



## AK Position Paper

# EU Trade and Investment Agreements TTIP and CETA

## About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 750.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

## Executive summary

The European Union (EU) is engaged in various negotiations with third countries on trade and investment. The on-going negotiations with the US on the Transatlantic Trade and Investment Partnership (TTIP) and with Canada on the Comprehensive Economic and Trade Agreement (CETA) are currently among the most important. The Austrian Federal Chamber of Labour (AK) has studied the various facets of these agreements and come to the following conclusions.

### **Transparency during the negotiations**

All versions of the negotiating text under consideration and its individual chapters must be made available to the European Parliament, the parliaments of the EU member states, and the public during each phase of the negotiations.

### **The impact on workers and consumers**

The studies on TTIP that have been made available until now suggest that the agreement will only lead to modest improvements in economic performance. However, this comes at a cost: workers and consumers will be forced to bear the high level of risk associated with the negative impacts of these trade agreements. Moreover, increased competitive pressure will lead to excessively low wages, part-time work without

social security coverage and other precarious working conditions. Instead of an economic miracle, TTIP promises uncertainty and social injustice.

### **Investment protection provisions**

These regulations should not be included as part of CETA or TTIP, because national legislation in the EU's member states, the US and Canada already provides far-reaching provisions that protect property; implementing these provisions would endanger public welfare.

### **Investor-to-state dispute settlement (ISDS)**

Disputes about trade must be resolved as they are today through public trials conducted in ordinary courts with independent judges and the right to appeal. Private arbitration tribunals must be rejected because they are tainted with structural bias, and this risks disputes being resolved unfairly.

### **Regulatory cooperation**

Any restriction of parliamentary-democratic legislation through consultative obligations and similar voting arrangements must be rejected. The decision as to whether specific regulations are 'unnecessary' or even 'burdensome' must not be made purely according to commercial considerations or cost. Transnational bo-

dies that scrutinise the compliance of future regulations must be rejected.

#### **Food quality and safety**

The application of the precautionary principle in the EU must be explicitly enshrined in the text of the agreement. The *acquis* regarding the prohibition or restriction of substances or residues in foods must be maintained. Furthermore, genetically modified organisms must be explicitly excluded from the scope of the agreement. Finally, genetically modified feed must be clearly labelled as such.

#### **Public services**

Public services must be bindingly exempt from the full scope of trade agreements. The ability of governments to regulate public services must not be restricted. The adoption of a negative list approach and a 'ratchet' clause must be firmly rejected.

#### **Public procurement**

Further market openings in this area need to be viewed highly critically. Public services – and this also includes contracts and concessions for public services – must be explicitly excluded from trade agreements. Austrian and European regulations on the integration of social and environmental concerns in public procurement procedures must not be undermined.

#### **Financial services**

Financial services must be exempt from the scope of TTIP, CETA and TiSA. Liberalisation commitments in the area of financial services in existing EU trade agreements need to be reviewed critically; excessive liberalisation commitments must be revised.

#### **Sustainable development**

as ILO members, most countries (and this include the EU member states, the US and Canada) are required to ratify, implement and effectively apply the ILO's eight core labour standards. These relate to the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

#### **Labour migration**

Negotiations on the further liberalisation of the cross-border provision of services by workers ("Mode 4") have to be rejected as long as an effective cross-border cooperation of administrative and legal authorities is not guaranteed. This is a precondition in order to be able to ensure compliance with the respective provisions on the minimum wage, working conditions and other labour standards set out in social and labour law and collective bargaining agreements.

#### **Privacy policy**

Europe must not depart from its traditions of comparatively strict levels of data protection. EU data protection provisions must apply to US companies that provide goods or services or observe the behaviour of EU consumers. EU citizens must be protected from excessive activities on the part of the security and intelligence services.

**Copyright**

the inclusion of copyright regulations in free trade agreements must be rejected. Negative experiences with ACTA mean that controversial anti-piracy provisions must be prevented from finding their way into free trade agreements 'through the back door'.

**REFIT**

The European Commission must ensure that trade agreements do not block regulatory requirements at the EU level such as those needed after the global shockwaves that occurred during the financial crisis between 2008 and 2009.

**Plurilateral Trade in Services Agreement (TiSA)**

The negotiations on a follow-up agreement to the GATS, which are aimed at implementing more far-reaching liberalisation, are a step in the wrong direction and must be rejected.

