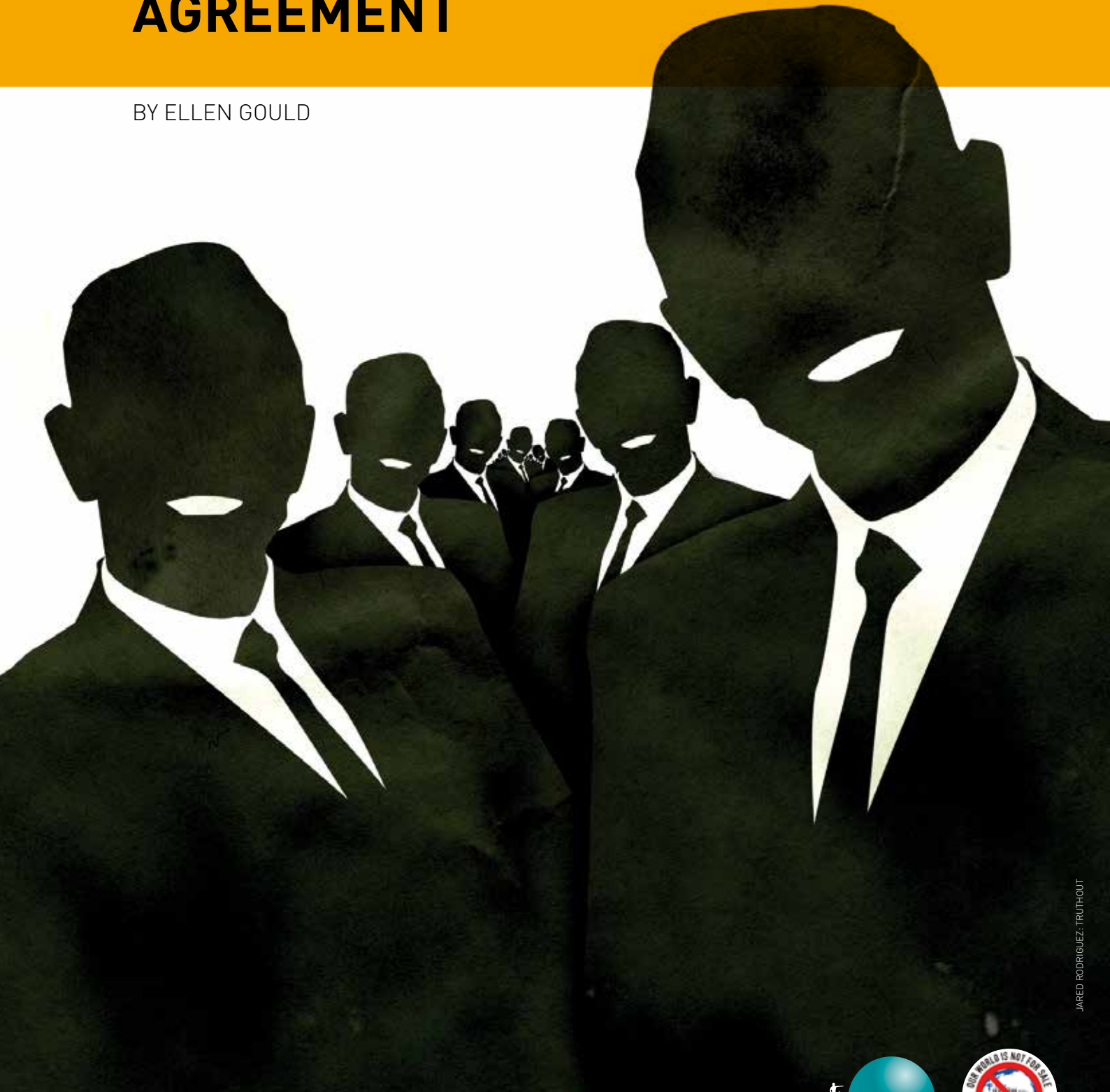


TISA - TRADE IN SERVICES AGREEMENT

THE REALLY GOOD FRIENDS OF TRANSNATIONAL CORPORATIONS AGREEMENT

BY ELLEN GOULD



JARED RODRIGUEZ: TRUTH-OUT



Written by Ellen Gould

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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



DENNIS JARVIS

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 found that US regulations prohibiting Internet and other forms of remote gambling were a GATS violation. WTO¹⁰ ”

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 CORSO

“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.

