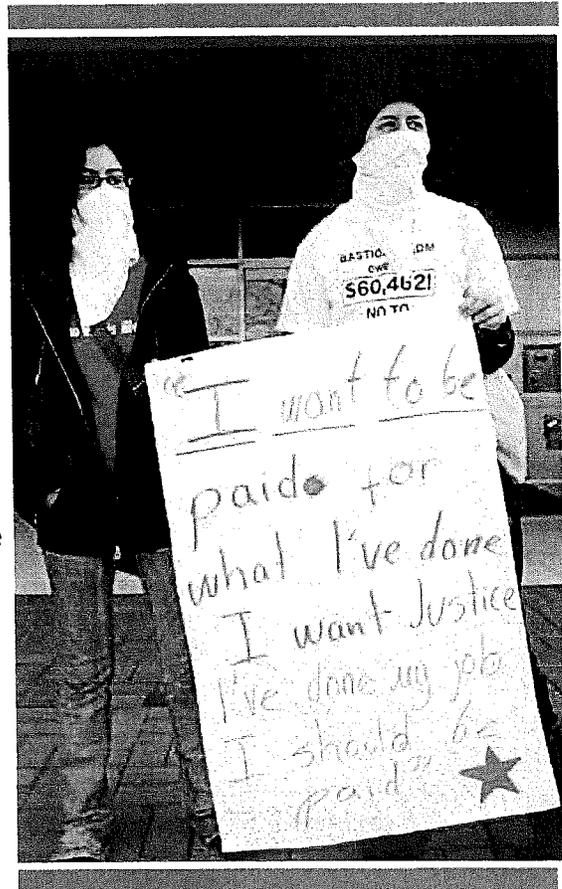
Mode 4 commitments enable firms from one country to temporarily send their employees - including executives, consultants, tradespeople, nurses, construction workers, etc. - to another country for the purpose of supplying services. The TISA, like the GATS, would prohibit so-called economic needs tests, 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_intg14Nov2013.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/stratop_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=epkch2CE2SI>.

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*.
- 34 "Market access" has two meanings in the GATS and TISA context. First, in a general sense, it refers to the right of a service supplier to supply a service through any of the four modes of supply. More specifically, it refers to GATS Article XVI, which prohibits government measures that limit the number of service operations, the value of service transactions or assets, the number of operations or quantity of output, the number of persons supplying a service and the participation of foreign capital, and also any requirements for specific types of legal entities. Such measures are GATS-illegal even if they apply equally to foreign and domestic service suppliers.
- 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.
- 36 For a good illustration of both the breadth and the complexity of implementing such standstill and ratchet provisions see: Switzerland State Secretariat for Economic Affairs. (February 27, 2013). "Questionnaire by Switzerland on Standstill and Ratchet." Federal Department of Economic Affairs, Education and Research. Online at: <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>.
- 37 Hall, David. (January 2010). "Challenges to Slovakia and Poland health policy decisions: use of investment treaties to claim compensation for reversal of privatisation/liberalisation policies." Public Services International Research Unit. Online at: http://gala.gre.ac.uk/2744/1/PSIRU_Report_9828_-_2010-02-H-tradelaw.pdf.
- 38 McDonald, David A. (2012). "Remunicipalisation works!" In Pigeon et al. (Eds.), *Remunicipalisation: Putting Water Back into Public Hands* (pp. 8-23). Amsterdam: Transnational Institute.
- 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.
- 42 Hall, David, Steve Thomas, Sandra van Niekerk, and Jenny Nguyen. (2013). *Renewable energy depends on the public not private sector*. Public Services International Research Unit.
- 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.
- 47 In the words of the U.S.-Gambling panel report: "Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired." World Trade Organization. (November 10, 2004). "United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services." Report of the Panel, WT/D285/R.
- 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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- 52 Legislative Assembly of New Brunswick. (April 2004). Select Committee on Public Auto Insurance. "Final Report on Public Auto Insurance in New Brunswick."
- 53 Furthermore, the GATS governmental authority exclusion could not be relied upon to exclude the creation of a new public auto insurance system.
- 54 David Schneiderman. (2008). *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press. P. 71.
- 55 See Letter from U.S. Congressional representatives to USTR Michael Froman, July 17, 2013. Online at: http://insidetrade.com/index.php?option=com_iwfile&file=Jul2013/wto2013_2288.pdf.
- 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>.
- 57 Inside U.S. Trade. (June 14, 2013). "Punke Signals U.S. Government Surveillance Could Complicate Trade Talks." *World Trade Online*, 31(24).
- 58 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.
- 59 See GATS Article XIV bis, "Security exceptions," which reads, in part, "Nothing in this Agreement shall be construed ... to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests" Online at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.
- 60 For an excellent discussion, in the EU context, of a range of options available to strengthen the protection for public services in trade and investment treaties, see: 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. Online at: http://www.epssu.org/IMG/pdf/Draft_report_Markus_Krajewski_mtg14Nov2013.pdf.



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MAINE
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2014 TRADE POLICY ASSESSMENT

Prepared for the Maine Citizen Trade Policy Commission

Maine Agriculture and Food Systems in the
Transatlantic Trade and Investment Partnership

by Karen Hansen-Kuhn, IATP and
John Piotti, Maine Farmland Trust

July 2014

Executive Summary

The negotiations for the Transatlantic Trade and Investment Partnership (TTIP) began with a series of bold assertions that it would serve to jump start the two ailing economies, resulting in rising economic growth and job creation on both sides of the Atlantic. Tariffs are already quite low. The bigger challenge – and the real target – is the very different approaches to regulation. Past experiences with free trade, such as those under the North American Free Trade Agreement, give reasons for concern. It is impossible to accurately predict the real impacts of changes in tariff and non-tariff barriers on specific sectors of agricultural production in Maine. The bigger question may be how the changes that could result from TTIP would affect the state's food sovereignty, i.e., farmers' efforts to produce sustainable crops at fair prices, consumers' demands for healthy and affordable foods, and their joint efforts to support local economies.

Food Safety: Tariffs on most crops are already very low. There are, however, some real differences in rules on food additives, pesticides and other agrochemicals that are allowed in one jurisdiction but not the other. The EU's restrictions on GMOs and its labeling laws could come under pressure in TTIP. Any changes in those rules made under TTIP would apply to the U.S. as well as the EU, potentially limiting what is allowable under Maine law. The Maine Citizen Trade Policy Commission (CPTC) should request information from USTR, including:

- Are commitments on food safety issues such as the use of chlorine rinses of poultry, Ractopamine in meat production and diphenylamine (DPA) on fruit being discussed within the TTIP negotiations on Sanitary and Phytosanitary Standards (SPS) or Technical Barriers to Trade (TBT), and, if so, would TTIP SPS or TBT requirements limit states' abilities to raise food safety standards?
- If those issues are not being addressed within the chapters on SPS or TBT, would they be covered under a chapter on regulatory coherence? How would regulatory coherence subordinate U.S. and Maine laws to protect public and environmental health in agriculture and food?
- Is GMO labeling being discussed in TTIP and, if so, how would any commitments made affect Maine's GMO labeling laws?

Public procurement programs, whether for local foods, roads, or renewable energy, are important tools to strengthen local economies. Maine (along with 36 other states), the U.S. and the EU are already included in the plurilateral Government Procurement Agreement, which requires many procurement programs (but not Farm to School programs) to be open to bids from foreign companies. The EU is seeking to expand those commitments in TTIP at the state level to include all goods, all services and all sectors, potentially undermining these important programs.

- The CPTC should insist on a written answer from USTR to its questions on procurement commitments for Farm to School and other local foods programs in TTIP, as well as on the EU's suggestion that federal grant funds used at the state level be opened up to European vendors. It might also consider sharing these concerns with other states and cities being approached by EU negotiators for procurement commitments.
- The CPTC should request information from the Governor's office on any meetings or other communications with EU or U.S. officials on potential procurement commitments under the trade agreement, both in terms of possible risks to local foods programs and more generally to clarify the

process of agreeing to those commitments at the state, county or city level. Those commitments should be the result of a fully informed public debate.

Geographical Indications establish legal protections for products based on their place of origin, specific production techniques, and the reputation of quality for those goods. The EU protects over 1,200 such products through intellectual property rights rules enforceable through trade agreements. Some U.S. GIs exist, such as Maine Lobster, which are protected by trademarks held by producers. The EU seeks to protect GIs in TTIP, potentially including cheese names such as feta, gorgonzola and munster, as it did in recent bilateral trade agreements with Canada, Central America, Peru and Korea.

- The CPTC should call on the European Commission and USTR to provide a list of the specific Geographical Indications protections sought by the EU in TTIP, as well as the U.S. response to date.
- Based on that information, the Commission could issue a request for comments or convene a hearing of Maine dairy, wine, cheese and processed meat producers on how they see their interests being affected by those protections. Their recommendations should inform advocacy by the Commission with USTR.

Dairy: Maine dairy farmers—like all American dairy farmers—have been struggling for the past decade, due to low producer prices, which are set by a complicated formula administered by the Federal Milk Marketing Order system (FMMO). FMMO prices have rebounded somewhat in the last two years, due in great part to increased demand for non-fat dry milk (NDM). It is likely that increased trade could lower the price of NDM, and in so doing, drive FMMO prices down significantly. This could prove particularly devastating to Maine dairy farms. Beyond this, Maine currently supplements payments to farms through a Dairy Stabilization Program, which could be subject to legal challenges under the trade deal as an unfair price support. It is also important to note that Maine dairy farmers, like EU farmers, do not use artificial bovine growth hormone. Depending on how the U.S. and EU deal with this issue in trade talks, the outcome may not prove beneficial to Maine farmers.

- The CPTC should request information from dairy groups and other available sources on the likely impact of increased export activity on the U.S. Class I milk price, given (in particular) the role that non-fat dry milk has in Federal Milk Marketing Order pricing.
- The CPTC should make sure trade negotiators are aware of the Maine's Dairy Stabilization Program and its importance to Maine.
- Work with in state players (e.g., Maine Farmland Trust, Maine Organic Farmers & Gardeners Association) to alert Maine's dairy processors (that do not accept milk with bovine growth hormones) of the possible consequences of an international trade agreement on their operations.

The establishment of common standards should serve to prohibit – rather than promote – efforts by corporations to play off regulatory standards in one jurisdiction against the other. The U.S.-EU Organic Equivalency Arrangement was negotiated outside the confines of a trade agreement. The current approach to our bilateral economic relations in TTIP is a political choice; alternatives are entirely possible. If not, if the talks are to continue along the lines of other recent trade agreements, then civil society and policy makers should seriously consider putting a halt to the TTIP until a different approach is underway.

An Assessment of TTIP's Impact on Maine's Agriculture and Food System*

**Prepared for the Maine Citizen Trade Policy Commission
by Karen Hansen-Kuhn, Institute for Agriculture and Trade Policy
and John Piotti, Maine Farmland Trust**

Introduction

The negotiations for the Transatlantic Trade and Investment Partnership (TTIP) began with a series of bold assertions. The agreement, leaders said, would serve to jump start the two ailing economies, resulting in rising economic growth and job creation on both sides of the Atlantic. It would streamline unnecessary red tape while at the same time raising standards to the highest levels. And it would serve as a guidepost for standards in trade agreements all over the world, and even at the floundering World Trade Organization (WTO).

The truth of these assertions, of course, will depend on the specific content of the trade deal. The U.S. and EU governments have so far refused to publish negotiating texts, but they have provided some information in summary form, and leaked negotiating documents and meeting reports continue to emerge. Civil society groups and legislators continue to push for greater transparency in the negotiations, so that analysis and advocacy is based on real and complete information. In the meantime, a fair amount of information can be deduced from existing information, as well as the results of recent trade deals, particularly the EU-Canada Comprehensive Economic and Free Trade Agreement (CETA).

Trade barriers between the U.S. and EU are already remarkably low, with weighted tariffs for U.S. agricultural exports to the EU averaging just 4.8 percent, and 2.1 percent for EU exports to the U.S.,¹ differences that could vanish with minor fluctuations in exchange rates one way or the other. In just the last year, for example, data at Bloomberg.com indicates that the dollar fell 8.8 percent against the euro from July 2013 to July 2014, in effect making U.S. exports cheaper (compared to a 5 percent rise the previous year)². The bigger challenge – and the real target – is the very different approaches to regulation. Regulatory coherence, like expanded trade, is in itself a neutral term. But the political context and economic consequences are not neutral, with corporations and their allies on both sides of the Atlantic pressing for harmonization of rules that limit their ability to buy and sell goods and services.

The trade agreement could affect a broad range of sectors, from energy to environment, and intellectual property rights to labor rights. TTIP could also have a significant impact on the evolution of agricultural markets and food systems in the U.S. and EU. Unlike the WTO, there is no specific chapter in TTIP on agriculture. Instead, the rules affecting agriculture, food safety and food systems are woven throughout the texts.

In this paper, we attempt to outline some of the concerns around issues of importance to Maine agriculture and food systems, focusing especially on topics that are key for healthier, more equitable and sustainable agriculture and food systems. These issues include possible TTIP provisions on:

* *Written with research assistance from Adam Needelman.*

- procurement rules on farm to school and other local foods initiatives,
- proposals for protections of Geographical Indications for cheese, meats and wines; and
- changes in market access rules that could affect dairy, fruit and other sectors relevant to Maine agriculture.

Free trade experiences

While it is impossible to predict with any certainty how the trade agreement would affect particular sectors of production, the history of trade liberalization since the North American Free Trade Agreement (NAFTA) was enacted in 1994 gives reason for concern, especially for the smaller scale, decentralized production that characterizes agriculture in Maine. Over the last 20 years, there has been a marked shift in the size of U.S. farms, with the number of very small farms and very large farms increasing dramatically. The increase in the number of small farms is due to several factors, including urban people returning to the land (although many are reliant on off-farm jobs to support themselves) and the growth in specialty crops for local farmers markets. The number of farms in the middle, those that are small but commercially viable on their own, dropped by 40 percent, from half of total farms in 1982 to less than a third in 2007.³

During this process of farm consolidation, the corporations involved in agriculture and food production also consolidated, both domestically and internationally. Mary Hendrickson at the University of Missouri calculates the share of production in different sectors held by just four firms. The U.S. share of the top four firms (Cargill, Tyson, JBS and National Beef) in total beef slaughtering, for example, increased from 69 percent in 1990 to 82 percent in 2011. The story is the same in pork slaughtering, where the ratio increased from 45 to 63 percent, soybean processing (61 to 85 percent) and other sectors, as fewer firms control bigger and bigger shares of total production. This concentration constrains farmers' choices about where to sell their goods, as well as consumers' choices about where and what they can buy.⁴

The trade rules are only part of the story of why agriculture and food systems have changed over the last few decades, but the NAFTA provisions on investment (which gave foreign investors new rights and protections) and tariffs clearly enabled corporations to separate various aspects of production to take advantage of the lowest costs. That is an explicit goal of most trade deals, including TTIP. Under the NAFTA rules, for example, U.S. companies grow cattle in Canada and pork in Mexico that they then bring back to the U.S. for slaughter and sale. Along the way, independent U.S. hog and poultry producers and competitive markets for their products have nearly disappeared.