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# Introduction

Many people in the European Union have already heard of the term 'TTIP'. The negotiations between the EU and the US on a comprehensive trade and investment agreement (the Transatlantic Trade and Investment Partnership) has long been the subject of intense political debate. At the same time, this has also brought other EU trade policy projects into the focus of public attention. These include the Comprehensive Economic and Trade Agreement (CETA), between the EU and Canada, which the European Commission views as having been finalised, and the continuing negotiations on the Trade in Services Agreement (TiSA).

These and many other of the trade agreements currently being negotiated by the EU stand for much more than the removal of classical trade barriers such as tariffs. They constitute a new generation of international trade agreements that further intensify the current offensive liberalisation strategy, and they will affect increasing numbers of policy and regulatory fields. These agreements are an attempt to circumvent on-going political differences between member states of the World Trade Organization (WTO), and aim to set new global standards in trade liberalisation. Moreover, as binding treaties of international law, these agreements will fundamentally decide in how far states will abandon democratic policy space as they prioritise the rights of transnational companies.

This position paper examines some of the most contentious aspects of

the proposed trade and investment agreements between the EU and the US (TTIP) and the EU and Canada (CETA) and puts forward the AK's main positions on these agreements. From the view of the European Commission, negotiations on CETA have been finalised; the agreement has however not been adopted yet. Negotiations on TTIP have been ongoing since the summer of 2013. We will also deal with the international trade in services agreement (TiSA), whose negotiations have been underway since spring 2013, in an individual chapter. Since the start of the negotiations on these and other EU trade agreements, the AK has sought to represent the interests of workers and consumers vis-à-vis political decision-makers at the Austrian and European level.

The promises of significant economic growth effects and job increases through trade agreements such as TTIP are not based on credible evidence. In contrast, the risks that such trade agreements bring with them for the public appear much more obvious. The envisaged provisions within CETA and TTIP aimed at protecting foreign investors, and the investor-to-state dispute settlement (ISDS), would enable US or Canadian multinational companies to use private ad hoc arbitration tribunals to claim damages if they viewed their (expected) profits as at risk through new laws or regulations. At the same time, the removal of 'unnecessary' regulatory differences, which has been particularly promoted in the context of TTIP, involves a further danger to public interests. It could



place regulations that protect consumers, workers and the environment under increasing pressure – even after TTIP has entered into force. This leads to questions about the consequences of these trade agreements amongst others for food safety regulations and privacy policy. Moreover, the far-reaching agenda currently under negotiation will also put pressure on governments' policy space to regulate the provision, organisation and financing of public services. Concern has also been expressed that the current trade agreements could place restrictions on the (re-)regulation of the financial sector, the necessity of which became clear at the very latest during the financial crisis. Furthermore, the EU also lacks a focus on sustainability for its trade and investment policy. This is amongst others reflected in the fact that although the European Commission does include chapters on sustainable development with references to international labour and environmental standards in its trade agreements, these minimum standards are not enforceable and violations of these standards are not subject to sanctions.

The EU's trade policy agenda is extensive. The European Commission is currently negotiating with nearly sixty countries on trade agreements (amongst others, Japan, India, Brazil, Argentina, Ukraine, Malaysia, Singapore and South Africa)<sup>1</sup>. The EU's free trade agreement with South Korea, which has been in force since July 2012, was the first bilateral agreement to be signed since the EU's 2006 'Global Europe' strategy. Negotiations with Colombia and Peru have also been completed, and the EU trade agreement with these two countries has already entered into force despite the fact that the ratification process has not been completed yet by all na-

tional parliaments. From the perspective of the negotiators, CETA has also been finalised. However, the outcome of the negotiations does not even meet the core demands of the representatives of workers. Consequently, the AK calls for the rejection of CETA in its current form, and that of TTIP, as long as the demands set out in this position paper are not met.

In the context of profound economic, social and environmental crises in the EU, and on the global scale, the question arises whether the EU's current trade policy agenda is paving the way towards a much-needed new model of wealth and distribution, or whether rather, it will restrict possibilities for such social change. The AK's answer is clear: EU trade and investment policy must undergo fundamental change in order to ensure that it effectively focuses on social, ecological and democratic goals, rather than undermining them.

