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BRUSSELS OFFICE

SCOTT SINCLAIR

TISA TROUBLES:
SERVICES, DEMOCRACY AND CORPORATE RULE IN THE TRUMP ERA

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SCOTT SINCLAIR

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Scott Sinclair is a senior research fellow with the Canadian Centre for Policy Alternatives, where he directs the centre's Trade and Investment Research Project. He has written widely on the impacts of trade treaties on public services and public interest regulation. Prior to joining CCPA, Scott was a senior trade policy advisor with the Government of British Columbia.

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INTRODUCTION

In late 2016, trade ambassadors from 23 WTO member governments gathered in Geneva in a last-ditch effort to wrap up negotiations on an ambitious but little known international trade agreement.[1] In the weeks and months leading up to the meeting, chief negotiators and other officials had been working feverishly to finalise the Trade in Services Agreement (TiSA) before a new US administration took office in January 2017.

Despite the intensive preparatory work, the ambassadors were unable to strike an agreement. Afterwards, officials gamely stressed that a deal was within sight.[2] But a planned December meeting of trade ministers to finalise and sign TiSA was cancelled, much to the disappointment of global corporate lobby groups that have been pressing for years to get a new services deal in place.[3]

TiSA talks have been officially underway since March 2013, and this is not the first time deadlines have slipped. The difficulties encountered in reaching agreement – even after over 20 full negotiating rounds and dozens of technical sessions – hint at the sensitivity of the wide range of issues on the table, including data privacy, digital trade, financial sector regulation and whether to automatically cover future services that have not even been conceived yet.[4] The delays underscore the deeper issues of democratic authority and regulatory autonomy at stake in these secretive talks.

The purpose of this paper is to provide a fuller understanding of these underlying issues. It will argue that, under the guise of expanding the international trade in services, TiSA is in fact aimed at freeing corporations providing transnational services from what they view as burdensome and needlessly differing national and local regulations. The agreement is also designed to pry open public services to commercial involvement. Failing that, public services and public enterprises would be confined, as much as possible, within their current boundaries. As such, this proposed treaty, while nominally about international trade in commercial services, cuts to the heart of the democratic regulation and decision-making affecting all services.

Two key points on which both TiSA proponents and critics agree are that services are incredibly broad and diverse and that they play a vital role in a modern economy. Services are associated with virtually every human need from birth to death and nearly everything citizens elect governments to do. A service can be defined as a product of human activity, other than a tangible commodity, that is aimed at satisfying a human need.[5] There are many types of services, ranging from private banking to public transport, electricity transmission to education, and childcare to water purification. Typically, services account for at least 60 to 70 % of the share of economic activity in a modern economy.[6]

Countless people deliver services that are vital to our daily lives and many of our jobs are directly tied to the provision of services to others. More broadly, how we choose to organise the delivery of vital services, including how to make them affordable and universally accessible, is a fundamental aspect of how we govern ourselves.

Unlike the international trade in goods, there are no tariffs or other at-the-border restrictions on trade in services. In fact, the principal barriers to international trade in services which TiSA targets are national, state and local government regulations. As with any other commercial activity, services must be regulated to protect consumers, the environment and the public interest. Deregulation makes it easier for corporate service providers, but it can increase the risk of fraud, exploitation and, in the case of financial services, systemic crisis.

Moreover, many essential services such as electricity, water, public transport, education or health care are best provided publicly or on a not-for-profit basis. Public services are a hallmark of an advanced society. Opening them to profit-making in order to boost international trade in services will reduce social well-being. It also carries a strong potential to decrease efficiency, since private, for-profit providers typically have higher financing costs than public entities and demand higher returns for their shareholders.

In these and many other ways, TiSA threatens democratic decision-making. The proposed agreement is mainly about restricting the regulation of an extremely broad range of privately delivered services, from local transport to international finance. It also interferes with how societies define the constantly shifting boundaries between private for-profit and public not-for-profit services. The governments and negotiators involved in TiSA only superficially acknowledge these concerns, relying on bland assurances about the right to regulate and protection for public services. But such assurances are empty because, as will be shown, they are not adequately reflected in the legal terms of the agreement.

The main issues at stake in the TiSA negotiations, as is true in most so-called trade agreements, are not principally trade-related at all. Fundamentally, TiSA is about curtailing society's ability to do two things: first, to democratically regulate and control the activities of multinational corporations engaged in the delivery of services; and second, to provide essential services to their citizens through the appropriate mix of public, not-for-profit and private services that they themselves decide. The goal of boosting international trade in services is simply a convenient ideological cloak behind which corporate lobbyists can quietly target unwanted regulations, develop business-friendly regulatory templates and increase pressure to commercialise public and essential services.

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ORIGINS OF TISA AND ITS FLAWED PROCESS

From its inception TiSA was a corporate-driven project and it remains so to this day. The scheme arose directly out of the deep dissatisfaction of corporate lobbyists with the slow pace of World Trade Organization (WTO) negotiations to expand coverage of the General Agreement on Trade in Services (GATS) and the broader impasse in the WTO's Doha round of trade talks.

International business interests have long sought binding, global and irreversible rules on services. No sooner had the GATS been concluded in the mid-1990s than corporate interests began agitating to expand and deepen its coverage. That goal was reflected in the so-called built-in agenda of the GATS, which called for successive rounds aimed at "achieving a progressively higher level of liberalisation" and the development of new restrictions in specific issue-areas such as government procurement, trade-distorting subsidies and domestic regulation.[7]

The momentum behind the GATS' built-in agenda was stymied, however, by vigorous mobilisation and public protest early in the new millennium (most notably at the 1999 Seattle WTO meetings). Subsequently, talks on services became mired in the broader impasse affecting the so-called Doha Development Agenda, the latest broad-based round of WTO negotiations launched in November 2001 in Doha, Qatar.

As the talks on GATS languished, corporate demands to shift negotiations on services from the WTO to a more corporate-friendly venue grew louder. In 2012, these demands were taken up by the self-styled Really Good Friends of Services, a group of WTO members drawn almost entirely from the developed world. The TiSA initiative was organised and led by the European Union, the United States and Australia, whose governments have continually pressed to enshrine deeper commercialisation and more business-friendly regulation of services in trade deals. These three governments continue to chair the negotiations.

A key motivation for TiSA was to bypass the large bloc of developing countries at the WTO that were resisting deeper commitments on trade in services. Many of these countries had watched the US and the EU block poorer countries' key demands for development-friendly WTO reforms such as greater market access for their agricultural products and safeguards for food security, among other proposals. By forming a breakaway group of hand-picked countries, and operating outside the confines of the WTO and the Doha round, the Really Good Friends of Services and their corporate allies hoped to make a major breakthrough in their long-standing quest for the radical liberalisation of services.

The ostensible goal is to create an ambitious agreement that could one day be accepted by all WTO members and reintegrated into the WTO system. However, there are serious legal difficulties surrounding the consistency of TiSA with WTO rules and procedures. These legal obstacles stem mostly from the fact that key participants do not want to automatically extend the results of TiSA to all other WTO members on a most-favoured-nation basis.[8] Rather, the whole point is to pressure major developing countries into joining the agreement on terms dictated by the original members. These legal issues, along with the bad blood created by the rich countries' aggressive tactic of sidelining most developing countries, make it very unlikely that TiSA could be smoothly integrated into the WTO in the short term.