Efforts to at least label those transnational meats under Country Of Origin Labeling (COOL) laws have been vigorously opposed by the Mexican and Canadian governments and are now facing a review at the WTO. In that case, Canada and Mexico asserted that the labeling laws constitutes a technical barrier to trade because of reporting requirements and that they discriminate against their exports to the U.S. The panel agreed with Canada and Mexico, and in response the U.S. government issued revised rules on COOL that it asserts places it in compliance. The final decision by the WTO panel is due later this year.⁵

The impacts of trade rules on food systems often extend well beyond the direct impacts on where food is produced and by whom. Changes in rules on foreign investment and trade barriers under NAFTA resulted in significant changes in the Mexican food system. Sharp increases in foreign investment in snack food production, fast food restaurants and supermarkets, coupled with rises in consumption of dairy, meat and processed foods, shifted the default food environment available to consumers and contributed to rising obesity rates. Mexico is now tied with the United States for the highest obesity rates in the world.⁶

The issues around trade and agriculture are not just whether costs can be lowered or production volumes increased, but what impacts those changes would have on rural economies, sustainable agricultural production and local control over the food system. Would the trade rules in TTIP help or hinder farmers' and consumers' efforts to re-localize food systems and build connections from farm to fork? How would a possible increase in dairy imports affect farm prices and subsidies? We in the U.S. have a lot to learn from the EU's efforts to retain their cultural and environmental heritage with family farms and sustainable agriculture, but in many ways this trade agreement would take us in the opposite direction.

Market access and Maine agriculture

Agricultural production is at the heart of Maine's economy, both in terms of economic interests and in the state's reputation as a leader in sustainability. As indicated in Table 1, since 1997 there has been an increase in the number of farms and the land used for farming. While the average farm size in acres seems stable, behind that average are a significant increase in relatively smaller farms, and a decrease in mid-sized farms, which corresponds to national trends. The market value of crops in Maine, as well as production of vegetables, increased substantially during the period, reflecting the increase in production of higher value products such as organic crops and specialty cheeses.

Table 1: Maine Agriculture

	2012	2007	2002	1997
Number of farms	8,173	8,136	7,196	7,404
Land in farms	1,454,104	1,347,566	1,369,768	1,313,066
Average size	178	166	190	177
Farms by size				
1 to 179 acres	6311	6446	5285	5322
180 to 499 acres	1318	1178	1334	1545
500 or more acres	544	510	577	537
Market value of agricultural products sold (\$1,000)				
	763,062	617,190	463,603	450,278

Source: 2012 Census of Agriculture, USDA National Agricultural Statistics Service

Tables 2 and 3 compares the top five Maine agricultural exports to the EU and the top five agricultural imports from the EU with the relevant tariff rates (a full listing of Maine's top exports to the EU prepared by the Maine International Trade Commission is included in Annex 1). For the most part, the tariffs on agricultural commodities are already very low, with the tariff rates rising with the degree of processing. The notable exception is exports of Maine lobsters to the EU. It is worth noting, however, that the lobster exports have dropped considerably in the last few years, from just over \$20 million in 2011, to \$17.5 million in 2012 and \$15.8 million in 2013, while the tariffs have remained stable. So it is not clear that a change in tariffs would actually affect exports to the EU market for that product. Even when tariffs do drop, as in the case of U.S. corn exports to Mexico in the wake of NAFTA's approval, the benefits do not necessarily trickle down to producers.⁷

Table 2: Top ten Maine agricultural exports to the EU and corresponding tariffs

Description	2014 EU Tariffs	Total 2013 (in US \$)
Lobsters, Live, Fresh, Ch, Salted	8% Live, 20% Prepared, 8% Whole, 10% Other	11,473,428
Lobsters, including in shell, Frozen	20%	4,372,555
Beer Made from Malt	0%	811,951
Potatoes, Prepared Etc. No Vinegar Etc., Frozen	14.40% cooked; 7.60% + EA(1) (formulated depending on ingredients) if in flakes, flour or meal; 17.6% otherwise	478,575
Waters Not Sweetened or Flavored; Ice and Snow	0%	459,206
Scallops Incl. Queen Scallops, Live, Fresh, Chilled	8%	361,449
Scallops Incl. Queen, Frozen/Dried/Salted/In Brine	20%	350,755
Vegetable Seeds For Sowing	8.30% for salad beet seed or beetroot seed; 3.00% otherwise	247,166
Juice of Single Fruit/Veg, Not Fortified Etc Nesoi	19.20% to [33.60% + 20.60 EUR/100kg]--depending on product	236,180
Cranberries, Blueberries, Etc, Fresh	0%, 3.20%, or 9.60% depending on product	215,520

Source: USDA Economic Research Service: Farm and Wealth Statistics, tariff data from Tariff information from the USITC Dataweb Tariff lookup tool: http://dataweb.usitc.gov/scripts/tariff_current.asp

Table 3: Maine's top ten agricultural imports from the EU and corresponding tariffs

Description	2014 US Tariff	Total 2013 (in US \$)
Vodka	0%	6,854,953
Wine, from Grape Nesoi & Gr Must W Alc, Nov 2 Liters	\$0.169/liter	4,116,780
Hams, Shoulders & Cuts, Bone In, Salted, Drd, Smkd	\$0.014/kg	3,566,466
Animal Feed Prep Except Dog Or Cat Food	0%, 7.5%, [\$0.804/kg+6.4%], 1.9%, 1.4%, Depending on product	915,877
Vegetable Seeds For Sowing	0%, \$0.0068/kg, \$0.01/kg, \$0.015/kg, \$0.059/kg depending on type of seed	574,119
Sparkling Wine Of Fresh Grapes	\$0.198/liter	555,936
Seabass, Fresh Or Chilled	3% if containers are 6.8 Kg or less; Free otherwise	421,155
Beer Made from Malt	0%	392,779
Fish Meat Fresh/Chilled Exc Fillets & Steaks	0%	383,557
Meat Of Swine, Salted, In Brine, Dried, Smkd	\$0.014/kg	273,338

Sources: WISERTrade, State HS Database and Tariff Data Source: "TARIC Consultation" European Commission Taxation and Customs Unit

Food safety and Technical Barriers to Trade

But just as the trade agreement is about much more than the actual flows of products and services, the negotiations on agricultural market access will focus on much more than tariffs. As in the chemical sector, the push for "behind the border restrictions," i.e., regulatory coherence on food safety and plant and animal health standards, is driving the trade talks. Much of the debate so far has focused on the EU's relatively higher food safety standards, especially its prohibitions on chlorine rinsed chicken, regulations on the use of additives such as ractopamine in pork and other meat production, its bans on beef produced using growth hormones, and restrictions on and labeling of genetically modified organisms. European policymakers continue to rely on the Precautionary Principle, which gives regulators the ability to impose restrictions in the face of scientific uncertainty over a product's safety. The default position under that principle is that food additives and chemicals can't enter the market unless the companies seeking to introduce those ingredients provide sufficient data to prove them safe, while in the U.S., for the most part food additives or processes are allowed to be commercialized unless

they are proven unsafe, based on studies conducted by the government. The Precautionary Principle is enshrined in the Treaty of Lisbon, the EU's founding document and guides the operations of the European Food Safety Authority (EFSA).

The U.S. National Chicken Council and CropLife America,⁸ among others, have complained about the EU restrictions on food additives in comments to USTR on TTIP. The Chicken Council asserts that the EU's stricter rules on poultry rinses (the EU has allowed only plain tap water rinses of chicken) unnecessarily restrict its exports. Speaking at a Senate hearing on TTIP, the Chicken Council's Bill Roenigk said, "One of the more irksome tricks in the EU bag has been the precautionary principle, which I understand the EU uses when it's convenient."⁹ EFSA's recent opinion on the use of peroxyacetic acid as a poultry rinse (while not a final change in its regulations) has eased some of the Chicken Council's concerns. It also illustrates the kind of regulatory changes that could take place in anticipation of TTIP. While not formally linked to the agreement, that decision, as well as the U.S. decision to ease restrictions on meat imports from the EU despite lingering concerns over contamination with BSE (Mad Cow Disease), reflects political accommodations that are clearly related to the trade talks.

Fruit exporters have also criticized EU restrictions on pesticide levels. The Northwest Horticultural Association notes that EU tariffs on apple exports range from 4 to 9 percent, depending on the time of year, and that graduated quotas for pear and apple imports restrict sales of lower cost U.S. fruits in European markets. They also point to the EU's restrictions on diphenylamine (DPA), which is used to control scald on apples and pears. The EU sets the maximum residue level for that chemical at 0.1 ppm as of November 2013, a level the Northwest Horticultural Association asserts will effectively ban U.S. apple and pear exports to Europe.¹⁰

EU regulators are concerned that DPA can combine with nitrogen while the fruit is in storage to produce nitrosamines. According to Environmental Working Group, both the U.S. and EU ban nitrosamines because they have been shown to cause cancer in laboratory animals, "and some studies have found that people eating foods with nitrosamines have elevated rates of stomach and esophageal cancers. Nitrosamines form when nitrogen-containing compounds combine with amines, which are compounds derived from ammonia. Since the 1970s, government agencies have regulated foods and consumer products to limit concentrations of chemicals that can serve as building blocks of nitrosamines."¹¹ These EU restrictions would not apply to imports of organic apples, as they are produced without that chemical.

The EU has also raised its own concerns about restrictions on fruit exports to the United States. In its 2014 Trade and Investment Barriers Report, the European Commission states that it, "also remains worried by the extremely long delays in treating other Sanitary and Phytosanitary (SPS) export applications submitted by the EU, e.g. for apples, pears, stone fruits and bell peppers."¹² These concerns were echoed in joint comments submitted by Copa-Cocega and FoodDrink Europe, who assert that, "Although it is possible to import apples and pears from Italy, currently US phytosanitary regulation establishes extremely restrictive conditions, which are equivalent to an import ban [of EU products]." They assert that the U.S. preclearance process is unfairly slow and bureaucratic, and that it essentially reflects "political" rather than food safety concerns. Noting a substantial market for pears and apples in

the U.S., it points to bilateral negotiations already underway between food safety agencies in Italy and the United States, and a separate process between the European Commission and USDA.¹³

Several organizations have raised concerns that the proposed chapter on regulatory coherence could drive regulatory standards down to the lowest common denominator by establishing a process that would require notification to the trading partners of any proposed regulations, new cost-benefit assessments and comment periods on any new laws. The Center for International Environmental Law sent a letter signed by 170 U.S. and EU organizations raising concerns that those provisions could affect federal and even state level laws, among other things.¹⁴ This could potentially affect specific legislation enacted in Maine, such as stricter regulations on pesticides.

Potential challenges to Maine's GMO labeling law

Disputes between the U.S and EU over restrictions on GMOs have been seething for more than a decade. The U.S. has challenged the EU's restrictions on GMOs in bilateral talks and multilateral talks, most notably in a dispute brought to a WTO dispute panel in 2003.¹⁵ In that case, the panel ruled against the EU's de facto moratorium on GMOs, finding that they constituted an unfair barrier to trade. The issue of GMO labeling has also been contentious. After a protracted debate at the international standards setting body Codex Alimentarius, the U.S. accepted its finding in support of voluntary labeling of GMOs. Codex definitions, standards and guidelines may be referenced in WTO disputes on Sanitary and Phytosanitary Standards, as well as in bilateral trade agreements like TTIP that are considered WTO plus.

The U.S. government, however, continues to challenge mandatory GMO labeling laws through its trade policy. In its 2013 report on Technical Barriers to Trade (TBTs), USTR notes ongoing discussions with the over labeling of GMO honey, and its objections to Peru's new rules establishing mandatory labeling of GMOs, complaints that it has raised at the WTO committee on TBTs.¹⁶ In USTR's 2014 report, it adds concerns about Ecuador's new mandatory labeling of transgenic foods and comments that it will raise these issues in WTO forums. It also raised concerns about the EU's framework regulation 1169/2011, which, as of December 2014 will allow Member States latitude in setting nutritional labeling standards. USTR notes that, "The chief concern of U.S. industry is that regulation 1169/2011 appears to provide wide latitude for EU Member states to adopt non-uniform implementing regulations. U.S. industry is concerned about the burden of meeting multiple labeling requirements, particularly if those requirements cannot be met through stickering or supplemental labeling."¹⁷

While there is no official or leaked information yet indicating that the U.S. is seeking to undermine the EU's mandatory GMO labeling laws in TTIP, it would certainly be consistent with the U.S. trade agenda in other forums and with industry demands.¹⁸ In comments to USTR, the National Oilseeds Processors Association lists the elimination of EU GMOs labeling laws as a major objective for the negotiations, saying that, "Since no evidence has ever been presented that such products are unsafe, the label's effect is to generate unjustifiable fear of biotechnology."¹⁹ This demand is echoed by the American Confectioners Association²⁰ and the American Soybean Association in separate comments to USTR, which asserts that, "There are no health, nutritional or food safety reasons for food products containing

biotech ingredients to be labeled, and any inclusion of biotech ingredients should not be stigmatized with a label.”²¹

Food industry groups, joined by the Chamber of Commerce, have already weighed in on the WTO dispute on Country Of Origin Labeling, urging Congress to back off even before the panel issues its final ruling. Pending the final report, due in late July, a coalition of meat industry groups and the Chamber of Commerce urged Congress to suspend the program. The National Farmers Union disagreed, saying, “Urging Congress to repeal COOL laws before the WTO report is issued is just another desperate attempt to prevent consumers from having access to basic information about their food. NFU eagerly awaits the WTO report and will recommend a response if necessary. Consumers have a right to know where their food comes from and our family farmer and rancher members agree.”²²

It is also possible that those groups would use investment provisions in the trade agreement to challenge GMO labeling laws. Investor State Dispute Settlement (ISDS), which gives foreign investors the right to sue governments for compensation over rules or regulations that undermine their expected profits, has become an extremely controversial issue in the trade talks. Under that provision, Phillip Morris is suing the government of Australia over its cigarette labeling laws. In that case, since Australia had refused to include ISDS in its free trade agreement with the United States, the company utilized an older Bilateral Investment Treaty between Hong Kong and Australia that does include ISDS to bring the lawsuit through its Hong Kong subsidiary. This raises the possibility that a U.S. company that is also incorporated in the EU could utilize such a provision to challenge GMO labeling or other consumer protection or environmental laws in the U.S.²³

If the U.S. and EU were to agree to restrict GMO labeling in TTIP, or to make it voluntary rather than mandatory, those commitments could supersede Maine’s GMO labeling law. Given the massive opposition to mandatory labeling by Monsanto, the Grocery Manufacturers Association and other corporate interests that are also active in USTR’s Trade Advisory Committee system, it is reasonable to assume that they have made this link too and are pressing USTR on the issue.

Recommendations

It is impossible to accurately predict the real impacts of these changes in tariff and non-tariff barriers on specific sectors of agricultural production in Maine. The bigger question is how the changes that could result from TTIP would affect the state’s food sovereignty, i.e., farmers’ efforts to produce sustainable crops at fair prices, consumers’ demands for healthy and affordable foods, and their joint efforts to support local economies. Tariffs on most crops are already very low, so this is unlikely to be an issue in the trade talks. On the other hand, there are some real differences in rules on food additives, pesticides and other agrochemicals that are allowed in one jurisdiction but not the other. The EU’s restrictions on GMOs and its progressive labeling laws could come under pressure from TTIP. Any changes in those rules made under TTIP would apply to the U.S. as well as the EU, potentially limiting what is allowable under Maine law.

A first step should be to insist that USTR provide more information on what is actually being negotiated and what rules or principles are off the table. The Maine Citizen Trade Policy Commission could request information on:

- Are commitments on food safety issues such as the use of chlorine rinses of poultry, ractopamine in meat production and diphenylamine (DPA) on fruit being discussed within the TTIP negotiations on Sanitary and Phytosanitary Standards or Technical Barriers to Trade, and, if so, would TTIP SPS or TBT requirements limit states' abilities to raise food safety standards?
- If those issues are not being addressed within the chapters on SPS or TBT, would they be covered under a chapter on regulatory coherence? How would regulatory coherence subordinate U.S. and Maine laws to protect public and environmental health in agriculture and food?
- Is GMO labeling being discussed in TTIP and, if so, how would any commitments made affect Maine's GMO labeling laws?