Éva Dessewffy

## The lack of transparency: the documents relevant to the negotiations must be published

Since the beginning of the TTIP negotiations, the European Commission has been confronted with criticism concerning the lack of transparency in connection with the documents used during the TTIP negotiations. Shortly after taking office, the president of the European Commission, Jean-Claude Juncker responded to this criticism by stating: *"We can do the best job, but there is no point if we cannot win the support and trust of the people for whom we work. We need to be more transparent, because we have nothing to hide. Let us show that we really mean it this time and that together we really are capable of changing and renewing Europe."*<sup>2</sup>

Despite the launch of a transparency initiative<sup>3</sup> by Trade Commissioner Cecilia Malmström, the criticism has continued:

- The majority of the documents that have been published so far are position papers prepared by the European Commission for the launch of its initiative, and not the actual texts being used in negotiations between the EU and the US
- Documents relating to the US can only be published with its consent, but the US is highly restrictive in this regard. However, US objection to the publication of documents relating to TTIP is no reason to withhold them from the European public

- The EU's proposals on services, duties, investments and procurement are exempt from disclosure. Yet these are the most controversial issues covered by the trade and investment agreement
- The European Commission also reserves the right to refuse to disclose particular documents and proposals even if they have been specifically requested. As such, decisions on whether such documents will be made public is subject to the utter arbitrariness of the European Commission
- The European Commission is currently negotiating more than sixty trade and investment agreements with third countries, however, the transparency initiative only covers TTIP and does not apply to other agreements

Although the transparency initiative has improved the access of EU parliamentarians to the texts of the TTIP agreement, most critics consider this to have been a matter of course; after all, ratification of TTIP requires European parliamentary approval. Consequently, Cecilia Malmström's transparency initiative continues to lag far behind expectations.

## The AK's Demands

- Publication of the EU's negotiating positions before each round of negotiations, and of all documents exchanged between the EU and its negotiating partners
- Publication of the texts used in the negotiations: all versions of the agreement must be made available to the European Parliament, the parliaments of the member states and the public during each step of the negotiations so that they can make proposals or lodge objections prior to the conclusion of negotiations and ratification of the agreement

Éva Dessewffy

## The effects on growth and employment: minor advantages and high levels of risk

The European Commission views TTIP as an engine of growth and jobs. However, according to the Commission's own analysis, which was based on a study by the London Research Institute (CEPR)<sup>4</sup>, in an optimistic scenario, TTIP will increase EU economic output by around 0.5%, albeit over a period of ten years. This would represent an annual increase of just 0.05% GDP. In the study's 'less ambitious' scenario, which is far more realistic, TTIP would merely produce a one-off increase in GDP of around 0.3% within ten years.

### **Mainstream studies: questionable assumptions and no consideration of adjustment costs**

The European Commission and business mainly base their figures on analyses conducted by Ecorys<sup>5</sup>, CEPR and Ifo/Bertelsmann Stiftung<sup>6</sup>. These studies use so-called general equilibrium models. However, such models only provide for short-term changes in the labour market, and assume that equilibrium will be reached in the long-term. This of course ignores situations such as long-term unemployment.

In addition, the majority of the growth picked up by these studies is based on reductions in so-called non-tariff barriers such as quotas, technical regulations, environmental and labour standards, food standards, and process and product approvals. Reducing trade barriers in this manner could refer to harmonising but also

repealing laws, administrative procedures and standards. However, these studies do not take into account the social costs of making such regulatory changes in areas like health, and consumer and worker protection. Furthermore, they ignore the costs of adjustment incurred through changes in technical standards by administrations and companies, and the costs of informing consumers about such changes.

Moreover, these studies tend to underestimate the importance of imports and either ignore or underestimate the costs of macroeconomic adjustment (such as the costs of changes in current account levels, the loss of customs revenues, and the costs associated with supporting the unemployed or retraining).<sup>7</sup>

Finally, these studies also disregard the effects of trade diversion: it is highly likely that TTIP will affect world trade flows<sup>8</sup>, and especially intra-EU trade<sup>9</sup>. In fact, a decline should be expected in trade between EU member states on the one hand, and between the European Union and other countries on the other. This would hit EU member states with sluggish growth and developing countries particularly hard.