It is far more probable that, once established, TiSA would operate outside the WTO for an extended period, during which developing countries will be individually targeted and pressured to join. Indeed, most analysts agree that the ultimate goal of TiSA proponents is to bring the key emerging economies, such as China, Brazil, India and South Africa, individually into the agreement when circumstances are favourable. For example, the recent victory of a right-wing government in Brazil, a country that was once a staunch TiSA critic, make that country a likely candidate for early inclusion.

EXCESSIVE SECRECY AND UNDUE CORPORATE INFLUENCE

It is no surprise that transnational corporations (TNCs) active in services, as they have expanded and extended their global reach, have increasingly strong interests in reducing the cost of complying with the regulations they face in different countries. TNCs also stand to benefit from reducing competition from domestic, sometimes publicly owned firms, and from the privatisation and commercialisation of public enterprises. Adopting global rules to reduce or eliminate constraints placed by governments on international commercial activity is understandably a key priority of many global corporations operating in the service sectors.

But, by shifting such decisions out of the public realm and into the sphere of closed-door trade talks, corporations are pursuing their own particular interests, aided and abetted by trade ministries whose mandate is to expand commerce. This trade treaty push is part of a shift from government or democratic regulation of services to corporate self-regulation, a trend that is creating all kinds of problems.

For the past three decades, neoliberal governments have been obsessed with reducing the burden of regulation on business. While corporations and their paid lobbyists emphasise the costs of complying with regulations, they tend to wilfully ignore the benefits.

While the costs of complying with regulations are relatively straightforward to calculate, the benefits to workers, consumers, the economy and the environment are frequently more diffuse and difficult to assess. For example, it is challenging to quantify the benefits of regulations that successfully prevent an environmental calamity (such as an oil spill or runaway climate change) or a financial meltdown until after such calamities have occurred and the devastating costs of inaction have become all too plain. Furthermore, a narrow focus on cost-benefit analysis misses the importance of precautionary approaches, where regulatory measures are taken to protect the public from irreparable harm, even where scientific evidence is not yet conclusive.

In fact, there is no purely objective means for a trade negotiator or a trade dispute panel to decide whether a particular government regulation is, for example, more burdensome than necessary. It is always of matter of judgment and of balancing competing interests. That is why public, democratic processes, which are participatory and can involve and balance different perspectives, interests and evidence, are the only acceptable way to make such regulatory decisions.

The TiSA negotiating process is highly secretive and heavily influenced by corporate lobby groups that stand to directly benefit from many matters under discussion. The closed process is highly inappropriate, especially given the importance of the key issues of public services and the public interest regulation of essential services. Negotiating proposals, for example, are routinely 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".[9] This unprecedented level of secrecy raises valid concerns from a public interest standpoint. By the time the broader public, civil society, independent experts and parliaments have an opportunity to scrutinise and understand the text and its regulatory implications, it will be next to impossible to change it.

In another twist, TiSA is designed to be a *living agreement*. This means that, once established, TiSA will become a forum for continuous negotiations and further piecemeal and sectoral deals. For example, in addition to TiSA's core text there are 20 annexes under consideration. Currently, just nine of these are to be included in the initial agreement. Once the initial TiSA framework is in force, however, the remaining annexes will be the subject of ongoing negotiations (see list page 12). The intent is to expand the number of annexes and covered sectors over time.

Future additions will be similarly removed from public and parliamentary security. In addition, some of the most controversial TiSA proposals, such as liberalising cross-border health or energy services, where agreement has so far been impossible to reach, can be deferred to ongoing negotiations and finalised later on when public attention may be diverted.

LIST OF TISA ANNEXES

A

Dispute Settlement
Domestic Regulation
Electronic Commerce
Financial Services
Institutional Provisions
Localisation
Movement of Natural Persons
Telecommunications Annex
Transparency Annex

Category A annexes are those that were close to completion in November 2016 and slated for immediate inclusion in TISA.

B

Air Transport
Delivery Services
Direct Selling
Energy and Mining-related Services
Export Subsidies
Government Procurement
Maritime Transport
Patient Mobility
Professional Services
Road Freight Services
State-owned Enterprises

Category B annexes: those that require further negotiation and will likely only be included later, if agreement is reached.

LIST OF TISA PARTIES (ALPHABETICAL ORDER):

Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States.

TISA'S COERCIVE STRUCTURE

A large cache of TiSA negotiating texts, leaked to an NGO website in early 2017, provides a rare look inside the secretive talks. The documents include the core text and a set of accompanying annexes, and indicate that the negotiations were bogged down by serious disagreements even before the unexpected victory of Donald Trump in the US presidential elections.

It is obvious from these documents that TiSA is an extraordinarily complex and wide-ranging agreement. Most of the 20 annexes, mentioned above, have been leaked in some version (see list on page 12).[10] These can be divided into two types: rules annexes and sectoral annexes.[11] The rules annexes are cross-cutting, apply across all sectors, and supplement the obligations in the core text, while the sectoral annexes set out templates for various sectors identified as priorities by negotiators and corporate groups. This complicated structure confirms, as negotiators have insisted all along, that TiSA is meant to be highly ambitious in terms of its scope and coverage.

TiSA's core text is largely modelled on the GATS, which is in keeping with the parties' goal to eventually incorporate it into the WTO system. Despite a superficial similarity to the older services agreement, TiSA clearly involves member governments going well beyond their existing GATS commitments. It also includes *new and enhanced disciplines*, meaning *GATS-plus* rules and restrictions, many of which are contained in the accompanying annexes rather than the core text.

When publicly defending the agreement from criticism, trade officials tend to emphasise the voluntary nature of TiSA commitments. The European Commission, for example, stresses that "each country can choose the types of service it wants to open to competition from the other countries taking part and the extent to which it wants to do so".[12] This description makes participating in TiSA negotiations sound as straightforward as ordering from the menu at a local restaurant.

But this soothing account conveniently ignores the dynamics of negotiations, as trade officials (reinforced by corporate lobbyists) persuade, prod and pressure one another into fulfilling the mandate to secure a comprehensive agreement with a high level of commitments. It also omits the ways that TiSA's structure deliberately pushes member states to make deeper commitments than they might otherwise prefer.

NEGATIVE LISTING

TiSA's "coercive structure", as researcher Ellen Gould calls it, is evident from the agreement's *negative listing* approach to national treatment.[13] Unlike the GATS, TiSA is top-down in the way it applies national treatment obligations. The starting assumption is that everything is covered; governments must then specifically list any sectors or measures to which they do not want TiSA's national treatment obligations to apply. National treatment requires that governments treat foreign services and service providers at least as favourably as their domestic counterparts.

At first glance, this structure contrasts significantly with TiSA's market access commitments, which mirror the *positive listing* basis found in the GATS. Under this bottom-up approach, governments list only those sectors where they agree to make commitments. If a sector is not listed, then the market access rules do not apply to it. Importantly, though, once a market access commitment has been made in any sector, any non-conforming policy measures in that sector that the government wants to protect must be listed in its schedule.