Procurement policies at risk in TTIP

Efforts to promote healthier, more sustainably produced foods span the entire food chain, from farm to table, and increasingly, from farm to school, hospital or other public institutions. These programs recognize the value of fresh, healthy foods and help make connections between urban consumers and farmers. There are thousands of farmers' markets, farm to supermarket and other voluntary initiatives along those lines throughout the United States and Europe.

These important, and yet fragile efforts flourish when they are an integral part of the community. As part of this movement towards local foods, new governmental programs are emerging that include bidding preferences for sustainable and locally grown foods in public procurement programs. In the United States, the 2008 Farm Bill specifically authorized public schools to include geographic preferences for locally grown unprocessed foods in their purchasing decisions.²⁴ These popular programs now reach almost six million students in all 50 states, including more than 200 schools in Maine.²⁵

These initiatives have been successful both because they help the school systems to source fresher, healthier foods at fair prices, and because they support urban to rural connections that build communities and encourage local economic development. New proposals to broaden that approach to foods for hospitals and other public institutions have emerged in Maine, Minnesota, Oklahoma, Oregon, Vermont and other states.²⁶

Similar initiatives in Europe also encourage local preferences for school lunch programs. In Italy, for example, schools consider location, culture, and how foods fit into their educational curriculum in making purchasing decisions.²⁷ As of 2010, 26 percent of school food purchases in Rome were from local farmers, and 67.5 percent were organic. EU procurement rules seem to limit such preferences, but Denmark, Austria and other countries have interpreted those rules liberally to allow for sustainable and local procurement of food in various public programs.²⁸

Unfortunately, these exciting examples of participatory food democracy could be at risk under TTIP. Both the U.S. and EU have targeted the elimination of “localization barriers to trade.” This could mean that bidding criteria designed to favor local foods or local jobs could be deemed illegal under the trade deal. The EU, in particular, has been insistent on the inclusion of procurement commitments at all levels of government, for all goods, and in all sectors. At a speech last spring in San Francisco, French trade minister Nicole Briqç declared, “Let’s dream a little with respect to public procurement. Why not replace “Buy American” which penalizes our companies with “Buy transatlantic” which reflects the depth of our mutual commitment?”²⁹

Public procurement in recent trade agreements³⁰

Procurement rules in trade agreements are designed to ensure that foreign firms can compete for publicly funded programs. In general, they require National Treatment (i.e., establish rules that prohibit discrimination against foreign suppliers of a good or service), establish rules on transparency in bidding processes, and set thresholds on the size of contracts covered by the trade commitments. They prohibit the use of measures designed to encourage local development by favoring local content or a degree of local ownership of businesses competing for procurement contracts. Parties to each agreement will also

Table 4: Government Procurement Agreement (GPA) restraints on government procurement, from the 2012 Assessment:^{*}

- **Nondiscrimination.** The GPA contains “most favored nation” (MFN) and “national treatment” (NT) provisions that prohibit Parties from implementing procurement policies that prefer domestic products, services or suppliers over those of another Party, or that fail to treat the products and services of other Parties equally. Impermissible discrimination under WTO rules can include measures that have discriminatory effects as well as those which intentionally discriminate in order to favor domestic producers.
- **Performance based standards.** Article VI of the GPA contains language stating that “where appropriate,” technical specifications for procurement shall be prescribed “in terms of performance rather than design or descriptive characteristics”
- **Use of “relevant international standards.”** Article VI also indicates that “where appropriate,” technical specifications for procurement contracts shall “be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.”
- **Procedural requirements.** The GPA contains various procedural provisions, including a requirement in Article XII:2 that “[t]ender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders” The specific information that must be provided includes “a complete description of the products or services required or of any requirements including technical specifications, conformity certifications . . . [and] any factors other than price that are to be considered in the evaluation of tenders”

indicate which sectors are excluded from these commitments, and whether environmental or social criteria can be used as bidding criteria.

At the international level, those rules can be set in bilateral free trade agreements or at the Government Procurement Agreement (GPA) at the WTO. The GPA is a plurilateral agreement, so it includes only the 43 countries that have agreed to sign on. It includes rules on goods and services, at the federal and sub-national levels of government and to public utilities (such as energy, water and public transport).³¹ The GPA was revised in 2011 to include additional commitments at the federal level, with those changes implemented as of April 2014.

All EU member states and thirty-seven U.S. states (including Maine) are part of the GPA.³² The inclusion of those U.S. states in the GPA generated considerable controversy. USTR recruited state governors to sign up for the agreement, with very little public consultation on the potential impacts. Several states later attempted to withdraw their approval, and six states, led by Maine, passed laws requiring approval by the state legislature.³³ In the bilateral trade deals that followed the GPA controversy, fewer states consented to have their procurement programs bound by the trade rules, with just 19 agreeing to commitments under the U.S.-Central America Free Trade Agreement (CAFTA) and eight making commitments under the U.S.-Peru FTA. In 2004, the Governor of Maine withdrew its approval of CAFTA commitments, and the state has not agreed to commitments under any free trade agreements since that time.

In 2011, the EU and Japan brought a complaint against Canada over the Ontario government's feed in tariff program for renewable energy, which included procurement preferences for wind and solar energy equipment manufactured in the province. Ontario is not bound by the GPA, but in any case the EU and Japan argued that the program does not qualify for procurement exceptions because, among other things, the energy is resold to consumers on commercial terms. The WTO panel agreed with those arguments and, as of June 2014, the Canadian government was in the process of revising the program to conform to WTO rules.³⁴

It is not entirely clear whether a similar argument could be made that school lunches, which are resold to many students in cafeterias, could be challenged on similar lines. In an article on local foods procurement in Ontario, Canadian attorney Kyra Bell-Pasht argues that while the WTO decision raises questions about that possibility, the GATT General Public Interest Exception (g) for conservation of natural resources (including the use of fossil fuels) could be used to justify local procurement provisions as environmental measures.³⁵

The EU's aggressive approach to local procurement in that dispute (an approach backed by the U.S. government in its own submission on the case), and in its approach to the CETA talks, raises concerns about how public programs designed to encourage local job creation and economic growth would fare under TTIP. In its summary of the results of the CETA negotiations, the European Commission (EC) states:

"As regards market access, the Canadian offer [m.d. 374/11 of 19 July 2011] is the most ambitious and comprehensive Canada has made so far to a third country, including in comparison to the access granted to the United States. For the first time, Canadian provinces and municipalities will open their procurement to a foreign partner, going well beyond what

Canada has offered in the GPA (the multilateral Government Procurement Agreement) or in NAFTA.”

According to the Canadian Government’s summary, the government maintained the ability to include social and environmental criteria in procurement contracts, as well as federally funded [but not, apparently, provincially funded] agricultural programs that are part of food programs. While the agreement does not cover procurement by public entities for goods “not with a view to commercial resale”, it does cover procurement contracts for “regional and local entities and bodies governed by public law, including hospitals, schools, universities and social services” over 200,000 SDRs³⁶ (about USD\$300,000), a threshold that could easily affect many state and local programs. While the details will not be known until the final text is published, the Toronto Food Policy Council, Food Secure Canada, and the Council of Canadians, among others, continue to raise serious concerns that the procurement commitments under CETA could jeopardize local foods programs across the country.³⁷

The EU’s agenda on procurement in TTIP

The EU outlined its general objectives on public procurement just before the first round of negotiations for TTIP in July 2013. It states that, “This negotiation would present an important opportunity for the EU and the U.S. to develop together some useful “GPA plus” elements to complement the revised GPA disciplines, with a view to improve bilaterally the regulatory disciplines.” It describes the EU’s intention to include 13 U.S. states not already covered by the GPA and bilateral arrangements, as well as 23 larger cities and metropolitan areas including New York, Philadelphia and Los Angeles.³⁸

More recently, in a leaked Note for the Attention of the Trade Policy Committee dated February 25, 2014, the European Commission’s Directorate of Trade lists its expectations of U.S. deliverables for “approximately 20 of the (economically) most important states.” This includes commitments by all state government executive agencies, including counties with a population over 700,000, state capitals and other cities with over 250,000 inhabitants, as well as public universities with enrollment 10,000 students and public hospitals with more than 500 beds.

According to data at the U.S. Bureau of Economic Analysis website, Maine is number 43 in terms of state GDP, so perhaps would be lower on the EU’s list of priorities. However, the European Commission memo also notes its priorities for all states with existing commitments under the Government Procurement Agreement (which would include Maine), particularly upgraded market access coverage of executive entities of state governments. Efforts to develop state-specific procurement requirements would likely conflict with the EU’s push to open procurement at all levels. Existing Maine law already requires state agencies and schools to buy a certain percentage of meat, fish, many dairy products and fresh fruits and vegetables directly from Maine farmers or food brokers. LD 1254, which was enacted in Maine but ultimately vetoed, would have established minimum purchase requirements for percentages of Maine foods in those programs.³⁹

Both the USTR and the EU’s Directorate of Trade have asserted that one of the major objectives in the TTIP is to eliminate localization barriers to trade, including local content requirements. In principle, this could include restrictions on procurement preferences for locally grown foods. Under Notes to Annex 1 of the GPA, however, the U.S. listed an exemption for the Department of Agriculture, stating, “This

Agreement does not cover procurement of any agricultural good made in furtherance of an agricultural support programme or a human feeding programme.” This means that federally funded Farm to School or similar farm to institution programs are not covered by GPA commitments. There is no similar note in the GPA on state-level commitments, so any locally funded feeding programs could potentially be subject to challenge.

The inclusion of procurement commitments on farm to school or other public feeding programs would be new, but each trade agreement sets specific rules and exclusions. In February 2014, both the Maine Citizen Trade Policy Commission and a separate group of national and regional farm to school and other networks,⁴⁰ in separate letters, wrote to the U.S. Trade Representative requesting written assurance that it would not agree to procurement commitments on farm to school or similar local foods procurement programs in TTIP. As of June 2014, neither group had received a written response.

Broader implications

While it is not clear if local foods programs would be included in procurement commitments under TTIP, the EU has stated clear priorities for state level procurement commitments in other sectors, particularly energy, transportation and construction and other Buy American programs designed to promote local employment and economic activity. State-level commitments on procurement and regulatory coherence are two of the EU’s most significant “offensive” interests in the trade agreement.

It is also not clear who would decide if a state, county or city is bound by procurement commitments under TTIP. A leaked memo on the December 2013 negotiating session notes USTR’s reluctance to press states on this issue despite pressure from EU negotiators, but informal reports indicate that EU officials are already visiting many states to build their case for inclusion in the agreement.

Under CETA, the Canadian government agreed to open federally funded programs at the provincial level to EU procurement bids. The Canadians also agreed to create a single electronic procurement website to provide information to European vendors on procurement opportunities. It is possible that the EU could take a similar approach under TTIP to open up state and local procurement using federal grants. In an article on European procurement directives and TTIP, Christopher Yukins reports that, “Because of an apparent reluctance to challenge the U.S. government’s argument that it may not compel the states to join a free trade agreement, some in the European procurement community have suggested that Europeans could instead gain nondiscriminatory access to state procurement markets indirectly, through the federal government’s grantmaking authority.”⁴¹ Yukins notes that this approach would be consistent with existing procurement reforms conditioning state use of federal grant monies, while avoiding the political problems associated with either convincing states to sign on to new commitments under TTIP or decreeing that it has the authority to unilaterally include them in the agreement.

Public procurement programs, whether for local foods, roads, or renewable energy, are important tools to strengthen local economies and give preference to disadvantaged groups such as minorities and small-scale businesses. As taxpayer funded initiatives, they also offer the opportunity to include criteria such as environmental sustainability or living wages into broader economic programs. Members of Congress have also weighed in on this debate. An amendment to the fiscal year 2015 Commerce, Justice, Science (CJS) Appropriations bill sponsored by Rep. Alan Grayson requires that, “[n]one of the funds made available by this Act may be used to negotiate an agreement that includes a waiver of the ‘Buy American Act.’” The bill, with the amendment, was approved 231-87 by the House of

Representatives on May 30. While it is not clear if that amendment would actually prohibit USTR from negotiating procurement commitments in trade agreements (if it were to pass the Senate and conference committee), it sends a strong political signal to negotiators on both sides of the Atlantic.⁴²

Recommendations:

The Maine Citizen Trade Policy Commission should:

- Insist on a written answer from USTR to its questions on procurement commitments for farm to school and other local foods programs in TTIP, as well as on the EU's suggestion that federal grant funds used at the state level be opened up to European vendors. It might also consider sharing these concerns with other states and cities being approached by EU negotiators for procurement commitments.
- Request information from the Governor's office on any meetings or other communications with EU or US officials on potential procurement commitments under the trade agreement, both in terms of possible risks to local foods programs and more generally to clarify the process of agreeing to those commitments at the state, county or city level. Those commitments should be the result of a fully informed public debate.

Geographical Indications in TTIP

A contentious debate over Geographical Indications (GIs) has emerged in the TTIP talks. To many Americans, this is an obscure and apparently new issue. Reports on EU demands to protect what most Americans would consider common food names such as "feta" have elicited surprised and rather derisive comments among Members of Congress and the media.

But, in fact, these kinds of protections have existed for more than a century. Geographical Indications establish legal protections for products based on their place of origin, specific production techniques, and the reputation of quality for those goods. The Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention) established protections for industrial and agricultural goods with a view to protecting producers' intellectual property. While there was much less trade than today, diplomats at the time were concerned about protections for their citizens' products at international trade fairs. That accord was followed by the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958.⁴³

The World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) includes a special section on the protection of GIs. Article 22.1 of the TRIPS Agreement defines GIs as:

"..indications which identify a good as originating in the territory of a Member [of the World Trade Organization], or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."⁴⁴

That article establishes that Members have a duty to prevent deceptive uses of product names through trademark or other intellectual property protections. However, Article 24 also establishes certain exceptions, notably, Article 24.6, which states:

“Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member.”⁴⁵

The question of whether GIs such as “feta” or “parmesan” are in fact common names or protected designations is at the heart of the current debate on GIs in TTIP.

EU protections for Geographical Indications

The central idea behind protections for GIs is that these products have inherent qualities related to their place of production (such as soil or climatic conditions, called *terroir*), as well as cultural knowledge and traditions, that differentiate them from similar products. That designation creates a kind of place-based “brand” that informs consumers about their special qualities and often allows producers to charge a premium price. GIs are most common for wines, cheeses and certain meats, but there are some GIs for certain kinds of textiles (such as Thai Silk) or Swiss Watches produced according to specific criteria.⁴⁶

Unlike other more controversial forms of intellectual property, protections for GIs are not held by specific companies or individuals. As opposed to trademarks, which are owned by a particular company or trade association, GIs are a collective right. They cannot be bought, sold or assigned to other rights holders.

These protections are most advanced in the European Union, which has established a process to register and protect GIs. In each case, producers apply to register a product using specific production and geographic standards. Those decisions are made first at the national level, although non-EU applicants may also apply directly to the European Commission.