### **Job and income losses are highly likely**

Although the CEPR study, on which the commission relies, makes no menti-

on of net employment effects, it does predict that TTIP will lead to shifts in employment. The commission used the results of the study to calculate that between 430,000 and 1.1 million workers in the EU will temporarily lose their jobs<sup>10</sup>. This trend was also confirmed by another study<sup>11</sup> that forecasts that TTIP will lead 600,000 people to lose their jobs and which even goes as far as predicting an annual loss of income of between €165 and €5000 per citizen in the EU.

### **What are the consequences of TTIP for Austria?**

An overview of the main studies has shown that we should expect a reduction in Austria's trade balance because the level of US imports is expected to grow twice as fast as the level of Austrian exports to the United States.<sup>12</sup>

Trade liberalisation through TTIP will of course produce both winners and losers. Some sectors, such as textiles, clothing, chemicals, machinery and the automotive sector, are likely to see increased trade with the United States through TTIP. However, this will occur at the expense of trade with European countries. Furthermore, the sectors that will see the strongest reductions in exports to the US are precisely those that are currently experiencing the highest growth in such exports.<sup>13</sup>

### **Austria's experience with the EU-South Korea free trade agreement**

To find an example of what happens when such agreements come into force, we only need to look to the agreement between the EU and South Korea that has been in place since mid-2012. This agreement has had a detrimental effect (from an Austrian perspective) on import-export

relations between Austria and South Korea. Before the agreement entered into force, Austrian imports from South Korea stood at €478 million (figures for 2010); by 2013, however, imports had almost doubled to €805 million. During the same period, Austrian exports to South Korea only saw a relatively small increase from €712 million in 2010 to €849 million in 2013.<sup>14</sup> Consequently, it can be argued that Austria has recorded a negative trade balance with South Korea since the free trade agreement entered into force. This means that the agreement has led foreign trade to account for a lower level of Austrian GDP than it did before the agreement came into force. Consequently, the figures on Austria's trade balance between 2010 and 2013 (which result from the EU-South Korea free trade agreement) support the findings of the study mentioned above that argued that negative developments in imports tend to be underestimated.

### **Conclusions**

Although foreign trade with third countries has certainly contributed towards growth in the European Union, the importance of export-induced growth through TTIP has been highly exaggerated. Aspects such as the negative consequences of higher levels of imports on employment are hardly mentioned in discussions. Furthermore, the public is expected to bear the costs of adjustment.

Increased bilateral trade between the EU and the United States, and between the EU and Canada, will come at the cost of intra-European trade. Consequently, TTIP and CETA could have fatal consequences for Austria, since the internal market is the crucial determinant of growth and employment in the country. Until

now, around 88% of demand for Austrian goods and services has come from EU member states; only 13% has come from other countries.<sup>15</sup> As such, the expected trade diversion from intra-European trade to trade with the United States could potentially jeopardise the economic recovery.

The studies that have become known so far on the economic effects of TTIP have at best predicted modest positive improvements in economic performance; however, these claims are not supported by credible evidence. Moreover, workers and consumers are expected to bear the high costs associated with the negative impact of trade agreements caused by increased competitive pressure. This situation leads to low wages, part time work without social security coverage, and other precarious working conditions. Instead of an economic miracle, TTIP promises uncertainty and social injustice.



Elisabeth Beer

## Investment protection provisions cannot be justified

With the entry into force of the Lisbon Treaty on 1 December 2009, the competency for drawing up new treaties with third countries in investment policy moved from the EU member states to the European level. Since then, investment protection provisions have formed an integral part of EU trade and investment agreements.

The first agreement negotiated by the European Commission with its new competence was CETA, the trade agreement between the EU and Canada. CETA now serves as a blueprint for further negotiations with countries such as Singapore, China and the United States. The TTIP text has yet to be made available.

### **Nothing justifies privileging property rights owned by foreign investors**

Investment protection provisions set out in CETA provide four minimum standards to foreign investors from contracting partner countries:

- protection from any form of discrimination
- special rules on transparency
- fair and equitable treatment in the host country
- free transfer of payments in a freely convertible currency

States that do not meet these minimum standards will have to compensate investors for damage and loss.

