

TISA

versus

Public Services



Public Services International
Internationale des Services Publics
Internationale de Servicios Públicos
Internationale der Öffentlichen Dienste
Internationell Facklig Organisation för Offentliga Tjänster
國際公務勞運

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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

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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



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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.

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

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

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

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

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

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

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

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

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

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

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



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

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

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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.

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

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

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

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

Can TISA be integrated into the WTO system?

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

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

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

agreement on terms dictated by the Really Good Friends group.

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

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

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

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

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

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

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

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

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

Whose idea was the TISA?

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

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



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

and continued to try and salvage an agreement until at least 2009.

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

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

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

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

What is on the table?

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

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

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

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

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



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WTO protest
against banks,
Geneva.
Photo: PSI

Remunicipalization

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



Public municipal water campaign, Germany.
Photo: Multinational Observer

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

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

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

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

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

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

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

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

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

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

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

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

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

Beyond the GATS

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

Standstill and ratchet provisions

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

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

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

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

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

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

Domestic regulation

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

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

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

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

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

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

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



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

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

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

The chill effect: public auto insurance

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

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

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

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

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

Movement of natural persons (Mode 4)

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

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

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

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

Cross-border data flows and privacy

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



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

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

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

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

Sectoral regulatory disciplines

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

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

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

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

Protecting public services

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

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

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

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

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

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

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

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



Rallying for public services, Canada. Photo: flux

Endnotes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 29 The Global Services Coalition is an umbrella lobby group that includes the U.S. Coalition of Services Industries, the European Services Forum, the Australian Services Roundtable, the Canadian Services Coalition, the Hong Kong Coalition of Service Industries, the Japan Services Network, the Taiwan Coalition of Service Industries, and TheCityUK, which promotes the U.K. financial services industry.
- 30 Global Services Coalition. (September 10, 2013). "Letter to Karel de Gucht, Commissioner for Trade, European Commission." Online at: <http://www.esf.be/new/wp-content/uploads/2013/10/GSC-Letter-on-TISA-to-Karel-de-Gucht1.pdf>.
- 31 Coalition of Services Industries. (Feb. 26, 2013). Letter to Douglas Bell, Office of the United States Trade Representative. p. 5. Online at: https://servicescoalition.org/images/CSI_ISA_Comment_Letter_FINAL.pdf.
- 32 Devarakonda, Ravi Kanth. (March 17, 2012). "An Assault on Multilateral Trade Negotiations." Inter Press Service. Online at: <http://www.ipsnews.net/2012/03/an-assault-on-multilateral-trade-negotiations>.
- 33 Bradner, Eric. (February 14, 2014). "U.S. financial proposal for TISA could come next week." *Politico*.
- 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_pQnbXpA4.
- 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.epsu.org/IMG/pdf/Draft_report_Markus_Krajewski_mtg14Nov2013.pdf.

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