The EU has separate registration and protection regimes for wines, spirits, and agricultural and food products. As of May 2014, 1226 food and agricultural products were registered at the European Commission as protected products. Those products include meats and meat products, cheeses, beers, fruits and flowers. They are produced and marketed locally or regionally, but some categories, especially cheeses, are widely exported as well. The list includes 216 cheeses, among them Gruyere, Roquefort, Queso Manchego, Mozzarella di Bufala, Camembert de Normandie, Neufchatel, Fontina, Gorgonzola, Asiago, Parmigiano Reggiano, Pecorino Romano, Gouda Holland, Edam Holland and Feta. It is important to note that in some cases, it is the compound name, such as Parmigiano Reggiano, that is protected, rather than the broader category of parmesan cheese.⁴⁷

In 2006, the U.S. and EU reached a bilateral agreement on the protection of wines. That agreement requires the U.S. to make changes in laws to limit the use of certain wine names considered “semi generic”: Burgundy; Chablis; Champagne; Chianti; Claret; Haut Sauterne; Hock; Madeira; Malaga; Marsala; Moselle; Port; Retsina; Rhine; Sauterne; Sherry and Tokay.⁴⁸ Existing producers of these wines would be “grandfathered” in, but non-EU producers not meeting the GI criteria for those wines would not be allowed to use those names. The EU has a similar bilateral agreement on wine with Australia, and agreements on wine and spirits with Canada, Mexico, Chile and South Africa.

The EU has been seeking to expand protections of geographical indications in its negotiation of bilateral free trade agreements. New commitments on the issue were reached in FTAs with Peru and Colombia, Central America, and Korea. In May, EU Trade Commissioner Karel De Gucht told a United Kingdom House of Lords subcommittee hearing on TTIP that, without securing at least partial protection for EU GIs in the United States, it would be very difficult to conclude a deal on agriculture. According to a report in Inside U.S. Trade, the EU is seeking GI protections for a list of 200 items, including meats, fruits and vegetables, wines and spirits, and 75 kinds of cheese.⁴⁹

There is no public information yet on the exact list of GI protections the EU will seek in TTIP, but an examination of the commitments made in other recent trade agreement could give some indications. Table 1 lists GI commitments made in three recent trade agreements negotiated by the EU.

Given the similarities in culture, consumer tastes and production with the U.S., the results of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) could also help to clarify the EU agenda in TTIP. The main CETA negotiations concluded in October 2013, when the two sides reached a political agreement, but the final negotiations are still underway as of this writing. Still, the technical summaries of the negotiations published by the EU and Canada are instructive. A leaked technical summary by the European Commission of the outcomes from the CETA text reports:

“Another very positive result is the outcome on Geographical Indications (GIs). It is remarkable that Canada - not traditionally a friend of GIs - has accepted that all types of food products will be protected at a comparable level to that offered by EU law and *that additional GIs can be added in the future* [emphasis added]. This is a very satisfactory achievement in itself, but at the same time also a useful precedent for future negotiations with other countries.

125 of our 145 priority GIs will enjoy in full the high protection reserved by Article 23 TRIPS to wines and spirits, i.e. that the use of a GI name is prohibited even when the true origin of the product is indicated or in translation or with expression such as "kind", "type", "style", "imitation" or the like.

In addition – after very difficult negotiations - Canada finally agreed to follow our [the EU's] request regarding the five cheeses (Asiago, Gorgonzola, Feta, Fontina, Munster) the names of which are largely considered generic on the North American market. The use of these protected denominations will be prohibited with an exception for the already existing uses on the Canadian market ('grandfathering').

New entrants into the Canadian market will only be able to sell their product if these 5 names are accompanied by indications such as "style", "type" "kind", or "imitation". This is a compromise solution, but one that achieves that Canada recognises that these names are protected GIs. It protects the market position of our producers by clearly distinguishing them from the original product. In addition, we have obtained for all GIs protection from the misleading use of symbols from the countries of the original GI owners. For instance, the misleading uses of flags and symbols are prohibited, and all products must have a clear and visible indication of their origin."⁵⁰

Table 5: Geographical Indications for Cheeses Protected in Recent EU Trade Agreements

EU-Central America Association Agreement (2012)	EU-Peru-Colombia Trade Agreement (2012)	EU-Korea FTA (2010)
Allgäuer Emmentaler		Asiago
Allgäuer Bergkäse		Brie De Meaux
Asiago	Brie de Meaux	Camembert De Normandie
Brie de Meaux	Camembert de Normandie	Comté
Camembert de Normandie	Comté	
Comté	Danablu	Emmental De Savoies
Danablu	Emmental de Savoie	
Emmental de Savoies		
Esrom	Feta	Feta
Feta		Fontina
Fontina	Gorgonzola	Gorgonzola
Gorgonzola	Grana Padano	Gran Padano
Grana Padano	Idiazábal	
Idiazábal		Mahón-Menorca
Kefalograviera		
Mahón-Menorca		Mozzarella Di Bufala
Manouri		Campana
Mozzarella di Bufala		
Campana	Parmigiano Reggiano	Parmigiano Reggiano
Parmigiano Reggiano		Pecorino Romano
Pecorino Romano	Provolone Valpadana	Provolone Valpadana
Provolone Valpadana		Queijo De São Jorge
Queijo S. Jorge	Queijo Serra da Estrela	
Queijo Serra da Estrela		Queso Manchego
Queso Manchego	Reblochon	Reblochon
Reblochon	Roquefort	Roquefort
Roquefort	Taleggio	Taleggio
Taleggio		

Source: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_other-countries

While the details of the EU's specific negotiating objectives on GIs in TTIP are not clear, it is clearly a priority area in the negotiations. The "Directive for the negotiation of the Transatlantic Trade and Investment Partnership between the European Union and the United States of America," which was adopted by the EU Council on 17 June 2013, outlines main negotiating objectives for the agreement. The only specific issue identified in the section on intellectual property rights is a mention of GIs. The text emphasizes that, "The negotiations shall aim to provide for enhanced protection and recognition of Geographical Indications through the Agreement, in a manner that complements and builds upon the TRIPS, also addressing the relationship with their prior use on the US market, with the aim of solving existing conflicts in a satisfactory manner."⁵¹

The debate on GIs in the United States

While this concept is most developed in the EU, there are a number of Geographical Indications already in use in the United States. Although there is no centralized list as in the EU, names such as Maine Lobsters, Idaho Potatoes, Vidalia Onions, Kona Coffee and Florida Oranges are protected under trademarks held by industry associations. The American Origin Products Research Association, an organization established to promote the establishment and protection of GIs in the United States, argues that increased designation and protection of GIs for locally produced cheeses and other goods would enhance value added for local producers and provide more accurate and useful information to consumers. They argue that existing trademark law puts the burden of protection on those industry associations, raising unfair obstacles to producers of locally established producers to establish their own place-based names for cheeses and other products.

Those concerns have found some resonance among Maine cheese producers. In an article in the Portland Press Herald, Caitlin Hunter, a cheese maker at Appleton Creamery said, "I completely agree with the Europeans that we should not use their cheese names. They have spent centuries developing their distinctive regional styles, and we should not steal them, or try to reproduce them." She labels her cheese "Camdenbert," (a takeoff on the coastal town Camden) for example.⁵² However, extending those protections to what most would regard as generic names is another matter.

The Consortium for Common Food Names (CCFN) argues that the EU's agenda on GIs would unfairly restrict food names that are no longer strictly associated with particular regions. It notes that a federal standard for production of Asiago cheese has existed since 1977 (almost 20 years before the European Commission recognized Asiago as a GI) and asserts that, "Despite its long-time usage in the Americas, consumption of asiago cheese in the United States was relatively limited until a few U.S. dairies increased production, and the restaurant chain Panera Bread began to sell asiago bagels (a breakfast pastry). Panera has now sold millions of asiago bagels, and American consumers are very familiar with asiago cheese. This is not due to asiago producers in Italy, but to producers in the United States and around the world that have been manufacturing and marketing this product for years."⁵³

The CCFN argues for a process to establish which food names are actually in common usage, perhaps with a registry at the international level. It further suggests requiring that GIs include the name of the

place where the good is produced, i.e., Camembert de Normandie (which is the actual GI approved by the EU) rather than simply Camembert (which, in fact, the EU has not sought to protect).

These issues have found resonance in Congress, where two major letters to USTR have rejected the EU's push for GI protections in TTIP. In an April 4 letter to USDA Secretary Tom Vilsack and USTR Michael Froman, 45 U.S. Senators rejected the EU's approach on GIs in TTIP, focusing on protections for processed meat names such as bologna. They called on USTR to work aggressively to ensure that the EU's approach on GIs does not impair the ability of U.S. businesses to compete, stating, "We are concerned that these restrictions would impact smaller businesses who specialize in artisan and other specialty meat products such as bratwurst, kielbasa, wiener schnitzel and various sausages."⁵⁴ It is worth noting that the EU does not recognize GIs for any of those terms as single meat names. According to the European Commission's Database of Origin and Registration (DOOR), it does recognize Mortadella Bologna, Thüringer Rostbratwurst, Nürnberger Bratwürste, Nürnberger Rostbratwürste and Kielbasa lisiicka.

That letter was followed in May by a letter from 177 members of the House of Representatives (including Reps. Michaud and Pingree) focused on GIs for cheese names. That letter, led by the Congressional Dairy Farmers Caucus with support from the National Milk Producers Federation, asserts that, "The EU is taking a mechanism that was created to protect consumers against misleading information and instead using it to carve out exclusive market access for its own producers. The EU's abuse of GIs threatens U.S. sales and exports of a number of U.S. agricultural products, but pose a particular concern to the use of dairy terms."⁵⁵

Potential impacts on Maine producers

According to at least one report, Maine has more artisan cheese producers than any state except New York. Jeff Roberts, the author of *The Atlas of American Cheese* and a consultant to the Vermont Institute of Artisan Cheese at the University of Vermont, reports that since he wrote that book in 2006, the number of artisan cheese producers in the state increased from 25 to 75. "To me, that's a truly remarkable expansion in a relatively short period of time," he commented. "And most of us outside of Maine have never heard of Maine artisan cheese because it really doesn't leave the state."⁵⁶

If TTIP were to include GI protections for specialty cheeses produced in Maine, producers could be compelled to modify those cheese names, either to other names or to include qualifiers like "style." The fact that the EU has already established protections for cheese names in its recent agreements with Colombia and Peru, Central America and Korea means that any exports by Maine producers to those markets could be restricted, potentially undermining the expansion of cheese production in the state.

Which cheese (or meat) names are protected would influence how cheese and dairy producers would be affected. If the EU focuses primarily on protections for the cheese names it protected in CETA (Asiago, Feta, Fontina, Gorgonzola, Munster), it seems most likely that it would impact larger corporations such as Kraft, rather than smaller producers of artisan cheeses. These impacts would be lessened if the protections are established for compound names such as Parmesano Reggiano rather than Parmesan.

However, a recent article in Inside Trade indicates that the EU is seeking protections for as many as 200 products, which would expand protections for their goods without necessarily including corresponding protections for US GIs in ways that benefit local producers. The way those protections are established would also matter, so that any GIs advance the interests of smaller, innovative local producers over those of larger corporations interested primarily in protecting export markets.

On the other hand, a vigorous public debate on the issues of protections for place based names, such as those advanced by the American Origin Products Association, could result in new protections for innovative cheeses and other goods. Maine Lobster is one such GI already in existence. Raising the profile of that issue, and examining the potential of existing trademark law or possibly other mechanisms such as those used in the EU, could enable Maine producers to establish specialty markets and potentially retain more of the value added from their production.

Recommendations:

- The CPTC should insist on transparency in this issue, calling on the EU and USTR to provide a list of the specific Geographical Indications protections sought by the EU in TTIP, as well as the U.S. response to date.
- Based on that information, the Commission could issue a request for comments or convene a hearing of Maine dairy, wine, cheese and processed meat producers on how they see their interests being affected by those protections. Their recommendations should inform advocacy by the Commission with USTR.

Impact on Maine's dairy sector

TTIP and other international trade agreements threaten Maine's dairy industry. To understand how, one must first learn about milk pricing.

Federal Milk Pricing

The prices paid to most American dairy farmers for their milk (i.e., producer prices) are set by the federal government through complicated formulas. The formulas, which are administered by the Federal Milk Marketing Order (FMMO) establish producer milk prices based on the wholesale price of various dairy products, namely cheese, butter, dry whey, and not-fat dry milk (NDM).

FMMO sets prices for four classes of milk:

- Class I is Grade A fluid milk.
- Class II is Grade A milk used in ice cream, yogurt, cottage cheese and similar products.
- Class III is Grade A milk used to make cream cheese and hard cheeses.
- Class IV is Grade A milk used to make butter or used for dry milk.

The formula for each milk class has been the same for decades. However, the results of applying the formula have changed dramatically. The reason is that the price of NDM has soared in recent years,

primarily due to increased demands in developing nations; and the price of NDM has a direct and significant impact on milk prices in Classes I, III, and IV.

It's worth noting that, until recently, the price of NDM had no impact on Class I pricing. This is because the formula for Class I pricing is based on either the price of butter or the price of NDM, whichever is higher. For decades, the price of butter has exceeded the price of NDM, so that NDM had no effect on the Class I price of milk. But that has now changed. Now—and for the foreseeable future—it is expected that NDM will continue to be driver, not butter.

A key detail about federal dairy pricing is that producer prices during the last decade have often been below most farmers' cost of production. Many farmers hold on even though they are losing money every day. (They do so, in part, because you cannot turn off a cow, as you turn off a piece of equipment; and in part, because even though these farmers may be losing money if they measure all their costs, having some cash flow enables them to continue to service their debt and keep the farm.) Still, many farmers have not been able to hold on; they have gone of business. Vermont, for example, lost over half its farms between 2004 and 2011.

Since 2011, the FMMO price has rebounded somewhat. (Few dairy farmers are making money if you look at true costs, including depreciation and real wages for family members; but more farmers are covering their marginal costs than a few years ago, which is enough to keep them in business.) However, it's important to recognize that recent increases in producer prices are due primarily to the increase price of NDM.

Maine Dairy Stabilization Program

The next key piece of information to know is that Maine has a unique program that augments the payments farmers receive when the FMMO price is low. The Maine Dairy Stabilization Program was enacted into law in 2004, immediately providing critical support to the troubled industry. In the period from 2004 to 2011, when Vermont lost over 50 percent of its dairy farms, Maine lost only 19 percent. The difference was this program.

The Maine Dairy Stabilization Program provides direct funding to Maine farms, based on the difference between the FMMO price and the cost of production for an average farm of that size. The program pays out different amounts for four tiers of production, based on the fact that larger farms have, on average, a lower cost of production. (Because of this structure, the program is generally referred to by Maine farmers as the "tier program".)

Once every three years, the Maine Milk Commission contracts with University of Maine researchers to conduct a "cost of production" study, identifying a different average cost for each of the four tiers. When the FMMO price falls below this cost figure, the Maine Milk Commission begins to pay farmers extra. (Without the program, dairy farmers are already paid by the Commission, so structuring the payments in this way is not requiring the Commission to take on a major new function, but simply to pay out a different amount.) The greater the difference between the FMMO price and the cost of production, the more the farmers are paid.

Maine has also enacted into law a mechanism to bring in new revenues when the FMMO price is low. The mechanism is a “handling tax” applied to retailers on every gallon of milk sold. The size of the tax goes up when the FMMO price goes down.

This tax can be applied without driving up consumer costs, as long as the level of taxation is moderate. The reason is this: what retailers charge for milk is dependent on what a consumer is willing to pay; when the FMMO price drops lower, the store’s cost drop as well, as explained below, so that the store’s margins increase; the new tax can be paid out of the this margin without any negative impact on the consumer price.

There are three players in the milk distribution chain: farmers (producers); processors; and retailers. As explained above, the producer price is set by government policy. The price paid to the processor by a retailer is also set by government policy. (The processors are treated like a public utility, in that they are allowed to cover their costs and make a little profit.) But the retailer is allowed to sell the milk for as much as the market will bear.