The property protection provisions stipulated in CETA go far beyond the immediate compensation for expropriation that EU citizens and entrepreneurs benefit from via national legislation. CETA's investment protection also covers government measures such as new laws, regulations, decisions, etc. that could have a similar effect to expropriation. This situation is known as 'indirect expropriation'. For example, if the Austrian parliament were to amend provisions on environmental or labour protection this could be viewed as in breach of the minimum standard of 'fair and equitable treatment' in cases where Canadian or US factory owners incurred additional costs. Moreover, if investors could demonstrate before a private arbitration tribunal a 'legitimate' expectation that no legal changes were to be implemented during their business activity, they would be entitled to compensation.

This wide-ranging right to state compensation comes with no discernible benefits to the public or citizens. On the contrary, the ability of parliaments to make legal changes that reflect the interests of the common good is being severely limited; thus, even the sovereign right to regulate is under threat. In fact, it

is likely that the mere threat of an investor's claim would be enough to block any new legislation. In addition, these changes would severely disrupt competitiveness between domestic and foreign companies.

### **Secure a positive climate for investment through equal treatment**

The idea of investment protection stems from agreements made between industrialised and developing countries or those in transition. On the one hand, investment protection was aimed at encouraging new investment in countries with weak legal systems. On the other, companies that invested abroad needed to be protected from arbitrary, unfair or otherwise unacceptable treatment and loss. However, the lessons learned from investment protection agreements lead to strong questions about their effectiveness. Moreover, businesses usually 'price in' the risks associated with foreign investment in countries with weak or lacking legal systems by having very high profit margins.

Countries such as Austria, Canada and the United States, however, are democratic states with fully developed judiciaries. These countries' legal systems do not pose risks to investment, and fundamental rights such as the right to property and equal treatment are strongly anchored in their judicial systems. Moreover, Austria, Canada and the United States are highly economically intertwined; proof in itself that investment protection in this form has not been needed before, and that it will not be needed in the future. Finally, the introduction of an investment protection regime would signal to the rest of the world that we question our own judicial system, system of governance, and the separation of powers.

## **The AK's Demands**

Investment protection provisions should not be included in CETA, TTIP or any other comparable EU trade and/or investment agreements, because:

- national legal systems already provide far-reaching provisions for the protection of property
- the sovereign right to regulate is being limited at the expense of the common good, democracy and taxpayers
- the European economy, which forms the greatest pillar of the Austrian labour market, would be in a far worse position due to unequal treatment and would suffer significant competitive disadvantages in the internal market
- minimum standards are still vaguely formulated and provide room for interpretation; this could permit unwarranted and dubious court action even by financial speculators
- investors who view their economic interests as at stake could use the clause on 'fair and equitable treatment' to take action against democratic regulations that reflect the general public interest
- there is no balance between the rights and obligations of foreign investors

Elisabeth Beer

# Investor-to-state dispute settlement: private justice in the interests of multinational corporations

In order to enforce investment protection provisions, an investor-to-state dispute settlement (ISDS) is foreseen as part of CETA, TTIP and other EU trade and investment agreements. If an investor feels discriminated against in a host country or that the principle of trust has been broken, an investor can bring the state directly before a private ad hoc arbitration tribunal that would make a judgment on the perceived infringement. Arbitrators in these tribunals have the authority to make judgments about what constitutes direct or indirect expropriation. They are also authorised to judge whether an investor is entitled to compensation for legal or procedural measures undertaken by a sovereign state.

## Democracy is in danger

The ISDS mechanism will enable US or Canadian multinationals to circumvent national jurisdictions by invoking private ad hoc tribunals if they assume new laws or regulations risk reducing their (expected) profits. This right places massive restrictions on a state's right to regulate. In the past, the mere threat of litigation has been enough to intimidate governments into rejecting regulatory initiatives. A tribunal's decision is final, and there is no possibility of a review by a further tribunal or even a national court.

Over the last decade, the ISDS mechanism has become a very powerful and efficient tool used by corpo-

rations and financial speculators to combat specific regulations and cuts to sovereign debt. Of the 600 cases that are known about, almost two thirds ended with governments paying compensation or compromising, such as by withdrawing or adapting their planned measures. Even if the investors do not always win their cases, taxpayers still generally have to pay the expensive costs of a tribunal, which, according to the OECD, averages at around US\$ 8 million.