So, for example, if a party agreed to list sanitation and waste management services in the market access column of its TiSA schedule (as all parties are being pressed to do by the EU among others), then it would have to explicitly exempt any public policies or regulations in the sector – even non-discriminatory ones – that would violate TISA's market access rules. Such non-conforming measures would include any public sector monopolies at the sub-national or regional level, any caps on foreign ownership, any limits on the number of service providers (such as only one toxic waste disposal operator per region), restrictions on the legal form of sanitation service providers (such as requiring joint ventures or publicly-owned, not-for-profit firms) and any economic needs tests (which limit the number of providers based on an assessment of what a given market can sustain).

In short, once a market access commitment has been made, TiSA's approach to market access obligations is, for all intents and purposes, nearly as intrusive as the negative listing approach for national treatment. In both cases, a TiSA party must explicitly protect any non-conforming measures in a covered sector that it wishes to preserve.

STANDSTILL AND RATCHET

Two major areas of concern within TiSA are its *standstill* and *ratchet* mechanisms. Standstill means that the current level of liberalisation in each country is locked in. The ratchet mechanism requires that any actions taken by a government that might affect the market in services must be taken in the direction of *greater conformity* with the agreement. The European Commission describes the ratchet clause in this manner: "A ratchet clause in a trade agreement means a country cannot reintroduce a particular trade barrier that it had previously and unilaterally removed in an area where it had made a commitment".[14] Under the ratchet mechanism, if any government eliminates a reserved policy measure, a future government cannot restore it.

TiSA's standstill and ratchet clauses apply explicitly only to national treatment.[15] However, as already explained, even though no formal standstill clause applies to market access, once a government has made market access commitments in a sector (or sub-sector), those commitments are locked in and any reserved measure in that sector (or sub-sector) cannot be strengthened unless the TiSA party has taken a reservation that explicitly preserves its future policy flexibility against TiSA's market access obligations.

TISA'S 4 MODES OF SUPPLY

TiSA, like its predecessor the GATS, defines *trade in services* broadly to encompass every conceivable way of providing a service internationally. The four *modes of supply* are:

MODE 1

CROSS-BORDER:

applies to services provided from the territory of one member into that of another. Only the service itself crosses the border, without the movement of persons or investment. The service supplier does not establish any presence in the territory of the member where the service is consumed. Examples include information or advice provided through fax, phone or electronic means. This ensures the right of a foreign service supplier to supply cross-border services without having to establish locally.

MODE 2

CONSUMPTION ABROAD:

applies to services consumed by citizens or firms of one member country in the territory of another member where the service is supplied. Essentially, the service is supplied to the consumer outside the territory of the member where the consumer resides. Examples include tourism, students studying abroad, or patients travelling to a foreign country for medical treatment.

MODE 4

NATURAL PERSONS:

applies to services provided by nationals of one member who travel to another member country to provide a service. This mode applies only to real, flesh-and-blood persons (as opposed to *legal persons*, that is, corporations). This mode ensures the right of *natural person*s to stay temporarily in another country for the purpose of supplying services, for example, executives, consultants or engineers who travel abroad for business purposes.[16]

MODE 3

COMMERCIAL PRESENCE:

applies to services provided by a foreign service supplier through investment in the territory of another member. This ensures the right of foreign firms to establish a commercial presence in a foreign country, for example though branches, subsidiaries, offices or any type of business or professional establishment.

TISA ANNEXES

TiSA's coercive structure is present, and even prevalent, in many of its annexes, which cover a huge array of issues and sectors. Many of TiSA's annexes define universal rules that apply across all sectors. Generally, like TiSA's national treatment obligations, these annexes apply on a top-down, negative listing basis.

A good example is the localisation annex, which should actually be called the *anti*-localisation annex. Its intent is to root out any law, public policy, regulation or measure that would require a corporation to establish itself in a country in order to supply a service in the local market. It also prohibits performance requirements that would, for example, require foreign service providers to purchase local goods or services, achieve minimum levels of domestic content, or transfer technology. Policy measures to boost domestic content would not be allowed even when foreign investors receive *advantages* from governments, for example, as a condition for access to publicly owned natural resources.[17]

The localisation annex, like national treatment, applies on a top-down basis. To preserve any non-conforming measure, a government must list it as an exception in its TiSA schedule. Any policy requirement benefitting local residents or the local economy – for example, a requirement that a foreign company must hire a certain level of local employees or maintain a local office – must be listed as an exception in a country's TiSA schedule, otherwise it must be removed. In trade treaty parlance, any non-conforming measure must be *listed, or lost*.

Many of TiSA's sectoral annexes also include customised deregulatory obligations that go beyond the core text's national treatment and market access commitments. For example, TiSA's leaked financial services annex includes proposals that would forbid governments from interfering with the cross-border transfer or processing of financial data, including personal data. Privacy and consumer advocates have warned that such TiSA obligations could interfere with and undermine privacy safeguards (see section on TiSA and data privacy, page 28-29).

TISA NEGOTIATING PRESSURE

In all these ways, TiSA is deliberately structured to push governments into maximising their commitments, even in areas where they might otherwise prefer not to. This pressure-cooker situation is a far cry from the purely voluntary and flexible negotiating process portrayed by TiSA's proponents.

A key point to keep in mind is that this coercive structure will also be applied to, and is arguably aimed at, countries that join TiSA at a later date. As has been the case with those states that acceded to the WTO after its creation in the mid-1990s, those that accede to TiSA in the future, including developing countries, will certainly face intense pressures to make even deeper and broader commitments than the founding members.[18]

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THREATS TO PUBLIC SERVICES

At its core, TiSA aims to commercialise services by opening them to profit-making by international corporations. This puts it on a collision course with public services, which are designed to meet social needs through affordable, accessible and, ideally, universal programs that serve the public interest. To achieve these goals, public services deliberately restrict commercial activity and profit-making, in effect hiving off significant sectors of the economy from commercial exploitation by either domestic or foreign firms. In this sense, public services can be construed as barriers to *international trade in services* as broadly defined under TiSA.

This inherent conflict suggests, at a minimum, the need for a strong and fully effective exclusion that would completely fence off public services from TiSA's corrosive rules. Such an exclusion has long been called for by public sector unions, many elected officials and other public service advocates. Unfortunately, TiSA does not have an effective general carve-out for public services.

TISA'S INADEQUATE "GOVERNMENTAL AUTHORITY" EXCLUSION

TiSA defines *services* as "any service in any sector except services supplied in the exercise of governmental authority".[19] Mirroring the GATS, it then goes on to define a service supplied in the exercise of governmental authority as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers".[20] This is TiSA's only general exclusion for public services, but its scope is so narrow that it has little practical relevance. Both of the qualifying criteria must be satisfied for the exclusion to apply. In order to benefit from the exclusion, a service (1) must not be supplied on a "commercial basis" *and* (2) must not be "supplied […] in competition with one or more service suppliers".[21]

The problem with this restrictive approach is that *public services* are rarely delivered exclusively by governments on a strictly non-commercial basis. Instead, vital public and essential services are typically delivered to the population through mixed systems that are wholly or partly funded and tightly regulated by governments at the central, regional and local levels. Health, education and other social service systems, for example, consist of a complex, continually shifting mix of governmental and private funding.

Moreover, these systems are frequently characterised by state, private not-for-profit and private for-profit entities delivering services – everything from child care to higher education – alongside one another in the same sector. An effective exclusion for public 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 citizens' basic needs are met.