Consider what happens when the FMMO price drops: the farmers make less and the processor makes the same. Usually the consumer price also remains the same. (There is little reason it will not, because it is the price consumers have been paying—and the retailers can sell if for that.) This means that retailers are making greater profit when the FMMO price drops. The effect of Maine’s handling tax is to take away *some* of this this profit. The Maine Dairy Stabilization program then provides that money to the farmers.

It’s an elegant way to correct a major deficiency in the FMMO system. If applied well, the farmers fare better, while the retailers still come out fine. Consumers benefit as well, because in the long run, consumers will be hurt if so many local dairy farmers go out of business and there is no longer adequate milk from local sources.

But even though this program works well in Maine, similar strategies have not been applied elsewhere. That’s because Maine is in a unique situation. First, Maine is not as closely bound to some of the legal constraints of the FMMO system (for complicated historical reasons). Second, the program only works because the amount of milk produced in Maine is roughly equal to the amount consumed.

A rough balance is essential to making this program work, because under the Interstate Commerce Clause, the handling tax needs to be applied to all milk sold in the state.

Consider if such a program was in place in Vermont, which is a smaller state with a larger proportion of its agriculture in dairy production. Vermont produces about six times the amount of milk it consumes. To help the farmers to the same degree as in Maine, the tax would need to be six times higher—and at that level, the system simply cannot work.

One final point about this system: the two programs (one paying farmers; another generating revenue) cannot be legally linked without violating the Interstate Commerce Clause. So the two programs are legally separate: the Maine Dairy Stabilization Program pays out funds to farmers from the state’s

General Fund; while the handling tax collects revenues into the General Funds, which the Legislature could use for any purpose.

Bovine Growth Hormones

In Maine, there is practically no use of artificial bovine growth hormones by dairy farmers. There is not a legal prohibition, but the two primary milk processors do not accept milk from cows that have received the hormones. This approach has worked extremely well for Maine's dairy industry. Although bovine growth hormones increase milk production, they are costly, and often reduce the working life of a dairy cow. All in all, the financial benefits are modest, if existent at all. Meanwhile, the fact that Maine milk is hormone free has helped sell it. So, while this is a major point of tension nationally in the trade talks, it isn't an issue for Maine producers.

Potential negative impacts of international trade agreements

One potential negative impact of the trade agreements now being pursued is that they could depress FMMO prices further. This risk is very real, due to the increasing importance of NDM prices on what farmers get paid. As noted above, the recent boost in FMMO prices is due primarily to the increased price of NDM. Broader trade opportunities could increase imports of NDM, which could easily depress the price of NDM, with potentially devastating impacts on farmer incomes.

This is clearly a concern with the TPP, as New Zealand is a major producer of NDM. For that reason, several major dairy industry organizations have spoken out against TPP.⁵⁷

However, the U.S. dairy industry has not expressed the same kind of organized opposition to TTIP. In fact, some industry organizations are supporting a new US-EU trade pact. This is because the "EU currently enjoys a trade surplus of \$1.2 billion" and some dairy groups believe that a "transatlantic agreement can do a lot to drive more reciprocal dairy trade between the US and the EU."⁵⁸

Presumably, these dairy groups feel that the extra revenues from new exports would more than offset any FMMO price depression that could be caused by more EU trade. That might be true for the kind of large dairy farms prevalent out West—some of which are situated in huge buildings that abut powdered milk plants (often owned by the same conglomerate that owns the herd). Yet Maine's dairy sector has limited export opportunities, given both its far smaller size and the fact that there is no powdered milk plant in the region. It is realistic to expect that, in Maine, the potential negative impacts of TTIP on FMMO prices will outweigh any benefits from new exports.

Another set of concerns stems from Maine's Dairy Stabilization program. It is possible, if not likely, that any international trade agreement would view this program as an unfair price support, particularly given the pressure to harmonize state and federal regulations. Given that the program only exists in Maine, there would not be any significant political pressure to have a trade agreement treat this program favorably. And yet this program has been (and remains) critically important to Maine's dairy industry.

Even if a new international trade agreement does not flat out prohibit Maine's Dairy Stabilization Program, it is likely that the program would be at greater risk for a legal challenge. As noted above, the program walks a fine line with the Interstate Commerce Clause. Though the authorities in Maine believe

that the state's current system is legally supportable, it's also true that the system is legally complicated. The likelihood of a lawsuit increases if Maine's dairy policies are under closer scrutiny due to a new international trade agreements.

Another area of concern stems from Maine's de-facto prohibition of bovine growth hormone. Growth hormones are generally not used in the EU, which suggests that the U.S. will try to address that forthrightly in any new trade agreement, as a way to increase export opportunities. The EU's restrictions on those hormones is already a flash point in the negotiations. Depending on the concessions granted, the unintended consequence could be that Maine's current position with bovine growth hormones, particularly its ability to promote any milk exports as hormone free, comes under renewed scrutiny and is weakened.

Recommendations:

The Maine Citizen Trade Policy Commission should:

- Make sure trade negotiators are aware of the Maine's Dairy Stabilization Program and its importance to Maine.
- Request information from dairy groups and other available sources on the likely impact of increased export activity on the U.S. Class I milk price, given (in particular) the role that NDM has in FMMO pricing.
- Work with instate players (e.g., Maine Farmland Trust, Maine Organic Farmers & Gardeners Association) to alert Maine's dairy processors (that do not accept milk with bovine growth hormones) of the possible consequences of an international trade agreement on their operations.

Overall conclusions

TTIP could affect Maine's agricultural and food sectors for decades to come. While there may be legitimate reasons to coordinate regulations between the U.S. and EU, those discussions need to happen under conditions of full transparency, something that is not possible under the current regime of secrecy. The establishment of common standards on food safety, procurement, or protections for local producers should serve to prohibit – rather than promote – efforts by corporations to play off regulatory standards in one jurisdiction against the other.

Any efforts to develop coherent approaches need to achieve a delicate balance on at least three dimensions: the appropriate level of decision making (subsidiarity); the right risk assessment and technical capacity; and fair and sustainable livelihoods and prices for farmers and consumers. Achieving the right balance among those complex topics within the context of a trade agreement, in which proposals on any one of those issues could be traded off for market access or other proposals on entirely different issues, seems fraught from the outset. This is a risky approach in any aspect of the

trade agreement, but is especially problematic in the arena of food and agriculture, which touches on public health, rural and urban economies and environmental protection.

Subsidiarity, the idea that decisions should be made at the smallest, lowest or least centralized level of decision making possible, was a central topic of debate in the formation of the European Union. Article 4 of the founding Treaty of Maastricht establishes that principle as a key element in the balance between the authorities of the Member States and the EU as a whole. In the U.S., that issue, while not usually described with that term, has long been a subject of tension between states' rights and federal authority. Maine's GMO labeling laws (as well as those in other states) for example, may eventually come into conflict -- or ultimately influence -- federal policy on that issue, and will undoubtedly raise the public profile of GMO safety across the country. In both the EU and U.S., that tension, and the grounding in the democratic concept of subsidiarity, reflects the conflict between local level innovations such as farm to school programs or restrictions on food additives or technologies based on emerging science, and the economic pressures driving commercialization even when the risks are not fully understood.

The common standards for organic foods negotiated between the US and EU, for example, offers an alternative approach to resolving those tensions within trade deals. The carefully crafted Organic Equivalency Arrangement incorporated input from the Organic Trade Association and the International Federation of Organic Agriculture Movements. As an Arrangement (rather than an Agreement or Treaty), it was enacted through an exchange of letters from USDA and USTR from the United States, and the European Commission for Agriculture and Development.

The Arrangement, which began in 2012, recognizes certification by the USDA National Organic Program as equivalent to the EU Organic Program. It provides for periodic reviews and establishes a work plan to exchange information on emerging issues.⁵⁹ A formal review of the process is scheduled for 2015. It provides a flexible basis for mutual learning and expanded trade in those goods. The fact that this bilateral arrangement was negotiated on its own, outside the horse trading inherent in any trade negotiations, created the conditions for a reasonable approach that can also be reopened should conditions change in the future.

There is ample room for cooperation among regulators in the U.S. and EU on issues related to food safety and food markets. Discussions of locally appropriate standards for chemicals or food additives or technologies benefit from shared knowledge across the Atlantic. On the other hand, the pressure for mutual recognition agreements in TTIP on chemical policy and financial reforms, among others, creates the conditions for a push to the lowest standards prevalent in either jurisdiction.

Those discussions always reflect pressures from competing interests, but they are also always enhanced when they take place under conditions of transparency and full information. That will not be possible in TTIP as long as the negotiations remain shrouded in secrecy. This is a general problem that runs throughout the trade agreement.

Governments should engage in meaningful discussions with all stakeholders on these and other issues before each negotiating session and upon its conclusion. Those dialogues should also include frank discussions on the potential tradeoffs among sectors and hold open the possibility that the most

productive avenues for progress could be outside of the trade talks, as happened with the agreement on organic standards.

While it seems unlikely that “harmonization” in TTIP will mean anything but a race towards the lowest common denominator in terms of standards, the public attention created by the trade talks does offer a platform to learn from the best experiences on both sides of the Atlantic. This could be an opportunity, for example, to recast the public debate in the United States (and perhaps even in the EU) on the Precautionary Principle as a sensible, scientific, and democratic approach to technologies that are advancing much more rapidly than knowledge of their safety. EU dairy producers (many of whom are opposed to TTIP) could learn from Maine’s experience with dairy prices supports. And local policymakers in many European countries, who are becoming increasingly alarmed about the potential impacts of TTIP on their food and agricultural systems, could learn from the Maine Citizen Trade Policy Commission’s experience at fostering an informed public debate.

The current approach to our bilateral economic relations in TTIP is a political choice; alternatives are entirely possible. If not, if the talks are to continue along the lines of other recent trade agreements, then civil society and policy makers should seriously consider putting a halt to the TTIP until a different approach is underway.

Annex 1: Maine Exports to the European Union



Global Resources. Local Expertise.

Rank	Code	Description	ANNUAL 2010	ANNUAL 2011	ANNUAL 2012	%2010- 2011	%2011- 2012	Rate
		TOTAL ALL COMMODITIES	374,062,772.	404,058,102.	364,415,948.	8.02	-9.81	
1	880000	Civilian Aircraft, Engines, And Parts	28,668,336.	51,544,840.	70,921,039.	79.80	37.59	Free
2	481190	Paper, Paperbd, Cellulose Wadd Etc, Coat Etc Nesoi	33,886,397.	32,770,621.	27,956,065.	-3.29	-14.69	Free
3	470329	Chem Woodpulp, Soda Etc, N Dis S Bl & Bl Nonconf	38,813,782.	52,715,777.	22,244,855.	35.82	-57.80	Free
4	902750	Instruments Etc Using Optical Radiations Nesoi	35,986,913.	28,398,666.	22,209,385.	-21.09	-21.79	Free
5	324300	Composite Diagnostic/Lab Reagents, Exc Pharmaceut	29,658,364.	20,655,662.	18,492,365.	-30.35	-10.47	Free
6	392313	Plates, Sheets Etc. Nesoi, Cellular Polyurethanes	18,317,531.	14,080,447.	17,972,372.	-23.13	27.64	6.5%
7	040103	Lobsters, Live, Fresh,Ch, Dried, Salted Or In Brine	11,669,946.	14,865,606.	16,573,213.	27.38	11.49	8%
8	850731	Tantalum Electrolytic Fixed Capacitors	4,693,204.	7,053,571.	12,010,418.	50.29	70.27	Free
9	841132	Gas Turbine Parts Nesoi	11,277,421.	3,594,681.	10,362,879.	-68.12	188.28	4.1%
10	300730	Antisera And Blood Fractions, Immun Products	4,347,583.	7,794,924.	8,764,881.	79.29	12.44	Free
11	841291	Parts Of Pumps For Liquids	6,794,132.	8,652,296.	8,026,103.	27.35	-7.24	1.7%
12	470326	Chem Wdpulp Sulfite Ex Dsslvng Gr Nonconf Semi/Blc	0.	0.	7,437,811.	0.-nan	0.inf	Free
13	902750	Value Of Repair/Alter Articles Previous Imported	2,835,496.	3,667,193.	5,094,972.	29.33	38.93	NA
14	480303	Paper & Paperboard, Uncoated, >10% Mech.Fib.,Rolls	0.	1,152,597.	4,356,210.	0.inf	277.95	Free
15	848330	Gears; Ball Or Roller Screws; Gear Boxes, Etc	197,019.	2,623,040.	4,071,911.	1,231.36	55.24	NA
16	950332	Yachts Etc For Pleas/Sport Nesoi; Row Bts, Canoes	2,273,650.	2,289,828.	3,838,196.	0.71	67.62	1.7%-2.7%
17	251900	Sanitary Towels And Tampons Diapers For Babies Etc	0.	0.	3,533,280.	0.-nan	0.inf	Free-12%
18	251013	Ppr/Pbrd For Writ/Pring,Clay Ctd,<=10%Mec Fbr,Rls	3,128,772.	3,941,725.	3,391,991.	25.98	-13.95	Free

19	<u>440320</u>	Coniferous Wood In The Rough, Not Treated	0.	9,273.	3,036,941.	0.inf	32,650.36	Free
20	<u>840690</u>	Parts For Steam And Other Vapor Turbines	553,781.	350,555.	2,828,346.	-36.70	706.82	2.7%
21	<u>480419</u>	Kraftliner, Uncoated, Bleached, In Rolls Or Sheets	0.	0.	2,697,607.	0.-nan	0.inf	Free
22	<u>903039</u>	Inst Meas Volt Crrnt Etc W-Out Rcrdng Dvce, Mltmtr	1,264,821.	1,955,116.	2,141,926.	54.58	9.55	2.1%-4.2%
23	<u>441890</u>	Builders Joinery And Carpentry Of Wood, Nesoi	1,236,784.	1,952,260.	1,999,364.	57.85	2.41	Free
24	<u>844900</u>	Mach F Manuf Or Finish Nonwovens;Hat Blocks; Parts	46,981.	34,937.	1,854,710.	-25.64	5,208.73	1.7%
25	<u>930591</u>	Parts & Accessor. Of Military Weapons Of Head 9301	17,282.	918,576.	1,736,617.	5,215.22	89.06	Free
26	<u>711319</u>	Jewelry And Parts Thereof, Of Oth Precious Metal	558,450.	277,286.	1,726,041.	-50.35	522.48	2.5%
27	<u>591140</u>	Textile Straining Cloth Used In Oil Presses Etc	2,487,358.	1,879,325.	1,584,498.	-24.44	-15.69	6%
28	<u>930190</u>	Military Weapons,Oth Thn Revol,Pist,&Hd 9307,Nesoi	82,690.	1,756,140.	1,584,320.	2,023.76	-9.78	Free
29	<u>853190</u>	Parts Of Electric Sound Or Visual Signaling Apts	29,439.	432,895.	1,494,764.	1,370.48	245.29	Free-2.2%
30	<u>392690</u>	Articles Of Plastics, Nesoi	3,306,589.	829,454.	1,462,912.	-74.92	76.37	Free-6.5%
31	<u>853710</u>	Controls Etc W Elect Appr F Elect Cont Nov 1000 V	1,398,707.	1,340,213.	1,430,997.	-4.18	6.77	2.1%
32	<u>842890</u>	Lifting, Handling, Loading & Unloading Machy Nesoi	437,371.	83,067.	1,387,566.	-81.01	1,570.42	Free
33	<u>470321</u>	Chemical Woodpulp, Soda Etc. N Dis S Bl & Bl Conif	51,100.	0.	1,364,248.	-100.00	0.inf	Free
34	<u>850450</u>	Electrical Inductors Nesoi	8,000.	683,853.	1,143,948.	8,448.16	67.28	Free-3.7%
35	<u>860791</u>	Parts, Nesoi, Of Locomotives	171,210.	2,682,611.	1,101,948.	1,466.85	-58.92	1.7%-3.7%
36	<u>160530</u>	Lobster, Prepared Or Preserved	1,470,428.	1,560,063.	1,095,897.	6.10	-29.75	20%
37	<u>970600</u>	Antiques Of An Age Exceeding One Hundred Years	536,122.	478,880.	1,090,413.	-10.68	127.70	Free
38	<u>902790</u>	Pts Of Inst, Phys/Chem Analysis Etc, Nesoi	2,791,597.	2,148,143.	1,070,217.	-23.05	-50.18	Free-2.5%
39	<u>848420</u>	Mechanical Seals	818,379.	1,095,637.	1,046,995.	33.88	-4.44	1.7%
40	<u>391390</u>	Natural And Modified Natural Polymers Nesoi, Pr Fm	1,180,327.	1,078,944.	988,436.	-8.59	-8.39	NA

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**Article notes: October 7, 2014
Citizen Trade Policy Commission**

**EUROPEAN LAWMAKERS THREATEN TO SCUPPER CANADA TRADE DEAL;
(Reuters; 8/28/14)**

This article reports that EU lawmakers were threatening to vote down a free trade agreement with Canada because it included ISDS provisions. Many EU lawmakers oppose the inclusion of ISDS provisions because of the perceived ability of multinational corporations to sue governments over regulations and laws that are seen as casing the corporations to lose profits. One lawmaker said, “ Giving corporations the right to sue governments for loss of anticipated profits would be ridiculous if it were not so dangerous.”