STANDSTILL AND RATCHET



SAM WOLFF

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?



ROGER SCHUEBER

FUTURE-PROOFING AND IRREVERSIBILITY OF COMMITMENTS

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 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.’ ”

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

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.

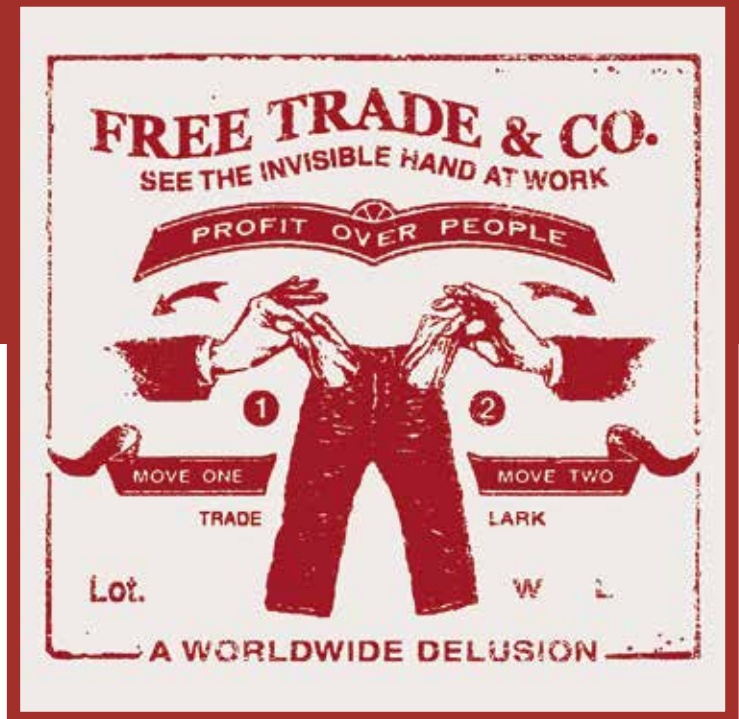
The imposition of new, binding restrictions on non-discriminatory domestic regulation is a controversial aspect of the GATS negotiations. WTO delegations are fighting each other in very undiplomatic terms over how severe these disciplines should be.²⁹ Any of the proposals on the table, however, would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



SSALONSO

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



LAWRENCE OP

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.
2. The 'Friends of Services' group was established in the 1990's by the G20 group of industrialized countries to push for services liberalization through the WTO. The establishment of this pressure group is described by Amrita Narlika in 'Inter-State Bargaining Coalitions in Services Negotiations: Interests of Developing Countries', a paper submitted to the World Services Congress, 1999. 'Friends of ...' groups have been established in the context of the GATS negotiations to press for liberalization in particular sectors.
3. Hufbauer, G; Jensen, B.; Stephenson, S. 'Framework for the International Services Agreement', Peterson Institute for International Economics, Policy Brief Brief Number pb 12 - 10, p. 16.
4. Testimony, Coalition of Services Industries, 12 March 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-2013-0001-0043>.
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>
7. Sinclair, S.; Mertins-Kirkwood, H. 'TISA vs Public Services', CCPA, April 2014. Online at: <http://www.world-psi.org/en/psi-special-report-tisa-versus-public-services>
8. Marrakesh Agreement Establishing the World Trade Organization, Online at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm
9. US Trade Representative Ron Kirk, Remarks to the Coalition of Service Industries 2012 Global Services Summit, 19 September 2012
10. WTO, 'United States – Measures Affecting the Cross-border Supply Of Gambling And Betting Services – Report of the Panel', WTO document WT/DS285/R, 10 November 2004. In April 2005, the WTO Appellate Body upheld the panel's decision that US laws prohibiting remote gambling violate its market access commitments.
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.
15. FedEx, response to USTR 'Request For Comments On An International Services Agreement' Docket Number: USTR-2013-0001. 21 January 2013. Online at <http://www.regulations.gov/#!documentDetail;D=USTR-2013-0001-0007>.
16. Testimony, Coalition of Service Industries, 12 March 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-2013-0001-0043>
17. Pruzin, Daniel. 'Officials Cite Agreement on Elements For 'Architecture' of Future Services Deal', WTO Reporter, 9 October 2012.
18. Property Casualty Insurers, submission to the USTR, 28 February 2013, response to USTR 'Request For Comments On An International Services Agreement' Docket Number: USTR-2013-0001.
19. Pruzin, Daniel. 'TISA Round Sees Progress on Proposals, Commitments to Make Market Access Offers', WTO Reporter, 12 November 2013.
20. "Battle looms over liquor monopoly", Norway's News in English, 16 June 2014.
21. Hufbauer, G; Jensen, B.; Stephenson, S. 'Framework for the International Services Agreement', Peterson Institute for International Economics, Policy Brief Number pb 12 - 10, p. 22.
22. Sarah Thorn, Senior Director Federal Government Relations. Letter to the Office of the US Trade Representative re International Services Agreement. 26 February 2013. Online at: <http://www.regulations.gov/contentStreamer?objectId=090000648120a748&disposition=attachment&contentType=pdf>
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25. WTO, 'Negotiations Under Article XXI Of The General Agreement On Trade In Services', Documents S/Secret/8, S/Secret/9, and S/Secret/10.
26. National Retail Federation. 'Comments of the National Retail Federation regarding International Services Agreements: Request for Comments and Notice of Public Hearing', 26 February 2013. Online at: <http://www.regulations.gov/#!documentDetail;D=USTR-2013-0001-0050>.
27. Sarah Thorn, Senior Director Federal Government Relations. Letter to the Office of the US Trade Representative re International Services Agreement. 26 February 2013. Online at: <http://www.regulations.gov/contentStreamer?objectId=090000648120a748&disposition=attachment&contentType=pdf>
28. Pruzin, Daniel. 'Australia Reports Agreement on Framework For Talks on Global Services Trade Next Year', WTO Reporter, 7 December 2012. According to Australia's WTO Ambassador, 'The text of the main body of the agreement will be based on the GATS. Specific GATS articles, in particular Article I (Scope and Definition), Articles XIV and XIV bis (General and Security Exemptions), Article XVI (Market Access), Article XVII (National Treatment), and Article XXVIII (Definitions) are among those proposed