During the heated debate over expansion of the GATS at the turn of the century, critics raised concerns that the *governmental authority* exclusion in the GATS, which is identical to that in TiSA, was too narrow to effectively protect most public services. At the time, these concerns were flatly dismissed by key trade officials, including then director general of the WTO Mike Moore, who claimed that "GATS explicitly excludes services supplied by governments".[22] Today it is widely admitted that the critics' concerns were valid and, by inference, that assurances made to the contrary by Moore and others were misleading.

For example, in a 2011 paper European Commission trade officials essentially conceded that the critics were right. The paper, which was meant to inform the Commission's approach to public services in future trade deals, candidly describes the GATS governmental authority exclusion as "a very narrow exception, essentially conforming to the EU concept of non-economic services of general interest". [23] Only a very few core functions supplied and paid for exclusively by governments, such as police and the judiciary, prisons, statutory social security schemes, military and border security, would fall within the scope of the governmental authority exclusion.[24]

The paper frankly affirms that: "A wide variety of so-called public services, including certain activities relating to education, healthcare, postal, telecommunications, waste collection, water provision, electricity, transport, etc. as they exist today in many countries, including in most EU Member States, will have certain commercial aspects and may be provided to some extent by private operators on a competitive basis".[25] Such services would not fall within the scope of the governmental authority exclusion.

TiSA's only general exclusion for public services is extremely narrow and for practical purposes useless in protecting public services. In principle, all services, including public services, are on the table in the talks and therefore at risk of liberalisation and commercialisation.

SHORTCOMINGS OF COUNTRY-SPECIFIC EXCLUSIONS

Since the governmental authority provision does not adequately safeguard public services, governments must rely on other means to shield them from TiSA's commercialising pressures. Under GATS, a country could simply make no commitments in a sector. But TiSA's negative list approach takes away this option, at least for national treatment. Consequently, it is left to each party to protect its own public services by applying country-specific exclusions, known as *limitations*.

It is important to emphasise that while governments may use limitations to exclude key public and essential services from the core obligations of TiSA, there is no guarantee that they will actually do so. In fact, governments may have their own reasons not to, or to keep such limitations to a minimum. Right-wing or neoliberal governments may not care about protecting public services, especially if keeping them off the table interferes with their ability to get concessions from other parties in areas of commercial interest. Even those governments that genuinely desire to protect certain public and essential services will face negotiating pressure from other TiSA members and the corporate sector to minimise policy space limitations.[26]

A further problem is that the means chosen to limit their TiSA commitments may not be fully effective in protecting public services from the commercialising pressures of the agreement. In addition, any future government can unilaterally remove such protections, exposing sectors to the full force of the agreement. The exceptions become targets for elimination in further negotiations; once eliminated, they will be difficult, if not impossible, to restore. Essentially, "with the stroke of a pen, a single neo-liberal government can lock all future governments into a policy strait-jacket".[27] Clearly, such an agreement is structurally biased towards eroding protections for public services, which are already ad hoc, of uncertain effectiveness and vulnerable to removal.

THE LIMITS OF LIMITATIONS: TISA AND EDUCATION

The example of educational services can be used to illustrate some of the shortcomings of relying on country-specific exemptions. Most TiSA countries have taken at least some steps to exclude public education from the obligations in the agreement. But different countries have taken different approaches, leading to a patchwork quilt of safeguards with varying levels of protection as well as significant gaps.

Canada for example typically excludes public education "to the extent that it is a social service for a public purpose".[28] The meaning of this key phrase, which was used first in the North American Free Trade Agreement, has never been defined, but Canada's approach would clearly expose the privately funded, privately delivered aspects of education to TiSA obligations. The EU, for its part, has taken a different approach, excluding *publicly funded* education from its TiSA commitments. This term–publicly funded–is also undefined. European Commission officials have insisted that any educational service provider that receives even a single euro from the public purse will be protected by this language. But it is certainly possible that a dispute settlement panel will not take such an expansive view, deciding based on the facts in a specific dispute that public funding must, for example, be substantial, or even that a majority of funding should come from public sources for the exclusion to kick in.

But even if these differing approaches prove effective at excluding *public* education, both the EU and Canada have offered to cover most aspects of *private* education under TiSA's national treatment and market access rules. It is a weak argument to assert that surrendering a government's authority to limit the growth of the private education sector and services will not affect the public education system.

For example, the unrestrained growth of the private education sector allows for-profit providers to skim off, or cherry-pick, the most profitable educational services, such as business management or administration, leaving the public system to provide less lucrative programs, such as liberal arts and humanities. Uncontrolled growth of the private system can also be expected to divert resources, including well-trained teachers and economically privileged students, to the private system.

Online, distance education undoubtedly has merits, especially the ability to reach remote populations. But it would be reckless to suppose that governments would not want, in certain circumstances, to ensure at least some degree of localisation in the interests of quality assurance or in order for private for-profit educational providers to be certified as degree-granting institutions. Such TiSA-inconsistent regulations could include, for example, requirements to have staff accessible in the country, to have physical resources such as a bricks-and-mortar library, or that curriculums impart some awareness of local history, conditions or culture to their students.

RESTRICTIONS ON STATE-OWNED ENTERPRISES

An entire annex of TiSA is devoted to restricting state-owned enterprises (SOEs). This annex is ostensibly targeted at countries such as China and India that have a large state-owned business sector and may one day join TiSA. US and European business lobbyists argue that these state firms engage in anti-competitive practices. Whatever their eventual target, these unprecedented rules would also have serious ramifications for state-owned-enterprises in the countries currently negotiating TiSA.

Despite decades of privatisation and austerity, SOEs continue to play a key role in delivering a wide range of public and essential services, even in many developed economies.[29] Under the terms of the annex, which is modelled, in part, on a chapter in the now defunct Trans-Pacific Partnership, an SOE must operate solely on the basis of commercial considerations in its purchase or supply of services, and in its sale of goods to service suppliers of another party.[30]

Such restrictions can defeat the purpose of public enterprises, which are provided with a mandate to serve the good of the community rather than purely commercial interests. For example, recent research has found clear evidence that consumers pay lower prices for electricity and natural gas in European countries where these energy services are provided through public enterprises.[31] Public enterprises can also be more responsive to public demands, for example, to shift to renewable sources of energy. This is one of the key motivations for the growing movement to remunicipalise privatised local services, both within Europe and worldwide.[32]

The TiSA annex acknowledges that an SOE can have a "public service mandate", defined as "a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory". But even when fulfilling their public service mandate, an SOE would be prohibited "in its supply of services" from treating its own citizens more favourably than "persons of another Party or of any non-Party".[33]

It is hard to grasp why, for example, a locally owned utility, supported by the local tax base, should be banned from giving preferences to its own citizens and local taxpayers. While some countries want the annex to apply only to central government SOEs, the European Union is demanding that the disciplines apply to SOEs at all levels of government, including federal states and municipalities.[34]

It is also ironic that the US and the EU are pushing such restrictions on SOEs after their experience during the 2008 financial crisis, when major industrial and financial companies on both sides of the Atlantic were effectively nationalised to save them – and the broader economy – from collapse. Such take-overs occurred around the world, but were prominent in the developed world's heartlands, for instance, with General Motors in the US and the Royal Bank of Scotland in the UK. TiSA's draft SOE annex permits such emergency measures if taken on a temporary basis.[35]

UNDERMINING PUBLIC SERVICES

TiSA negotiators can, if they so wish, protect their country's public services through careful scheduling, but this smoke-and-mirrors game should not obscure the basic fact that full market access commitments are incompatible with public service delivery models. TiSA's market access rules prohibit monopolies and exclusive service providers, whether public or private. A full market access commitment in a sector, such as wastewater or sanitation services, is, in essence, a legally binding guarantee to keep that sector permanently open to competition from foreign service providers.