Is This EU-US Trade Deal A “Once-In-A-Generation” Opportunity?(Forbes; 8/28/14)

This article skeptically reviews the claim from a member of the British Parliament that the TTIP is a “once-in-a-generation” opportunity that will result in significant job and economic growth. The article recounts the lack of transparency in the current TTIP negotiations, highlights the dangers of ISDS provisions and the threat to public services and government procurement contracts that the TTIP is alleged to likely contain when it is finally completed.

Low Expectations for Hanoi Round cast Doubt on November TPP Result; (Inside US Trade; 8/29/14)

This article reports that the next round of informal TPP talks scheduled to take place in Hanoi in early September are not likely to result in a final TPP agreement being finalized in November- a publically stated goal of the Obama administration. Among the latest hurdles facing the TPP negotiations are controversial and unresolved topics regarding intellectual property protections for pharmaceuticals, disciplines for state-owned enterprises, technical barriers to trade, sanitary and phytosanitary measures, and labor rights.

American Envoy to Brussels Says EU Needs TTIP Benefits More Than US; (Inside US Trade; 9/4/14)

The newly appointed US Ambassador to Brussels, Anthony Gardner, stated publically that because of Europe’s “continuing sluggish economic performance” that Europe needs the economic benefits of the TTIP more than the US does. Ambassador Gardner also dismissed current EU concerns about GMO issues and sanitary washes for meat and poultry as “peripheral” and stated the need for a comprehensive trade agreement to be finalized in the near future. Additional remarks from Ambassador Gardner also criticized those who allege that the TTIP negotiations are lacking in transparency and he sought to dispel allegations that the US procurement market is more closed and restrictive than that of the EU nations.

New Trade Deal- TISA- Could Undermine Safety, Environmental, Workers' Rights Regs; (AFL-CIO Blog; 9/5/14)

This blog post seeks to explain the current negotiations between the US and other WTO members for the Trade in Services Agreement (TISA). While the negotiators for TISA allege that the treaty will liberalize trade and investment in services and also expand regulations on services, many critics claim that TISA will effectively remove regulatory barriers to trade thus imperiling many crucial regulations and laws concerning public safety, the environment and various workers' rights. The blog post also highlights the secrecy and lack of transparency around the current TISA negotiations.

Nomination of Cecilia Malmstrom as E.U. Trade Envoy Signals Interest in U.S. Talks; (New York Times; 9/10/14)

The recent appointment of Ms. Cecilia Malmstrom as EU Trade Envoy by Jean-Claude Juncker, President-elect of the European Commission, is seen as a reflection of his strong interest in rejuvenating the somewhat stalled TTIP negotiations.

Vietnamese Delegation Heading to Washington Next Week to Talk TPP; (US Trade Today; 9/12/14)

This article reports on the September visit from a high-level Vietnamese trade delegation to Washington. One of the main purposes of the visit was to discuss the TPP and thus highlight the Vietnamese interest in gaining market access in the US for apparel and footwear.

EU chairs next round of plurilateral talks on services; (trade.ec.europa.eu; 9/19/14)

This brief article reports on the next round of TISA negotiations that were to take place in Geneva on September 21st. One of the focuses of these talks is to center on four regulatory disciplines: financial services, telecommunications, domestic regulation & transparency, and "mode 4" [Staff Note: the WTO website has this to say about Mode 4: "*The movement of natural persons is one of the four ways through which services can be supplied internationally. Otherwise known as "Mode 4", it covers natural persons who are either service suppliers (such as independent professionals) or who work for a service supplier and who are present in another WTO member to supply a service.*"]

Cecilia Malmstrom, E.U. Trade Nominee, Points to 'Toxic Element' in U.S. Talks; (new York Times; 9/30/14)

Cecilia Malmstrom, nominated to be the next EU trade commissioner, told a hearing of the European Parliament that the inclusion of ISDS provisions in the TTIP was a "nuclear weapon" that may have to be excluded from the final negotiated version of the TTIP. The article goes on to state that European opposition to ISDS is rooted in a belief that the US would use this provision to overturn European laws and regulations concerning the environment, food safety and publicly funded health care.

USTR: TPP Briefing Schedule; (USTR; 10/1/14)

The USTR released a draft agenda of a briefing for cleared advisors and liaisons that will take place regarding the TPP in Washington DC on October 9th. The detailed agenda includes presentations on Rules of Origin, Financial Services, Cross Border Services & Non-conforming Measures, Technical Barriers to Trade, Market Access (Agriculture), Environment and Intellectual Property.

The trade clause that overrules governments; (Washington Post; 10/1/14)

This opinion piece discusses the possible inclusion of ISDS provisions in the TTIP and offers the writer's opinion on why he is opposed to ISDS- namely "the mockery that the ISDS procedure can make of a nation's laws...". He also cites recent European opposition to ISDS and suggests that the inclusion of ISDS in the TTIP, which is strongly supported by President Obama, would paradoxically threaten to undermine some of his landmark achievements including the fight against pollution and global warming and his "commitment to a single standard of justice."

EUROPEAN LAWMAKERS THREATEN TO SCUPPER CANADA TRADE DEAL – RTRS

Reuters

28-Aug-2014 15:30

- EU Parliament has to ratify trade treaty
- Greens fear it may dilute EU environmental law
- Far-right politicians concerned about sovereignty

By Julia Fioretti and **Barbara Lewis**

BRUSSELS, Aug 28 (Reuters) - EU lawmakers are threatening to block a multi-billion dollar trade pact between Canada and the European Union -- a blueprint for a much bigger EU-U.S. deal -- because it would allow firms to sue governments if they breach the treaty.

The agreement with Canada, a draft of which was seen by Reuters, could increase bilateral trade by one fifth to 26 billion euros (\$34 billion).

But European consumer and environmental groups say a mechanism in the accord would allow multinationals to bully the EU's 28 governments into doing their bidding regardless of environmental, labour and food laws and would set a bad precedent for the planned EU-U.S. trade pact.

The European Parliament must ratify both the Canada and the U.S. pacts. Since elections in May, the rise of nationalist, Eurosceptic parties in the legislature, many of them opposed to globalisation, have complicated the EU's free-trade ambitions.

"The Greens will fight hard to get a majority in the parliament against (the EU-Canada deal)," said Claude Turmes of the Green group, echoing concerns from others in the European Parliament, including the Socialist bloc.

Tiziana Beghin, an EU lawmaker from Italy's anti-establishment 5-Star Movement who sits on the parliament's influential trade committee, called the EU-Canada deal an "affront to democracy".

"Giving corporations the right to sue governments for loss of anticipated profit would be ridiculous if it were not so dangerous," she told Reuters.

According to the draft accord, the chapter on "Investor-State Dispute Settlement" (ISDS) allows companies to sue either an EU country or Canada in a special court if they think their trade interests have been damaged.

Some member states, including Germany, the EU's biggest economy, have also expressed opposition to the ISDS.

Canada and the European Commission deny accusations that the ISDS mechanism will give multinationals too much power. They say dispute settlement has been an important part of trade deals since the North American Free Trade Agreement 20 years ago.

Some in business consider it an insurance policy against the impact of laws on their profits or against expropriation.

NEGATIVE SIGNAL

In the European Parliament, it is not yet clear whether there is enough opposition to block the EU-Canada deal, but the very fact such threats are being made indicates the change in tone from the previous, more business-friendly parliament.

Together with the Socialists' 191 members, the political groups opposing the agreement could count on 341 votes, just 35 short of a majority.

Passing the accord is likely to depend on centrist parties forming a grand coalition and much will depend on how the Socialists, who say they oppose the dispute mechanism, vote.

In 2012 the EU Parliament flexed its muscles by rejecting an Anti-Counterfeiting Trade Agreement, which would have set global standards for enforcement of intellectual property rights.

Blocking the Canada trade deal would send a very negative signal on the chances of the even more ambitious EU-U.S. accord, which if approved would encompass almost half of the global economy and about a third of world trade.

"This issue is very important since the accord with Canada with the arbitration clause would foreshadow a deal with the United States," said French far-right leader Marine Le Pen.

Hostility to the dispute settlement panel has united those such as Le Pen, who see it as a threat to national sovereignty, and those worried about the implications for environmental law.

Dutch Green MEP Bas Eickhout said the draft deal would "open the backdoor" for firms to kill off environmental legislation.

The EU and Canada hope to sign the accord -- officially known as the Comprehensive Economic and Trade Agreement (CETA)-- at an Ottawa summit on Sept. 25-26, officials said. It must still be ratified by both the EU and Canadian parliaments.

(1 US dollar = 0.7588 euro)

(Additional reporting by David Ljunggren in Ottawa; Editing by Gareth Jones)

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Is This EU-US Trade Deal A 'Once-In-A-Generation' Opportunity?

Forbes 8/28/14

The Transatlantic Trade and Investment Partnership ("TTIP") might not have come up on the radar for most folk but perhaps it should. The silence is largely down to something of media blackout – with a few exceptions. Why this might be makes one wonder given that it could have wide-ranging ramifications and information is out there at the click of a mouse.

One of the few media outlets in the UK to pass comment, The Guardian, carried an article last November by environmental campaigner George Monbiot titled 'This transatlantic trade deal is a full-frontal assault on democracy.' He noted the silence coming out of Brussels on the issue.

In essence TTIP is a comprehensive free trade and investment treaty presently being negotiated – in secret – between the European Union (EU) and the United States (U.S.). The main objective is to remove regulatory barriers or differences, which limit or restrict the potential profits to be made by transnational corporations.

A panel of corporate lawyers will effectively be able to overrule national Parliaments and democratically elected Governments, through a mechanism called the 'Investor-State Dispute Settlement' (ISDS). It is already being used by companies in various parts of the world including Canada and El Salvador to dampen regulations designed to safeguard citizens and protect the planet.

The barriers are considered by a number of campaigning organisations such as War on Want, a UK-based anti-poverty charity, to be some of our "most prized social standards and environmental regulations". These include labour rights, food safety rules,

regulations on the use of toxic chemicals, digital privacy laws and even new banking safeguards introduced to prevent a repeat of the 2008 financial crisis. The stakes could not be higher.

The intention to launch TTIP negotiations was first announced by President Barack Obama in his State of the Union address in February 2013, and the first round of negotiations took place between European Commission and U.S. officials in July 2013.

John Hilary, executive director of War on Want, who wrote a 42-page document titled ‘The Transatlantic Trade and Investment Partnership (TTIP): A Charter for deregulation, an attack on jobs, an end to democracy’ (Feb 2014) explains: “The aim is to rush through the talks as swiftly as possible with no details entering the public domain, in the hope that they can be concluded before the peoples of Europe and the U.S. find out the true scale of the TTIP threat.” The document is available in English, French, Spanish and other languages to download via their website.

So, what exactly is the threat? On top of the deregulation agenda behind TTIP, it is also seeking to create new markets by opening up public services and Government procurement contracts to competition from transnational corporations, thereby threatening – as some campaigners like Hilary argue – “to introduce a further wave of privatizations in key sectors, such as health and education.” For some corporates this may be seen as bonanza time.

Perhaps most concerning of all to them is that TTIP seeks to grant foreign investors a new right to sue sovereign states in front of ad hoc arbitration tribunals for loss of profits resulting from public policy decisions. This reinforces the view that multinational corporations will run rampant in pursuit of profit.

The ISDS mechanism, as Hilary puts it “elevates transnational capital to a status equivalent to the nation-state itself”, and threatens to

undermine the most basic principles of democracy in the EU and U.S. alike. Some have suggested it poses the greatest threat to democracy since World War Two.

Currently there is a growing body of concern among U.S. and EU citizens over the threats posed by TTIP. Civil society groups are now joining forces with academics, parliamentarians and others to prevent pro-business Government officials in basically signing away the key social and environmental standards. Over 100 groups across the EU, including the UK-based World Development Movement, have signed a document expressing their opposition to TTIP negotiations.

In the UK a series of protests were staged this July in towns and cities across the country against the proposed deal. Campaigners also launched a 'Citizens' Initiative' petition to the European Commission with the aim of getting a million signatures against the deal.

Elsewhere, Campact, a German grass roots campaigning group, also launched a petition calling for a stop to the TTIP negotiations. So far 625,000 have signed. One million signatures are needed to stipulate that the EU Parliament spends a day discussing this petition.

Teresa Villiers, a British MP and Secretary of State for Northern Ireland, responding in a standard letter to comments on TTIP from Phil Fletcher, a stalwart Green Party campaigner in London who stood in May's local elections in England (in her constituency), believes this partnership is "a once in a generation opportunity".

The argument put forward is that it would lead to significant benefits in terms of jobs and growth, with the potential to deliver £10 billion (c.US\$16bn) to the UK economy each year. However, a study by academics from Manchester and Ghent universities casts doubt over the figure and estimates that in reality the likely effect on growth would be a fraction of this amount.

Furthermore, while the European Commission has claimed the deal would bring people in the UK and the rest of Europe an extra £2 (c.\$3.2) per person per week by 2027, a European Commission study has forecast that one million people across the UK, Europe and the U.S. could lose their jobs through the deal. So, the jury is out.

Highlighting concerns the Slovak Government has already been sued under a legal system similar to that being proposed under TTIP for reversing health privatization policies.

On environmental regulations, Fletcher notes: “The EU has openly acknowledged that TTIP will further intensify pressure on the environment, and that it will add an extra 11 million metric tonnes of carbon dioxide (Co2) to the atmosphere, making it difficult for the EU to meet ITS emission reduction commitments under the Kyoto protocol.”

It does seem a tad strange that there has been no attempt by the UK Government to inform or consult the public about what Monbiot calls “this monstrous assault on democracy”, especially given the fierce debate about continued British membership of the EU. This is a debate that is likely to run.