for incorporation.’

29. See, for example, what was said at the 23 March 2011 meeting of the GATS Working Party on Domestic WTO Document S/WPDR/M/49. Available online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx
30. Stumberg, R. ‘GATS Negotiations on Domestic Regulation: A Plain Language Guide’, Harrison Institute for Public Law, Georgetown University 19 May 2010. Available online at: http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf
31. Pruzin, Daniel. ‘Negotiators Eye Early-December Deal On Framework for Global Services’, WTO Reporter, 13 November 2012.
32. As significant as the impacts of the TISA as a standalone agreement would be, its full implications may only be known if it becomes ‘multilateralized’ under the WTO. The European Commission has said TISA will use the same concepts as the GATS so that it can ‘be easily brought into the remits of the GATS.’
33. WTO, ‘Negotiations on Trade in Services - Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee’, Document TN/S/36, 21 April 2011, p. 28.
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36. WTO, ‘Turkey, Schedule of Specific Commitments, Document GATS/SC/88, 15 April 1994.
37. WTO, ‘The Separate Customs Territory of Taiwan, Penghu, Kinmen And Matsu, Schedule of Specific Commitments’, Document GATS/SC/136, 15 February 2002.
38. Jonathan S. Kallmer, ‘Not Your Father’s Trade Agenda: The Evolving Priorities of International Trade and Investment Negotiations’, *Global Trade and Customs Journal*, Volume 8, Issue 7&8, 2013, pps. 253 and 247.
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42. WTO, ‘Examples Of Measures To Be Addressed By Disciplines Under Gats Article VI.4 – Informal Note of the Secretariat’, 12 July 2002. Document JOB(01)/62/Rev.2.
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- Agreement (TISA)', 28 November 2013.
46. The WTO Appellate Body stated in the often cited Korea-Beef case that determining the necessity of a measure 'involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.' WTO, 'Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef – Report of the Appellate Body', 11 December 2000. Document WT/DS161/AB/R.
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 49. 'Coverage for Pre-existing Conditions', Protections, Affordable Care Act. Online at: <https://www.healthcare.gov/how-does-the-health-care-law-protect-me/#part=3>
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 58. TISA, Financial Services Annex, Online at: <https://wikileaks.org/tisa-financial/WikiLeaks-secret-tisa-financial-annex.pdf>
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 61. WTO, 'Revision of the Canadian Schedule of Commitments for GATS - Financial Services', WTO document GATS/SC/16/Suppl.4/Rev.1, 6 June 2000.
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