While it is true that TiSA does not force governments to privatise any public service, the basic purpose of its trade-in-services provisions is to facilitate and lock in greater liberalisation (i.e. foreign competition and therefore commercialisation) of services. TiSA is not designed to accommodate the dynamic nature of public services and democratic decision-making regarding such services.

If directed by their governments, TiSA negotiators could easily have fully excluded public services, a reasonable demand made by many groups. One straightforward proposal for such a model clause reads: "This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest".[36]

But the absence of such an effective exclusion is no accident. One of the attractions of TiSA for TNCs is its usefulness in prying open public services to greater commercial involvement, thereby creating new markets for foreign service corporations. TiSA is loaded with features deliberately designed to restrict each country's policy space to confine existing public services as far as possible within their current boundaries and to lock in any future corporate inroads on public services (see box TiSA: Locking in privatisation). This makes the struggle to defend and expand public services significantly more difficult.

TISA: LOCKING IN PRIVATISATION

In 2012, the Indian city of Nagpur became the first in the country to fully privatise its water system. The city's water service was handed over to Orange City Water, a joint venture between the French multinational Veolia and a local Indian construction firm.

Problems soon arose, with water bills going up by 35%. There were cost overruns of 46%, moreover, some slum dwellers never received the promised service. Amid widespread allegations of corruption and shoddy construction, citizens experienced 300 separate rate increases, often imposed without proper notice.[37]

A strong grassroots movement emerged to fight for the water service to be brought back under public control.

While the citizens of Nagpur are still fighting for public water, their struggle is only one of many examples of the remunicipalisation movement. Hundreds of cities and towns around the world have fought and successfully reversed privatisations.[38]

Even though India does not participate in the TiSA talks, its local public services are, in a very real sense, among the ultimate targets of the deal. As one senior European official explained: "Once the agreement comes into force we are hoping to integrate it into the World Trade Organisation, in other words, have its rules accepted by all 162 WTO members and become the benchmark for global trade in services".[39]

Meanwhile, at the negotiating table rich-country governments have made proposals that would compel any governments joining TiSA to make commitments covering wastewater, sewage and other environmental services.

For example, a Canadian proposal leaked to Wikileaks would compel TiSA parties to make GATS-plus commitments covering water and other environmental services.[40] The Canadian proposal allows countries to exclude the politically sensitive area of "collection, purification, and distribution of water", but otherwise it entails full commitments regarding national treatment for water-related services such as wastewater and sewage. Since sewage and drinking water services are usually bundled together and delivered by the same provider, this exclusion is too narrow and mostly for show.

Making full national treatment commitments would still permit local governments to reverse water privatisations, as long as foreign companies are treated at least as favourably as local providers (whether commercial, not for-profit or public). But such national treatment commitments would also trigger TiSA's cross-cutting provisions such as the localisation annex, which would prevent attaching any local benefit provisions to water contracts, and the restrictions on domestic regulation, which could pose a host of problems for local licensing and authorisation conditions that regulate rates, access, quality and conservation.[41]

But the Canadian proposal's most problematic element is that it also demands that government make full market access commitments, particularly in mode 3 (commercial presence), covering environmental services.[42] It also seeks to subject such market access commitments to a standstill.[43] This would freeze existing public services in their current state and make any future privatisations irreversible. TiSA's market access provisions explicitly prohibit so-called quantitative restrictions, including public monopolies. They also disallow any limitation on the participation of foreign investors, such as Veolia, in committed sectors.

After a country has made full market access commitments in a sector or sub-sector, a local government could not reverse a privatisation in order to restore a public monopoly. In other words, in such a situation, the citizens of Nagpur would be unable to bring their water services back under public control without India facing the threat of a costly trade challenge.

TISA: THREATS TO THE DEMOCRATIC REGULATION OF ESSENTIAL SERVICES

The previous section explored how TiSA threatens the ability of governments to maintain, expand and create public services – in particular, how it would impede the rights of governments and citizens to democratically define the shifting boundaries between public and private services.

Another important set of concerns relates to how TiSA would affect the ability of governments to regulate a wide range of privately delivered services, spanning sectors such as transportation, energy, retail, e-commerce, express delivery, telecommunications and finance, in order to protect consumers, workers or the environment.

TiSA proponents often assert that the negotiations are solely about ensuring greater transparency and non-discrimination in regulation. They claim that, as long as regulatory processes are open and regulations treat foreigners and locals the same, there is no conflict between TiSA and public interest regulation. If this were true, TiSA would be a much shorter and simpler agreement, involving only basic national treatment commitments and some transparency rules.

In truth, TiSA is far more extensive and complex. As we have seen, the core text is supplemented by detailed country schedules, and up to 20 additional rule-setting and sectoral annexes, with TiSA considered a *living agreement* that can be expanded through ongoing, continuous negotiations. This complexity underlines the depth and intrusiveness of the agreement.

Even TiSA's core text oversteps simple transparency and non-discrimination. TiSA's market access provisions (similar to those found in the GATS) prohibit certain types of measures, even if they are non-discriminatory. Where market access commitments are made, governments at all levels face constraints on how they can regulate. Limiting the number or size of service suppliers in a committed sector, banning a specific service (which is considered a zero quota), employing economic needs tests (for example, deciding employers must first offer employment opportunities to qualified personnel in the local market before bringing in foreign workers), or requiring that services be provided through a particular type of legal entity (such as a registered not-for-profit) are all prohibited. And to be clear, these are absolute, not relative, prohibitions. Such policies are unacceptable even if they apply equally to foreign and domestic service providers.

TiSA's interference with non-discriminatory regulation does not end at these market access restrictions. Many of its GATS-plus *new and enhanced disciplines* and its

proposed sectoral annexes are intended to define and promote so-called pro-competitive regulatory environments that advance the interests of TNCs. These efforts to define and enforce corporate-friendly regulatory models and even to outlaw certain forms of regulation, such as privacy requirements stipulating that personal data must be stored locally, prove that TiSA goes far beyond mere transparency and non-discrimination. The ambitions of these corporations do not stop at ensuring equal treatment; in some cases they are unabashedly deregulatory.

The US-based National Retail Federation, the world's largest retail trade association, is a good example of this philosophy. The federation urged US trade officials 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). In a separate submission, the country's largest retailer went even further. Walmart advocated that "There should be no restrictions on store size, number, or geographic location (and) similarly, there should be no merchandise restrictions (audio visual, tobacco, food, pharmaceuticals, cosmetics etc.)".[44] This provides a clear example of a corporation lobbying to reduce its own costs by shifting them onto the public, who are left to cope with the health and social problems stemming from increased tobacco use, junk food consumption and prescription drug abuse.