Friday, August 29, 2014
Inside US Trade

TPP Meeting Preview

Low Expectations For Hanoi Round Cast Doubt On November TPP Result

Posted: August 29, 2014

Editors Note: Inside U.S Trade will have a reporter on the ground in Hanoi to cover the TPP informal round, and will be heading to Seoul afterward to deliver an update on Korea's TPP deliberations. Please continue to check www.insidetrade.com for updates.

At an informal round of talks taking place Sept. 1-10 in Hanoi, Trans-Pacific Partnership (TPP) negotiators are poised to confront some of the most contentious issues in the negotiations, including intellectual property (IP) protections for drugs and disciplines on state-owned enterprises (SOEs). But with no plans to actually resolve any of these tough issues in Hanoi, observers are questioning whether it is realistic to expect that the Obama administration will achieve its goal of reaching a substantial TPP outcome by November.

The talks on pharmaceutical IP and SOEs, for example, will focus on so-called "technical" work. In practical terms, this means the negotiators will be trying to further clarify and define the various options for resolving these issues, without actually pulling the trigger. Some of these decisions can be made by TPP chief negotiators, who will be in Hanoi, but most are likely to be left up to ministers.

On SOEs, the parties have come close to agreement on how to craft a definition for which entities will be covered, and are now focusing the bulk of their energy on negotiating country-specific exceptions to the disciplines. Countries where SOEs dominate the economy, like Vietnam, have made this phase of the talks arduous, and it will likely take ministerial-level talks to resolve it, sources say.

The talks on drug IP also involve a series of complex issues that will likely have to be resolved at the political level. TPP countries have generally coalesced around a U.S. proposal under which less-developed members would be able to temporarily provide a lower standard of drug IP protection than more developed members. But they are still at odds over the mechanism for transitioning between the two standards, as well as what will be the core obligations for both standards on issues like patent linkage and exclusivity periods for clinical trial data.

Both aspects are technically difficult, politically sensitive and hotly debated between the 12 TPP parties. The United States specifically has faced significant pushback on its demands and has already backed down from its initial position.

In the span of the 10-day informal round in Hanoi, the negotiating groups on IP and SOEs will meet almost every day, as will the group dealing with the painstaking rules of origin (ROO) chapter. The other negotiating groups meeting will be textiles, investment, environment, and legal issues, according to informed sources. In addition, negotiators will hold meetings on market access for goods, services and investment, but not government procurement.

But those are not the only issues on deck for Hanoi. Felipe Lopeandia, Chile's chief TPP negotiator, disclosed in an Aug. 21 briefing with stakeholders that one of the key objectives of the round will be to make progress on the final outstanding issues in the chapters on sanitary and phytosanitary (SPS) measures, labor rights, technical barriers to trade (TBT), and services, according to a Chilean government press release. His comments suggest that these four topics will be tackled by the chief negotiators, while lower-level officials will discuss the other issues.

Even if negotiators further clarify potential compromises in Hanoi, the next steps for the TPP negotiations are unclear. One informed source said TPP countries have not yet confirmed that they will hold a TPP ministerial meeting in October, as the U.S. has proposed, and probably will not make a decision on that until after the Hanoi informal round.

In addition, it is still unclear what type of outcome on TPP the U.S. is seeking for a November meeting of Asia-Pacific Economic Cooperation (APEC) leaders, this source said. Observers say it would be extremely difficult to reach a partial agreement of any kind due to the links between the different aspects of the negotiations. Every concession a party makes is conditioned on gains in another area, meaning that without the whole picture, a deal will continue to be elusive.

Meanwhile, officials from South Korea are slated to attend the informal round in Hanoi to keep an eye on how the TPP talks are unfolding. Korea has announced its interest in joining the TPP negotiations and held consultations with all current participants, some of them multiple times, but has still not formally sought entrance.

The U.S. has been abundantly clear in saying that it wants to conclude the deal with the current 12 participants before welcoming anyone else to the table, while at the same time saying that Korea's willingness to resolve bilateral issues will impact U.S. support for an eventual Korean TPP bid. Seoul, meanwhile, has continued to hold open that it should be able to join the talks while they are still ongoing if they drag on much longer.

The linchpin of the whole TPP deal has long been perceived to be Japan's willingness -- or lack thereof -- to improve its market access offer for sensitive agricultural products. In this discussion, the U.S. and Japan are the key players.

The two countries claimed they found a path forward on bilateral issues during President Obama's trip to Tokyo in April, when the U.S. dropped its demand that Japan eliminate tariffs on beef and pork. U.S. negotiators have since claimed that Japan is now engaging more seriously on agricultural market access with other TPP parties. They also claim this is unlocking some of the difficult issues in the rules negotiations.

There are indications this has happened to some degree since a May informal TPP round in Ho Chi Minh City, Vietnam, but not with any great speed. Sources say Japan has discussed agricultural market access for its sensitive areas with parties beside the U.S., but only in a general way. Talks on specific tariff lines appear to be far away.

In light of this, Canada -- which has agricultural offensive interests and but also significant import sensitivities due to its supply management systems for dairy, poultry and eggs -- is not expected to come to Hanoi with any new flexibility, sources said. While U.S. officials have charged that Ottawa is hiding behind Tokyo on agricultural market access, other sources sympathetic to Canada take exception to that argument.

One source noted that all TPP parties, including the U.S., are holding off on making politically difficult concessions until the parameters of a market access deal with Japan become clearer. In that regard, Canada is no different, although its major sensitivity happens to be agriculture, this source argued.

Amid all of this, a potential game-changer could be if the U.S. and Japan follow through with a July pledge to disclose to other TPP parties the details of their bilateral discussions on market access in October. That could generate momentum in the negotiations, although some observers say it would still be difficult to wrap up all outstanding issues before November.

Even some top-level political officials do not seem to think the talks will unfold quickly enough for a deal to materialize by the end of the year. In early August, New Zealand Trade Minister Tim Groser became the second minister from a TPP country to predict that the negotiations will not be concluded in 2014.

Groser's comments echoed Australian Trade Minister Andrew Robb, who said in June he did not think the TPP talks would be finished this year and that a more likely timeline for their conclusion is the first half of 2015.

President Obama said following a June summit with New Zealand Prime Minister John Key that by the time of the November APEC meeting, "we should have something that we have consulted with Congress about, that the public can take a look at and we can make a forceful argument to go ahead and close the deal." Chilean President Michelle Bachelet said on July 1 that the U.S. is seeking a "draft" TPP deal by the APEC meeting.

Some observers say they feel a sense of déjà vu about the current dynamic. Around this time last year, U.S. Trade Representative Michael Froman announced that the TPP talks were in the "end game." In November 2013, he said the time is "now" for TPP parties to make the difficult political decisions needed to complete the deal.

In a conference call with reporters on Aug. 28 from Myanmar, where he attended meetings with economic ministers from Southeast Asia and other trading partners, Froman said the U.S. is looking at the Hanoi round "as an opportunity to make further progress on the outstanding issues and expect it to be very productive." He said he discussed the TPP negotiations in bilateral meetings with several TPP trade ministers in Myanmar, but did not stop in any TPP countries before returning home.

Since the 19th round of TPP negotiations in Aug. 2013, held in Brunei, TPP parties have stopped calling their gatherings "rounds" and have not had a formal role for stakeholders during negotiating meetings. But they have held a slew of meetings at different levels since.

These include a chief negotiators meeting in Washington in September 2013, an informal round in Salt Lake City in November 2013, and a December 2013 ministerial in Singapore. Another informal round and ministerial were held in Singapore in February, followed in May by a similar back-to-back round and ministerial in Ho Chi Minh City and Singapore, respectively. The last informal TPP round was held in July in Ottawa

American Envoy To Brussels Says EU Needs TTIP Benefits More Than U.S.

Posted: September 4, 2014

The new U.S. ambassador to Brussels this week said the European Union is more in need of the potential economic benefits of the Transatlantic Trade and Investment Partnership (TTIP) than the United States because of Europe's "continuing sluggish economic performance."

"Both sides of the Atlantic need faster growth and more and better jobs, but let's face it: Europe needs them even more," the ambassador, Anthony Gardner, said before a Sept. 3 meeting of the EU's International Trade Committee (INTA) in Brussels. "How is Europe going to provide its youth a future, its retirees a decent pension and pay for the social protections it wants without growth?"

At the same time, Gardner argued that the U.S. "remains fully committed to these negotiations and to an ambitious outcome." He rejected the notion that the upcoming midterm elections in November are impacting U.S. engagement, and said the administration's lack of Trade Promotion Authority (TPA) "is not an impediment to proceeding with negotiations now." He added that the administration is "confident that we will succeed in getting TPA."

Gardner insisted that a TTIP deal could be completed by the end of next year, but flatly rejected a proposal advanced by Italy's trade minister to break the initiative up into phases for earlier completion.

"[O]nly a comprehensive agreement would yield the significant results our leaders want and at the same time provide the necessary balance," he said. "I know that our friend [Italian Vice Minister of Trade] Carlo Calenda believes that an interim agreement should be considered, but we continue to believe that only a comprehensive agreement will work."

The ambassador's remarks – his first before a European Parliament committee since taking the position in February – come after more than a year of the TTIP negotiations during which both U.S. and EU observers have often questioned the U.S.'s seriousness about the initiative, and seen the EU as playing the role of the "demandeur."

Those sentiments were echoed during the hearing by Marietje Schaake, a Dutch member of the Group of the Alliance of Liberals and Democrats for Europe, the parliament's fourth-largest political party.

Schaake, who is also a member of a parliament group focusing on relations with the U.S., said the EU is not seeing the type of commitment and sense of urgency from the U.S. that is needed to complete the deal on "one tank of gas." She faulted both the Obama administration and the U.S. Congress for this.

"I think it is now time, especially on the American side, to step on the gas because in regard to some developments such as Trade Promotion Authority; we are not seeing the commitment and the sense of urgency we would like to see," Schaake said. "There's [a] significantly less ambitious appearance of members of Congress in meeting with us."

"I think we're at a crucial point with TTIP and with how this is going to take shape in moving on, where we need more commitment from the House of Representatives and the Senate, as representatives of our respective citizens and [businesses] to make TTIP work. I encourage you to send that message to Washington loudly and clearly," she said.

The U.S. ambassador also dismissed as "peripheral" many of the worries about TTIP that have been raised by EU civil society groups, including that it will introduce into Europe more genetically modified food and sanitizing washes for meat and poultry, but also more broadly threaten the ability of EU governments to regulate. Presenting TTIP as a strategic deal, Gardner sought to make the case that these issues should be seen within the broader geopolitical context the U.S. and EU now face. He went as far as to contrast fears raised in the EU about TTIP leading to imports of chlorine-washed chicken to the downing of the Malaysian Airlines flight over Ukrainian airspace, which killed 298 passengers and crewmembers.

"At a time when Russia is supplying troops and equipment to the separatists in the Ukraine and shares responsibility for the killing of European citizens in the skies above Ukraine, it would be appropriate to put peripheral issues such as chicken washed in chlorine into some perspective," Gardner said.

"To those who are skeptical about this agreement and who refuse to believe the assurances provided by both sides, I would simply say this: We are still in a relatively early stage of the negotiations. Do not prejudge the results. Wait until we have advanced texts," he added.

The ambassador also downplayed criticisms that the value of the TTIP deal might be overstated. In response to a question by Yannick Jadot, a French member of the Green party, who suggested the estimates have been exaggerated, Gardner said this issue is a moot point.

"You mention that the projections for growth for TTIP might be too ambitious," Gardner said. "Maybe they are, maybe they aren't. But my answer to you is: So what? My answer is Europe needs growth. It needs jobs ... Are we really in a position to say 0.5 percent [gross domestic product] growth isn't good enough or it will take too much time for us to reach that level? I don't think we have the luxury to make that kind of argument."

In what appeared to be an allusion to China and other major economies, Gardner warned that if TTIP is not concluded, those economies will be the ones setting global standards rather than the U.S. and EU. Gardner said those standards would be unpalatable for the EU and U.S. because other countries do not have the same shared values as the EU and U.S.

"If we fail [to complete TTIP], other countries who do not share our values and whose weight in the international trading system is growing fast will set the agenda themselves," Gardner said.

Gardner also set to dispel what he deemed to be "myths" about TTIP, including that the U.S. government procurement market is more closed than the EU market. He argued that the openness of the EU and U.S. public procurement markets are "roughly equal."

He labeled as "counterproductive" demands for the U.S. to repeal the Buy American Act, which requires a preference for U.S.-made goods in federal government purchases. Instead, he called on the EU to present a "specific list of concerns and demands" on procurement so that the U.S. can sit down and determine whether it can respond to them.

The EU has sought more access to U.S. federal and sub-federal procurement under TTIP. Granting additional access for goods procurement at the federal level would require USTR to waive the Buy American Act, which it already has the legal authority to do.

Giving EU companies additional access to state-level procurement would require the consent of the states themselves. Gardner acknowledged this hurdle, pointing out that the federal government cannot mandate how U.S. states spend their tax dollars.

He said the federal government is willing to engage with these states to see if they are willing to expand their international procurement commitments, but appeared to put the onus on the EU to convince state governments to do so. "I would suggest the best way to convince a governor or a state legislator they should participate in these negotiations is to lay out to them the benefits and the opportunities their states would gain," he said.

Many of the MEPs raised the issue of transparency in the TTIP negotiations, but Gardner was adamant that the U.S. has provided all of the transparency it can.

"It is rather difficult to convince us to provide you more access to negotiating texts than we provide our own members of Congress," Gardner said.

Marine Le Pen, a French MEP who is a euroskeptic, suggested that it is easier to visit a prisoner in jail than to view TTIP texts. He asked Gardner if members of Congress were satisfied with the level of transparency of the negotiations.

"Yes, they are happy with the transparency we give them," Gardner said. "They have access and their staff members do have access to our negotiating texts. We simply can't do more, and I'm not sure how to take forward, how to be more responsive to the clear concerns that have been expressed by this body."

Despite Gardner's comments, transparency in trade negotiations has remained a contentious political issue in Congress. EU Trade Commissioner Karel De Gucht, other officials and civil society groups have previously criticized the U.S.'s reading room procedure and the overall access to TTIP negotiating documents (*Inside U.S. Trade*, July 11).

Inside U.S. Trade - 09/05/2014, Vol. 32, No. 35

New Trade Deal—TISA—Could Undermine Safety, Environmental, Workers' Rights Regs

0 COMMENTS

09/05/2014

[Ryan Thornton](#)

The United States is currently negotiating a new International Services Agreement called the Trade in Services Agreement, or TISA. At the start of 2012, a number of World Trade Organization (WTO) member states, including the European Union, formed a group called the "Really Good Friends of Services" or RGF (and yes, that is really what they named themselves), with the purpose of drafting a trade agreement that would further liberalize trade and investment in services and expand regulatory disciplines on services sectors.

However, like past services agreements (such as the [GATS](#)), the TISA is not about tariffs. Rather, a large part of this agreement will be about removing what are called "regulatory barriers to trade," which is another way of saying that this agreement could essentially change the regulation of many public and commercial services. Instead of benefiting the public interest, this agreement seems positioned to serve the interests of private, for-profit corporations.

The term "services" refers to a wide range of economic activities such as construction, medicine, education, retail, e-commerce, telecommunications and financial services, among others. Many workers in these sectors rely on unions to represent them and advocate for things like fair wages and job safety. With growth in the services sector continuing at unprecedented levels, this category has become an increasingly important priority in global trade flows, and the direction of trade obligations in this area is critical. The group of countries currently negotiating TISA accounted for [nearly 70% of world trade in services in 2012](#).