## The arbitration system is out of control

Private ad hoc tribunals have often been criticised as biased, inconsistent and undemocratic. The experts in investment protection are a small, closely-knit group of law firms. More than half of the known investment protection cases were presided over by just 15 arbitrators. Moreover, these people do not merely act as arbitrators; they are lawyers and can represent a party during a dispute. Furthermore, they even call each other as experts during tribunal proceedings. However, there is no talk of a conflict of interest here, even when they 'change sides'.<sup>16</sup> At the same time, law firms have a financial interest in ensuring as many disputes occur as possible, and in securing the highest possible levels of compensation. Moreover, these tribunals can only be invoked by investors and not states. This situation has led law firms to search for business

opportunities by offering investors the possibility of filing a specific complaint before a tribunal; they even advertise their services in journals. These firms also work with capital funders, and contribute to the high costs of a tribunal if they are guaranteed part of the compensation. This has led to the development of a specific sector aimed at profiting from these tribunals.

The massive criticism by trade unions and civil society directed towards this system has begun to show effects. Even proponents of the ISDS mechanism admit the need for a better balance between regulatory rights and investment protection, that arbitration will have to be made more transparent, and that arbitrators must become more independent. Moreover, selective reforms of CETA have already been implemented: a voluntary code of conduct now exists for arbitrators; there are rules on transparency, and the possibility to lodge an appeal is in prospect.

However, these highly selective improvements do not fundamentally affect the principle of private justice. Arbitrators, whose independence or legitimacy is not guaranteed, will still make binding decisions about the appropriateness of specific regulatory measures that have been put in place in the interests of the public, and they will be able to do so far from the framework of national jurisdictions.

### **The privatisation of jurisdictional authority must be rejected**

Before CETA, ISDS was only common in bilateral investment treaties between developed and developing countries. Expanding the arbitration system to developed states governed by the rule of law, such as the US, Canada and the EU would mean granting more than one quarter of all fo-

reign companies in the EU the right to invoke a tribunal. Doing so, however, would provide the ISDS mechanism with an unprecedented dimension. It is unclear whether this would even be legal, as it would involve a move away from the separation of powers and the independent judiciary, and towards a system of private justice for large parts of the business sector.

## **The AK's Demands**

The ISDS mechanism must be rejected on principle, because:

- Private tribunals are tainted with structural bias and cannot fairly resolve disputes. Making judgments on public regulation is a core function of the state and must remain so. The common good must take precedence over particular economic interests
- Ordinary courts with public trials, independent judges and the right to appeal must be used to resolve disputes
- The privatisation of jurisdictional authority is to be vehemently rejected
- The rights of parliaments and citizens will be massively restricted
- Taxpayers should not be made accountable for investment risks as the economic framework can change during the course of business
- European businesses will be highly disadvantaged compared to Canadian and US businesses
- States have nothing to gain through arbitration; at best, they can defend themselves against claims for compensation

Elisabeth Beer

## This investment protection regime cannot be reformed

In spring 2014, the European Commission launched a public consultation in response to massive resistance from trade unions, workers' interest groups and civil society against its plans to provide multinationals with exclusive rights to call tribunals. At the same time, it suspended negotiations on the investment protection chapter with the United States. Nevertheless, investment protection and ISDS are already part of the CETA agreement with Canada.

Participation in the European Commission's online consultation on the ISDS mechanism in TTIP was higher than in any previous consultation: nearly 150,000 people and institutions provided answers to the highly technical questions posed in the consultation. The overwhelming majority (97%) fundamentally rejected the provision of an exclusive right to call a tribunal to multinationals in EU trade agreements such as TTIP. A total of 33,753 responses came from Austria.

### **Massive resistance leads to isolated improvements**

In response to the highly critical results of its consultation, the European Commission intends to discuss proposals to reform TTIP's most controversial aspects. However, it refuses to depart from the provision of privileged rights to multinationals. The European Commission

is holding consultations on better protection of the right to regulate for states; the establishment and function of tribunals; the relationship between national legal proceedings and ISDS; and a framework for appeal against decisions made at the tribunals. If the discussions do lead to selective improvements, they will only apply to TTIP, not to CETA or any other of the agreements currently being negotiated with Singapore, China, India, Vietnam, Myanmar etc.