It is deeply worrying when powerful corporations regard closed-door trade negotiations as a legitimate means to advance their deregulatory goals. Regulation intrinsically involves setting limits on private sector activities. Predictably, corporations routinely oppose such limits. They view regulations as a cost, with someone else reaping the benefits. Nobel Prize-winning economist Joseph Stiglitz sees things differently. In assessing the Trans-Pacific Partnership (TPP) negotiations, he wrote: "Huge multinational corporations complain that inconsistent regulations make business costly. But most of the regulations, even if they are imperfect, are there for a reason: to protect workers, consumers, the economy and the environment".[45]

In light of these differing, and often opposing, private and public interests, a legitimate regulatory process must be inclusive, open to the public and involve participation by a wide variety of interested third parties, including non-governmental public interest advocates. A proper regulatory process should be evidence-based, with the evidence published and subject to critical examination by independent experts and full debate by all concerned. Where the evidence is unclear or incomplete and the potential harm is serious, regulation should err on the side of precaution and public safety. Finally, regulation must be capable of being adapted and adjusted in response to public input, experience and new evidence. The TiSA process, which is opaque, secretive, corporate-biased and inflexible (with provisions that can only be amended with the consent of all parties), meets none of these basic regulatory benchmarks.[46]

GIG WORKERS AND TISA[47]

Among TiSA's numerous annexes, one will search in vain for any provisions aimed at protecting workers' rights and labour standards. This is despite the fact that TiSA aims to cover sectors such as marine transport that are notorious for terrible labour conditions.

It was not long ago that service workers were considered either employees or independent contractors under most countries' national and subnational labour laws. Those workers covered by collective agreements enjoyed additional protections from arbitrary or unfair treatment by their employers and/or clients. Today, a new species of mobile application-based services is blurring the lines between workers' clockable and spare time.

These self-described *technology* firms, many of them based in Silicon Valley, say they merely connect people who want a service (a ride somewhere, in the case of Uber and Lyft, or a place to stay, in the case of Airbnb) with people willing to provide it. They call it the *sharing economy*, but others, pointing out the precarious situations of the non-salaried, frequently non-insured people providing the services, have dubbed it *app-loitation*.[48]

The value to shareholders of app-based service companies is in their ability to *disrupt* older sectors, such as tourism and hotels, or open traditionally closed-off or highly regulated services, such as the taxi business, to low-overhead (and lower-wage) competition. In doing so, they have created rare sources of new capital accumulation in an era of otherwise lacklustre growth. But these services also drive down wages and standards.

Uber does not own the vehicles that pick up its passengers at the push of a button on their mobile phone, for example, nor was it required to insure its drivers (at least not until recently). But it alone retains the right to raise the rates it charges customers and the rates it pays drivers, or to dismiss drivers when their customer approval rating dips below excellent. Benefits? Don't even think about it: Uber, as its executives frequently claim, is not an employer in legal terms.[49]

Airbnb poses other unique challenges, in particular to municipalities facing spikes in housing prices. While the broader tourism sector appears willing to live with the competition, there is evidence that Airbnb rentals are pushing up both housing and rental costs in cities by removing apartments, permanently in some cases, from the available rental stock.[50]

In larger markets like New York, London and Toronto, regulated taxi drivers, who complain of being unfairly priced out of the market by tech CEOs and their apps, are pushing to regulate the disruptors, including by requiring Uber, Lyft and other ride-sharing drivers to have insurance. Some countries have moved to ban Uber outright. Likewise, municipalities are beginning to put limits on the number of Airbnb rentals, and the length of time of apartments can be rented, to dampen the effect on housing prices.

The European Union recently passed a non-binding resolution endorsing calls for better labour protections for *sharing* economy workers. Importantly, rapporteur Maria Joao Rodrigues called for "legal certainty on what constitutes 'employment', also for work intermediated by digital platforms."[51] Given the significant impact this would have on app-based service company profits, which depend on undermining wages in traditional sectors, we can expect them to fight new regulations.

TiSA as written would give these companies more legal tools to attack regulatory measures ranging from municipal government bans on services such as Uber (which under TiSA's market access rules are disallowed), limits on the number of Airbnb rentals (also problematic under TiSA's market access rules) to licensing conditions that are allegedly more burdensome than necessary to ensure the quality of the service (potential violations of TiSA's domestic regulation annex). TiSA is clearly designed to provide certainty for transnational service providers, and is not aimed at affording some level of security, let alone justice, to the precariously *apploited*.

TISA'S DOMESTIC REGULATION ANNEX

TiSA contains controversial restrictions on domestic regulation. These would limit how governments can regulate in the areas of licensing, qualification procedures, and standards – even when such regulations do not discriminate in favour of local services or service providers.

TNCs have long argued for special status in order to take advantage of open market access in services, where the main barriers to trade are regulations. They repeatedly lobby for a domestic regulatory environment that is not only open to foreign involvement, but also business-friendly; that makes getting the necessary approvals as fast and as simple as possible and ensures that service regulations are not so burdensome that they interfere with profit-making.

Despite this corporate pressure, public interest advocates, regulators and some elected officials have been understandably reluctant to allow trade rules to override non-discriminatory public interest regulations. The subject matter of these planned restrictions on domestic regulation is very broad and highly sensitive. *Licensing procedures and requirements*, for example, includes not only professional licensing for service providers (e.g. to ensure proper training and qualifications for lawyers, engineers or accountants), but also licensing requirements for many key institutions and major projects delivering vital services. Such authorisations include everything from accrediting universities and hospitals to approvals for energy pipelines or toxic waste disposal facilities. *Technical standards* involve an open-ended range of vital regulations, including drinking water quality standards, quality standards for private training and education, rules ensuring safe transport of hazardous materials and nuclear safety standards.

The plan to develop such restrictions on non-discriminatory domestic regulation was part of the built-in work program of the GATS, but after 15 years of negotiations at the WTO no agreement has yet been reached. Major developing countries, including Brazil and South Africa, led the opposition to these rules, and their position was buttressed by the concerns of US state and local governments, which were successful in moderating the US government's stance.

Even with a smaller group of more *like-minded*, pro-liberalisation government representatives at the table, the controversy surrounding these rules has apparently carried over into TiSA. Before the planned December 2016 ministerial meeting was cancelled, the decision had already been taken to refer the issues of the scope and nature of these domestic regulation rules to trade ministers, because officials had been unable to reconcile their differences at the technical level.

While details are murky, there are several remaining points of contention. The first concerns whether the domestic regulation restrictions should apply to all services or only

to services committed in a country's TiSA schedule. The second issue is whether the planned restrictions on domestic regulation should be confined to qualification requirements and licensing procedures or also apply fully to the highly sensitive area of technical standards. The third area of disagreement is over the inclusion of a controversial *necessity test*.

Under a necessity test, TiSA trade dispute panels would be empowered to decide whether non-discriminatory regulations are "more burdensome than necessary to ensure the quality of the service".[52] The application of such a necessity test would involve trade panellists making binding decisions about whether a challenged regulation was actually needed, or whether some substitute, more business-friendly regulatory option was, in their view, reasonably available.