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Although increasing services trade flows can create economic advantages, it must be done right if it is going to benefit working families and not just global corporations. Too often trade deals are simply aimed at [deregulation](#) and don't give adequate thought to why regulations are necessary in the first place. AFL-CIO Trade Policy Specialist Celeste Drake gave a [presentation](#) in 2013 at the annual WTO public forum about how TISA, if it is simply a deregulation tool, could put immigration reform and public transit programs at risk.

In recent decades, the United States has negotiated trade agreements that largely benefited corporate power at the expense of working people. The guiding question for new trade agreements that work for workers must be: will these trade rules promote decent work and improve standards of living? Too often in past trade agreements that answer has been no.

It is imperative that governments retain their ability to regulate in the public interest on important economic and social issues like environmental protection, public health, financial stability and protections for workers and consumers.

The TISA negotiations largely have been kept secret, and apart from occasional leaked documents, little is known about the specific points in the agreement. The TISA negotiations should be open to the public and based on well-researched impact data. We cannot afford an agreement that hurts working people around the world and contributes to growing income inequality.

Public Services International (PSI), the global union federation for public-sector workers, is leading the way in keeping tabs on this agreement and researching its potential impacts. You can get additional information about the TISA from PSI's website. PSI is hosting a Global Trade Summit in Washington, D.C., on Sept. 16, 2014, to discuss the impacts of trade on public servants, and the AFL-CIO is participating. Check back here for more information after the summit.

Nomination of Cecilia Malmstrom as E.U. Trade Envoy Signals Interest in U.S. Talks

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By DAVID JOLLY
SEPTEMBER 10, 2014
New York Times

PARIS — The selection of Cecilia Malmstrom on Wednesday to be Europe’s new trade chief suggests that Jean-Claude Juncker, the president-elect of the European Commission, is eager to restart stalled talks with the United States on the creation of a trade partnership.

Ms. Malmstrom, a member of the pro-free market Swedish Liberal Party, is taking over the trade portfolio from Karel De Gucht, a Belgian, with orders to move on negotiations with Washington to create what would be one the world’s largest trade areas.

In a “mission letter” that was posted on the commission’s website, Mr. Juncker called on Ms. Malmstrom to focus on working toward “a reasonable and balanced” trans-Atlantic trade and investment partnership with the United States, one “which neither threatens Europe’s safety, health, social and data protection standards, nor jeopardizes our cultural diversity.”

The aim, he wrote, “must be to conclude the negotiations on a reciprocal and mutually beneficial basis.”

US Trade Today
9/12/14

Vietnamese Delegation Heading To Washington Next Week To Talk TPP

HANOI — A high-level Vietnamese government delegation is planning to travel to Washington next week to discuss the country's priorities in the Trans-Pacific Partnership (TPP) and other issues in meetings with U.S. officials, lawmakers, and business groups, according to sources briefed on the details of the trip.

The delegation will be led by Vietnamese Deputy Prime Minister Vu Van Ninh and Vietnam's chief TPP negotiator, Vice Minister of Industry and Trade Tran Quoc Khanh, sources said. During his visit, Vu will meet with U.S. Trade Representative Michael Froman to advance work on TPP, according to a Sept. 10 press release from USTR.

In addition, the two Vietnamese officials are expected to make remarks at the U.S. Chamber of Commerce on Sept. 15 in an event co-hosted by the U.S.-ASEAN Business Council.

The goals of the delegation's trip are to promote U.S.-Vietnam trade and economic relations more broadly, and to focus on a few key issues, including TPP.

One source familiar with the trip said the delegation is expected to stress the importance of Vietnam gaining additional market access for apparel and footwear under TPP, and securing a rule of origin on apparel that allows it to take advantage of that access. These outcomes are especially important for Vietnam in light of the commitments on labor, state-owned enterprises, and other issues that it is being asked to take on by the U.S., this source said.

Sources said there are no signs here that the U.S. is close to yielding in the near term on the rule of origin issue for apparel, in light of its own domestic sensitivities. Many sources speculate this is has led Vietnam to avoid engaging seriously on issues on which it is sensitive, such as labor rights.

In a related development, Vietnam has put forward a formidable list of demands to exempt many of its SOEs from new rules that the United States hopes will counteract the competition-distorting effects of the government assistance such firms enjoy (see related story).

The exact dates of the Vietnamese delegation's trip, and who the delegation will meet with in the U.S. capital, were not clear. But sources speculated that the delegation is likely to meet with members or staff of the House Ways & Means and Senate Finance Committees.

Goods and services Brussels, 19 September 2014

EU chairs next round of plurilateral talks on services

The next round of plurilateral negotiations for the Trade in Services Agreement (TiSA) will start on Sunday 21 September in Geneva.

As the chair of the five days gathering, the EU is keen to bring a new dynamics to the services discussion. In this round, the analysis of the offers on market access that are on the table will be linked to the discussions on regulatory texts in specific services sectors. At the end of the round, the participants will try to draw conclusions on the relation between schedules and disciplines in a broader, horizontal discussion.

This round will also focus on four key regulatory disciplines which have been chosen for longer and detailed discussion: financial services, telecommunication, domestic regulation & transparency and mode 4. The group will also briefly exchange views on all modes of transport, professional services, competitive delivery services and distribution.

What is more, during the week-long negotiations, three new proposals will be presented. The EU will make a proposal on government procurement in services with the aim of setting an end to discrimination in this area. The EU envisages the elimination of all differences in treatment between domestically owned and foreign owned (but domestically established) companies in the process of providing services to a public authority. Other participants will make proposals on environmental services and health related services.

Background

Since the talks were launched in March last year, 21 of the 23 participants have tabled their opening bids. Only Pakistan and Paraguay have not yet listed which of their services markets they are prepared to open up and to what degree.

Although the negotiations do not fall under the remit of the WTO, the EU makes efforts to ensure that the TiSA is compatible with the General Agreement on Trade in Services (GATS). Ensuring that the agreement is GATS compatible will not only make it open to other WTO members who wish to join later, but also make it easier to integrate it into the WTO. Therefore the round has been deliberately scheduled to be back-to-back with regular meetings of the WTO and of the General Agreement on Trade in Services (GATS). The aim is to increase synergies with and ensure participation of capital-based officials.

Cecilia Malmstrom, E.U. Trade Nominee, Points to 'Toxic Element' in U.S. Talks

BRUSSELS — The nominee to be the European Union's next trade commissioner said on Monday that a crucial provision sought by the United States in current trans-Atlantic trade talks was a "toxic element" that should be modified or eliminated.

The nominee, Cecilia Malmstrom, told a packed hearing at the European Parliament in Brussels that a proposed trade-pact measure that would give companies the right to sue countries was a "nuclear weapon" that might have to be abandoned.

Ms. Malmstrom, a 46-year-old Swede who has served as the European Union's commissioner for home affairs for the past five years, also called for throwing the trade negotiations open to fuller public scrutiny to quell fears in Europe that cherished social and environmental safeguards might be compromised in any pact with the United States.

Her remarks indicated that if Ms. Malmstrom was approved as the next trade commissioner, the negotiations, which have made little apparent headway since they began last year, would have no easier path.

"I have no illusions that T.T.I.P. is not going to be very difficult," she said, referring to the Transatlantic Trade and Investment Partnership, as the pact would be called.

"There is a lot of skepticism," Ms. Malmstrom said, adding that there should be a "new start" in the way that European negotiators approach the talks in order to gain public trust.

She has been nominated to succeed Karel De Gucht. If confirmed as trade commissioner, Ms. Malmstrom would be taking on the role amid efforts by Russia to stop Ukraine from being drawn toward the West through a trade agreement with the European Union. Viktor F. Yanukovich was ousted in February as Ukraine's president after he refused to sign the deal last autumn.

The so-called association agreement was signed in June by Ukraine's new government. But fierce opposition from Russia prompted Ukraine and the European Union this month to postpone putting much of the accord into effect until 2016.

"I will not, if I am confirmed, and the commission will not, allow Russia to amend the agreement," Ms. Malmstrom said.

Her testimony marked the start of more than a week of hearings at the European Parliament, where lawmakers will question nominees for the top jobs at the European Commission, the executive arm of the European Union.

The Parliament is expected to decide on Oct. 22 whether to accept, or reject, the entire slate of nominees in a single up-or-down vote.

The trans-Atlantic talks with the United States were announced by President Obama in February 2013 and the negotiations entered their seventh round this week in Washington. But negotiators say the two sides remain far apart in important areas.

Resistance has developed partly as a result of widespread concerns in Europe, among labor unions and environmentalists and officials of some governments, that the United States could win the power to override protections in areas like environmental protection, food safety and publicly funded health care.

Those concerns have focused in particular on the right-to-sue provision — formally known as investor-to-state dispute settlement — which is an increasingly common component of trade agreements around the world. The provision is meant to ensure that governments comply with their treaty obligations by allowing companies to bring lawsuits directly against individual countries.

Even if a trade agreement is reached with the United States, it could be vetoed by the Parliament, which in May elections gained a significant number of members from populist and protest parties skeptical about globalization and trade.

“It’s going to be difficult to get support for T.T.I.P. in the Parliament — you need to tell this to your American friends,” said Elmar Brok, a German lawmaker who supports the deal.

From: FN-USTR-IAPE <IAPE@ustr.eop.gov>
Date: October 1, 2014 at 11:51:06 AM EDT
To: Undisclosed recipients;;
Subject: Secured Advisors TPP Briefing Schedule

Office of the United States Trade Representative

Executive Office of the President | www.ustr.gov

Office of Intergovernmental Affairs & Public Engagement | contactustr@ustr.eop.gov

Attached is the draft schedule for the briefing that USTR will host for cleared advisors and liaisons in Washington, DC on Thursday, October 9th. Please note, the agenda is not final and there may be slight changes made over the next couple of days. We will try not to make substantial changes given the impact that would have on your schedules.

Our lead negotiators will provide updates on their respective chapters to all advisors. At the end of the day, we will convene break-out sessions with each Committee. We are requesting each Committee Chair submit a list of the specific issues that your respective Committee would like to discuss during the break-out session to Julia Friedman at jfriedman@ustr.eop.gov by COB Monday, October 6th. We will use the lists submitted by the Committee Chairs to assign negotiators to each of the break-outs.

If you have any questions, please feel free to reach out to Julia at any time. Thank you for your patience.

Office of the United States Trade Representative

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Cleared Advisors Briefing on TPP

Thursday, October 9, 2014

U.S. Department of Commerce

HCHB Auditorium (Main Entrance 14th Street, NW)

DRAFT AGENDA

9:00-9:15 AM Welcome

9:15-9:45 AM State-Owned Enterprises

9:45-10:00 AM Customs/Trade Facilitation

10:00-10:30 AM Rules of Origin

10:30-10:45 AM E-Commerce

10:45-11:15 AM Financial Services

11:15-11:45 AM Cross Border Services and Non-Conforming Measures

11:45 -12:15 PM Investment and Investor-State Dispute Settlement

Lunch

1:00-1:15 PM Technical Barriers to Trade

1:15-1:35 PM Sanitary and Phytosanitary Measures

1:35-1:55 PM Market Access (Agriculture)

1:55-2:15 PM Market Access (Industrial Goods)

2:15-2:35 PM Market Access (Textiles)

2:35-3:05 PM Environment

3:05-3:20 PM Labor

3:20-3:50 PM Intellectual Property

Individual Committee Meetings

4:00-5:30 PM ITACs (Auditorium)

4:00-5:30 PM APAC & ATACs (Room 1414)

4:00-5:30 PM IGPAC (Green Room)

4:00-5:30 PM LAC liaisons (Room 1411)

4:00-5:30 PM ACTPN liaisons (Room 1410)

(Washington Post)

The trade clause that overrules governments

By [Harold Meyerson](#) Opinion writer October 1 at 7:37 PM

One of the public policy paradoxes of the past quarter-century is why the center-left governments of advanced economies have supported trade policies that undermine the very environmental and labor protections they fight for at home. Foremost among these self-subverting policies have been the [Investor-State Dispute Settlement \(ISDS\)](#) provisions included in every significant trade deal the United States has signed since Ronald Reagan's presidency. Under ISDS, foreign investors can sue a nation with which their own country has such treaty arrangements over any rules, regulations or changes in policy that they say harm their financial interests.

These suits aren't heard in the courts, however. If a U.S. company wants to sue, say, California or the Environmental Protection Agency, it must pursue its claim in a California or federal court. Under ISDS, however, a foreign-owned company suing California or the EPA gets to plead its case to an extra-governmental tribunal of three extra-governmental judges engaged just for that case — and the judges' ruling can't be appealed to a higher court. Under ISDS, there are no higher courts.

The mockery that the ISDS procedure can make of a nation's laws can be illustrated by a series of cases. In Germany in 2009, the Swedish energy company Vattenfall, seeking to build a coal-fired power plant near Hamburg, used ISDS [to sue the government](#) for conditioning its approval of the plant on Vattenfall taking measures to protect the Elbe River from its waste products. To avoid paying penalties to the company under ISDS (the company had asked for \$1.9 billion in damages), the state eventually [lifted its conditions](#).

Three years later, Vattenfall sued Germany for its post-Fukushima decision to phase out nuclear power plants; [the case is advancing](#) through the ISDS process. German companies that owned nuclear power plants had no such recourse.

After Australia passed a law requiring tobacco products to be sold in packaging featuring prominent health warnings, a Philip Morris subsidiary [sued the government](#) in Australian court and lost.

It also sued the government through the ISDS, where the case is still pending. The health ministry in next-door New Zealand [cited the prospect](#) of a Philip Morris victory in ISDS as the reason it was holding up such warnings on cigarette packages in its own country.

ISDS provisions began popping up in trade deals during the Reagan and first Bush administrations. The mystery is why they continued to be included in trade deals, such as NAFTA, enacted under Democratic administrations in the United States and social democratic governments in Europe and elsewhere. While beloved by Wall Street, they have drawn the increasing ire of environmentalists and labor advocates — two of the center-left's key constituencies.

Now, at long last, one of those center-left governments has come to its senses. In a speech last week to the Bundestag, German Economy Minister Sigmar Gabriel — a leader of the Social

Democrats in Chancellor Angela Merkel's coalition government — announced the government's opposition to including the ISDS procedure in a pending trade agreement with Canada and, by extension, in the proposed Transatlantic Trade and Investment Partnership between the European Union and the United States. There would be no transatlantic trade deal, said Gabriel, unless negotiators scrapped the ISDS provision and the special treatment for foreign investors that it affords.

The German government's decision was likely shaped by its experience with the ISDS in the Vattenfall cases, but its position has broad European support. In March, E.U. Trade Commissioner Karel de Gucht let it be known that the European Union had proposed dropping the ISDS from the transatlantic agreement, but the United States objected. The president-elect of the European Commission, Jean-Claude Juncker, has said that he won't "accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes."

Which raises the question of why the president of the United States thinks the jurisdiction of U.S. and European courts should be subordinated to those special ISDS courts. An E.U.-U.S. treaty with an ISDS clause invites a massive end-run around national regulations: Public Citizen's Global Trade Watch has counted 24,200 U.S. subsidiaries of E.U.-based corporations that could avail themselves of ISDS under the treaty, and 51,400 E.U. subsidiaries of U.S.-based companies that could do the same.

The Obama administration's insistence on ISDS may please Wall Street, but it threatens to undermine some of the president's landmark achievements in curbing pollution and fighting global warming, not to mention his commitment to a single standard of justice. It's not worthy of the president, and he should join Europe in scrapping it.

Read more from Harold Meyerson's archive or follow him on Twitter.

http://www.washingtonpost.com/opinions/harold-meyerson-allowing-foreign-firms-to-sue-nations-hurts-trade-deals/2014/10/01/4b3725b0-4964-11e4-891d-7131052086a0_story.html