Business and its lobbyists have felt forced to respond to the debate about reforms, because public opinion on the tribunals has been devastating: secret courts without democratic legitimation, biased tribunals, non-transparent procedures and governments facing intimidation. It has become clear to the lobbyists that if they are to save the privileged rights to multinationals, concessions will have to be made. This is why ideas such as an international investment court with independent judges, transparent procedures, the participation of third parties and the possibility of appeal are all being discussed now. Furthermore, the state's right to regulate should also be better protected in TTIP and parallel tribunals should not be approved.

## Don't let them pull the wool over your eyes!

In theory, the proposals for selective ISDS reform seem like an improvement to the status quo. However, this is misleading: Austria is currently under no investment protection obligations to Canadian or US investors and cannot be sued by them! So why would we want to put ourselves in a much worse situation? Moreover, the proposed reforms do not address the main criticisms of the controversial investment protection regime:

- Investment protection rights are being prioritised over human rights and democracy
- State rights to regulate in the interests of the common good are being given up to private tribunals
- Investment protection measures serve individual economic interests rather than the public interest
- The tribunals are undemocratic, unpredictable and unilateral (only the investor can call for arbitration). Tribunals are not obliged to respect any particular constitution, fundamental rights or even human rights. However, they still have the authority to make judgements on the appropriateness of specific regulatory measures
- Investment protection is a privilege provided to foreign investors and this disadvantages domestic investors, the mainstay of the local labour market
- The clauses on fair and equal treatment and indirect expro-

priation provide investors with the right to sue for compensation, regardless of the institutional structuring of tribunals or courts

## The AK's Demands

- Remove investment protection provisions and special rights to claim for multinationals from all trade and investment agreements
- Investment protection provisions and the ISDS mechanism must be rejected as part of TTIP
- CETA must be renegotiated and the ISDS chapter removed
- Agreements that are currently being negotiated (with Singapore, Japan, China, India, Vietnam, Myanmar, etc.) shall not contain chapters on investment protection and ISDS



Éva Dessewffy

## Regulatory cooperation: a wolf in sheep's clothing

The TTIP negotiations are focused on the removal of trade barriers. In particular, this means that existing and future regulatory differences between the EU and the US that are interpreted as 'unnecessary' or 'burdensome' barriers to trade are to be removed. Differences in regulation could refer to areas such as production standards, food safety and regulatory processes for chemicals, and lead such standards to be wound down by mutual recognition, harmonisation or through the 'simplification' of specific arrangements.

### **All areas of legislation are affected**

In principle, the tribunals cover any planned or existing regulatory measures that could have an impact on transatlantic trade. This includes regulations, directives, measures and delegated acts at the EU level and that of EU member states. This broad definition means that almost any form of legislation or regulation in the EU or the US could be affected by the regulatory cooperation in TTIP.

### **Current standards have not been safeguarded**

There are fears that current levels of protection for consumers, workers and the environment will be reduced or that restrictions will be placed on improving them in the future. This is especially true in areas governed by entirely different regulatory phi-

losophies. For example, in many areas of health and environmental protection (such as genetic engineering, food safety or hazardous chemicals) the EU applies the precautionary principle. This enables products and production methods to be banned as a preventative measure in the absence of definitive scientific certainty about their safety. This can be done to protect people, animals and the environment. However, the US government has criticised this principle as 'unscientific'. In the US, there are no special approval procedures or requirements for genetically modified organisms and no commitments to have them identified as such.

The European Commission has repeatedly asserted that cooperation in this field would not lead to the softening of consumer protection, health, environmental and labour standards, that the right to regulate would not be touched, and that this was stated in the preamble to TTIP.<sup>17</sup> Nevertheless, the European Commission also attempted to meet the demands of the US agricultural industry on the regulatory issue right at the beginning of TTIP negotiations. Examples include the approval of lactic acid treatment for cattle carcasses, and the lack of labelling for cloned meat.<sup>18</sup>

## Parliaments are being ignored

From a democratic point of view, the European Commission's proposals regarding a 'living agreement' are highly questionable. In the context of regulatory cooperation, they would lead to the establishment of long-term mechanisms to ensure that even after TTIP has entered into force existing and future regulatory differences will be avoided or reformed. National parliaments are not included in the European Commission's proposals for regulatory cooperation at any point.