If TiSA ultimately includes a necessity test, it would be a dangerous and unwarranted intrusion on regulatory autonomy and democratic decision-making. But even if TiSA governments stop short of applying a full-fledged necessity test, other alternative formulations – such as that regulations must be "based on objective and transparent criteria" – would also be highly problematic.[53] Providing the trade ministries of countries where large corporations are based with new tools to challenge completely non-discriminatory public interest regulations is a recipe for *regulatory chill* (the idea that governments will be more reluctant to regulate when faced with the threat of a trade treaty challenge). Likewise, empowering unaccountable trade dispute panels to second-guess regulators and democratically enacted regulations is certain to weaken public, consumer, worker and environmental protections across a broad range of vital services.

TISA AND DATA PRIVACY[54]

Electronic commerce (e-commerce), which refers to any business conducted using networked digital technologies, is a rapidly growing aspect of the global economy. E-commerce includes not only online shopping for goods and services, but also the transmission of funds and currencies, digital marketing and communications, and peer-to-peer exchanges.

A key issue in the rise of e-commerce is the massive collection and distribution of personal data by vendors, network operators and other online actors. All Internet users, but especially e-commerce consumers, are subject to significant surveillance, often without their understanding or consent. E-commerce businesses that profit from the collection and sale of personal information – mostly major US firms – have been resistant to initiatives aimed at protecting data privacy. Among other interests, these firms want maximum flexibility to store and process in one country personal information collected in other countries.

The leaked TiSA text reveals a concerted effort by the e-commerce industry via US negotiators to undermine data privacy across TiSA parties. Several proposed provisions are relevant, although consensus has not yet been reached. Most importantly, the text proposes that governments be prevented from restricting cross-border data flows.[55] TiSA would thus ensure businesses can move personal information from jurisdictions with stronger privacy rights to jurisdictions with weaker privacy rights. For example, data on Europeans could be collected and stored on US servers where it is not protected by EU privacy laws and is vulnerable to US government surveillance.

Similarly, the text proposes a ban on data localisation requirements, which means businesses would no longer be required to store data in the jurisdiction where it is collected.[56] Without these rules, businesses can sidestep some domestic laws and regulations, including privacy requirements.

The strongest opposition to these US proposals comes from the European Union. Although the EU is currently debating its internal position on cross-border data flows, it is so far erring on the side of personal privacy over commercial flexibility in the TiSA negotiations. This US–EU friction was aggravated by a recent US executive order to exclude all non-US citizens from US laws protecting privacy,[57] which has provoked a backlash from privacy-conscious Europeans. A deal reached between the EU and US on cross-border data flows last summer might also unravel.

The text does contain some rudimentary proposals to protect data privacy, but they are generally weak. For example, TiSA would require countries to "adopt or maintain a domestic legal framework that provides for the protection of […] personal information", but it does not define that framework or require parties to meet a minimum standard.[58] In general, the text is designed to empower e-commerce firms and the financial services industry without commensurate protections for consumers and their privacy rights.

THE AUTOMATIC INCLUSION OF FUTURE SERVICES

Another controversial US demand illustrates TiSA's deregulatory bias. The US wants any future services, even those that have not yet been conceived, to be automatically covered by TiSA. Undoubtedly, taking such a step would seriously impede the regulation of emerging sectors and technologies.

The threat posed by such a provision is most evident in the financial services sector. The leaked financial services annex contains yet-to-be finalised language originally sponsored by the US, and Panama, a notorious offshore tax haven. It reads: "Each Party shall permit financial service suppliers of any other Party established in its territory to offer in its territory any new financial service supplied that the Party would permit its own

financial service suppliers to supply without additional legislative action by the Party".[59] This proposal reflects the influence of the US Coalition of Services Industries. One of the group's demands is that new services be automatically covered by TiSA. The coalition insists that "The competitiveness of financial services firms depends on their ability to innovate, often rapidly in order to meet the special needs of customers by developing and offering new products and services".[60]

Yet, as many financial experts and analysts have observed, the proliferation of new and poorly understood financial products such as collateralised debt obligations, credit default swaps and complicated derivatives was a major factor both in precipitating and worsening the severity of the 2008 financial crisis. Especially in the financial sector, it is often desirable, and even necessary, to curb innovation by financial service providers in the interests of protecting consumers and the stability of the financial system.

For example, Nobel laureate James Tobin's 1972 proposal for a tax on financial transactions was designed to slow down the velocity of international financial transactions by putting a speed bump (in the form of a small transaction tax) on international currency transactions. More recently, many industry insiders and regulators, including advocates of minimal regulation such as Alan Greenspan, have admitted that, due to the complexity and proliferation of lightly regulated financial products and instruments, regulators did not understand or appreciate the risk of the impending collapse of the financial system. In short, restricting the proliferation of new products and delivery methods is an important means of ensuring that innovation does not outstrip regulatory oversight.[61]

Despite the incredible damage done by the financial crisis, US banking, securities and insurance lobbyists continue to push for TiSA obligations that might boost their profits but that would increase the risks to the public and the broader economy. These obligations would ensure that if a new financial product or delivery method is approved domestically in any TiSA country, such permission would be automatically extended, without requiring any legislative approval, to established services firms from other TiSA countries.[62] This compulsory opening of new services to powerful foreign corporations would make it far more difficult for governments to reverse course if problems develop. Such reckless proposals set the stage for future crises.

CONCLUSION: TISA'S UNCERTAIN FUTURE

The election of Donald Trump has thrown many things into turmoil, including US trade policy. One of the administration's first official acts was to withdraw from the TPP, another TiSA-like mega trade and investment deal that would primarily benefit transnational corporations at the expense of workers, citizens and the environment.[63]

The current suspension of TiSA negotiations leaves other countries and the corporate sector waiting for a decision from the US government. The new administration has so far provided few clues about its attitude toward TiSA. In the first major trade policy document outlining the president's key trade priorities for 2017, TiSA is mentioned only briefly and in purely descriptive terms.[64] In confirmation hearings, Trump's nominee for United States Trade Representative, Robert Lighthizer, was non-committal but did not rule out the possibility of the US re-engaging in TiSA talks.[65]

As things stand, there are several possible scenarios, but whichever course of action the US takes, the fate of TiSA hangs very much in the balance.

The first scenario is that the US will withdraw from TiSA and the talks will collapse or be suspended indefinitely. The Trump administration has said it strongly favours bilateral over multilateral negotiations. One of its clearest trade policy pronouncements stresses that "going forward, we will tend to focus on bilateral negotiations".[66] Since TiSA, like the seemingly now-defunct TPP, is a plurilateral or mega-regional agreement, this might spell trouble for TiSA, especially given the focus on higher US priorities such as NAFTA renegotiation.

A second scenario is that the US pulls out of the talks, but that other parties continue under the leadership of the EU. Such an outcome appears unlikely but cannot be ruled out. Without the US, which accounts for over one-quarter of global services trade, other parties and even the corporate sector might reconsider whether a diminished deal would be worth the effort. Moreover, the current text very much reflects US priorities, for example, in prohibiting data localisation and automatically covering new services. Some provisions of a deal finalised without the US at the table could look quite different, although not necessarily less intrusive in all respects. The EU has taken worse positions than the Obama administration did on certain key TiSA issues, such as pushing for full application to state and local governments, favouring strong restrictions on domestic regulation and pressing for TiSA to cover government procurement of services.

The third and by far the most dangerous scenario is that the US recommits to TiSA participation with a renewed, even more aggressive, negotiating mandate. The chief reason why Trump and his advisors favour bilateral talks is that they believe they can get more concessions by asserting US power one-on-one against other countries. They are in no way opposed, in principle, to TiSA-style international deals that promote privatisation or deregulation, an agenda they are vigorously pursuing at home in the US.[67]

In fact, one of the US administration's main criticisms of plurilateral deals like the TPP is that they do not go far enough in meeting US corporate goals, such as stronger patent protection for medicines and total bans on data localisation (including in the area of financial services). If Trump can be convinced that TiSA will deliver on key US corporate priorities, he may yet embrace it.

Many of the corporate lobbies backing TiSA have close ties to Trump and the agreement has garnered strong support from congressional Republicans. For example, IBM and Walmart are two of the six co-chairs of Team TiSA, the US business coalition promoting TiSA. Meanwhile, Ginni Rometty, IBM's chief executive officer, and Doug McMillon, CEO of Walmart, now sit on Trump's Strategic and Policy Forum, a group of high-level business advisors to the new administration.[68] Trump himself has stakes in many services businesses that arguably stand to benefit from TiSA.[69]

The ability of corporate voices to sway the Trump administration on this issue may also be made easier by the fact that the US has a significant surplus in trade in services, which helps offset the huge US trade deficit in goods. This deficit has raised the ire of Trump's trade policy advisors.

If the US decides to pull out, it will not be the first TiSA country to head for the exit. Singapore participated in early TiSA talks but withdrew before formal negotiations got underway. Later, Uruguay and Paraguay both pulled out. Nevertheless, if the US turns its back on TiSA it would surely deal the agreement a blow from which it would be difficult to recover.

Still, citizens and activists cannot afford to simply sit back, anticipating that the rogue plutocrats now running the White House will derail TiSA. While progressives agree that current free trade models have failed most workers and citizens, this should not be interpreted as support for the views of Trump and his advisors.[70]

For inspiration in the fight to block TiSA, progressives should look instead to the example of Uruguay, which withdrew from TiSA in 2015. In most countries, TiSA has received scant attention, especially when compared to the impressive popular mobilisations to oppose the Transatlantic Trade and Investment Partnership (TTIP), CETA and TPP. Uruguay is the exception.

Uruguay joined the TISA negotiations in mid-2014 after the talks had already been underway for more than a year. This decision was greeted with concern and growing opposition from trade unions, environmental organisations and other civil society groups in the country, culminating in a one-day general strike in which TiSA was a key issue.

To its credit, Uruguay's government responded to public and grassroots concern by launching an intensive four-month national consultation on TiSA. The process, the first of its kind in any TiSA country, included gathering the views of all government ministries, business, civil society and the general public. Subsequently, reflecting public and civil society concerns, a large majority of the governing Frento Amplio voted for a resolution urging the government to abandon the TiSA talks. On 7 September 2015, President Tabaré Vázquez announced that Uruguay would formally withdraw from TiSA.[71] Shortly afterwards, Uruguay's neighbor and Mercosur partner Paraguay announced it too would withdraw from TiSA.

It is no accident that the first country to withdraw from TiSA is one where access to water is a constitutionally recognised right of all citizens and public enterprises continue to play a vital role in providing essential services. This includes full public management of water and sanitation.[72] Public awareness that TiSA could interfere with just such decisions to reverse privatisation and return water and other essential services to public management was a significant factor in mobilising support for Uruguay's pullout.

The Uruguayan government also expressed concerns about how TiSA could interfere with the regulation of its telecommunications and financial services sectors.

As the Uruguayan experience demonstrates, once there is wider public awareness of TiSA's anti-democratic threats to public services and unjustifiable constraints on democratic regulation, public opposition will grow. It should also be noted that even if the talks stall or falter because of the US government's antipathy to the negotiating venue, TiSA's deregulatory agenda and problematic elements will likely resurface in other negotiating forums and impending trade deals, including in the new wave of bilateral deals championed by the US.

The broader lesson for citizens in all countries is that such deals only survive under conditions of great secrecy and the deliberate exclusion of all but corporate interests. It is essential that citizens press their governments for full public participation and debate before any deal is finalised.

TiSA's current troubles provide an opportunity that should be seized upon to expose the unacceptable constraints that it and similar corporate-dominated trade and investment deals seek to impose on democratic societies.

ENDNOTES

1 The 23 jurisdictions participating in TiSA are: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States.

2 "TISA ministerial cancelled because a deal in 2016 has been ruled out". World Trade Online. 18 November 2016.

3 Global Services Coalition. "Message to Ambassadors and Chief Negotiators of the TiSA Countries". December 2016. http://www.twcsi.org.tw/eng/exevent_detail.php?lid=1008.

4 European Commission. "TiSA in a nutshell". http://ec.europa.eu/trade/policy/in-focus/tisa. Accessed 26 April 2017.

5 Scott Sinclair and Jim Grieshaber-Otto. Facing the Facts: A Guide to the GATS Debate. Canadian Centre for Policy Alternatives. 2002: Appendix 2, p. 112.

6 Central Intelligence Agency. World Factbook. https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html. Accessed 31 March 2017.

7 World Trade Organisation. General Agreement on Trade in Services. Article XIX: Negotiation of Specific Commitments, Article VI: Domestic Regulation, Article XIII: Government Procurement and Article XV: Subsidies. https://www.wto.org/english/docs_e/legal_e/legal_e.htm#services/.

8 These obstacles are discussed at greater length in Scott Sinclair and Hadrian Mertins-Kirkwood. "TISA versus Public Services". Public Services International. 2012: 8-10. https://www.policyalternatives.ca/publications/reports/tisa-versus-public-services.

9 See, for example, "Trade in Services Agreement (TISA) Financ ial Services Annex." WikiLeaks. June 19, 2014. https://wikileaks.org/tisa-financial/WikiLeaks-secret-tisa-financial-annex.pdf.

10 The leaked 2016 versions of the draft core text and thirteen annexes can be found at: http://bilaterals.org/?+-tisa-+/. Earlier versions of most of the annexes have also been leaked: see https://www.wikileaks.org/tisa/ and https://ttip-leaks.org/tisa. Accessed 15 March 2017.

11 The rules annexes address corporate concerns such as localisation, movement of information, state-owned enterprises, domestic regulation, electronic commerce, transparency and movement of natural persons. The sectoral annexes define "pro-competitive" deregulatory templates for key sectors including financial services, telecoms, air transport services, delivery services, international maritime transport services, and road freight transport.

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Rosa-Luxemburg-Stiftung, Brussels Office
11 Avenue Michel-Ange 1000 Brussels, Belgium
www.rosalux.eu

Legally responsible person
Dr Martin Schirdewan
Brussels, July 2017

Author
Scott Sinclair

Editing
Simon Phillips (Linguatransfair)

Design & illustration
Mélanie Heddrich

Photos cc
Annette Dubois/flickr – 9, 41; Christian Natiez/flickr – 10;
GGAADD/flickr – 15; Ano./IUF – 19; Cornelia Reetz/flickr – 38

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Under the guise of expanding the international trade in services, TiSA will make it much harder for governments to regulate vital services such as energy, water, banking, transport, education and more. The agreement is also designed to pry open public services to commercial involvement. While this agenda may suit the commercial interests of the transnational corporations behind the secretive TiSA negotiations, it will not serve the broader public interest. As such, this proposed treaty cuts to the heart of democratic regulation and decision-making affecting all services.

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