Instead, regulatory cooperation is to be implemented by three bodies: the 'Regulatory Cooperation Body', a 'Joint Ministerial Body' and so-called 'Focal Points'. Representatives of regulatory departments from the EU and the US are to submit proposals aimed at increasing regulatory coherence. This places preliminary decisions about legislation in the hands of transatlantic bodies. Furthermore, an 'early information mechanism' is to provide impact analyses of the effects of proposed regulatory measures on transatlantic trade. This will enable representatives of corporate interests in the EU and the US to influence draft laws at a very early stage if they view them as running counter to their trade and investment interests.

## The AK's Demands

- Decisions as to which laws and regulations are unnecessary or burdensome must not be made purely according to commercial considerations or due to costs. Parliaments must be involved in all levels of regulatory cooperation. Parliaments (and not ministerial committees) must hold exclusive decision-making authority. As such, democratic regulations must not be allowed to be modified to reflect TTIP after it has come into force, and the treaty must not lead to restrictions on future regulatory developments. The establishment of transnational bodies to scrutinise future regulations must be rejected
- The scope of this part of the agreement has been defined far too broadly; it must be clearly defined and limited. Striving for high levels of protection is not enough; existing levels of protection must also be secured. Sensitive regulations governing the fields of health, safety, consumer protection (in particular, privacy laws), labour standards and environmental protection must be exempt from the scope of the treaty. In addition, a number of further exemptions must be implemented in certain sectors such as chemicals, pharmaceuticals, food and on topics such as genetically modified organisms, hormones, antibiotics and veterinary matters
- The EU's precautionary principle must be explicitly anchored in the text of TTIP, CETA and other trade agreements. A mention in the preamble is not enough
- Impact analyses in connection with proposed new regulations must not be reduced to trade-related aspects. The social costs of any changes or the repeal of specific laws must also be taken into account

Heinz Schöffl

## Secure the highest possible levels of food quality and safety

Food regulatory concerns have been harmonised largely as part of the EU acquis. The EU deploys a system based on prohibitions, restrictions and explicit final approvals on permitted levels of additives, pesticide residues, veterinary medicinal products and environmental pollutants. In most of these areas, registration or approval processes are already in place. Many of these arrangements are based on scientific assessments, and in areas where it is impossible to find an adequate scientific base for an assessment the precautionary principle is applied. In contrast, the US deploys far fewer and less detailed regulatory requirements. Moreover, the responsibility for food safety is placed far more in the hands of the food industry, albeit within a much more comprehensive product liability regime.

### **Consumer protection: the risk of the lowest common denominator**

These fundamentally different approaches to achieving the desired level of food safety demonstrate that it would be risky to reduce trade barriers that result from these differences. Differing provisions would have to be mutually recognised, or harmonised at a common level; both are unsatisfactory from a consumer protection perspective. Harmonisation, while taking into account relevant (usually economic) interests, quickly leads to a levelling

of standards and requirements. On the other hand, mutual recognition of (different) legal regulations distorts competition, which in turn leads to pressure for reform (usually resulting in mutual recognition of the lowest common denominator). Improving consumer protection in food law will become even more difficult to achieve when a major partner is involved whose interests are strongly oriented towards profit.

Arguably, if consumer protection and obligations to provide information to the public were to be harmonised at the respective highest level, a trade agreement such as this could lead to stronger consumer protection; that, however, would require a different aim than the one pursued with TTIP.

The European Commission considers to think about and to verify whether instead of the EU's tight threshold values for the pesticide load of food the less ambitious standards of the WHO could be applied. Against continuous affirmations of the Commission the standards would be lowered.

## The AK's Demands

From a consumer protection perspective, the TTIP negotiations could lead to the questioning of several major European standards. Consequently:

- The EU's precautionary principle must be explicitly anchored in the agreement's text. The precautionary principle is an established part of European environmental and health policy, and it ensures that risk management measures are undertaken in the most comprehensive scientific manner possible and that scientific uncertainty is always taken into account
- The *acquis* regarding the prohibition or restriction of substances or residues in food must be maintained
- Genetically modified plants and microorganisms (GMOs) and their labelling: the majority of European consumers are highly suspicious of the use of genetic engineering to produce agricultural products and microorganisms, particularly when they are used in food production. In cases where GMOs have already gained authorisation, a transparent and comprehensive system that provides consumers with clear and unambiguous information must be maintained and expanded
- The use of antibiotics in animal fattening, the use of growth hormones in cattle fattening or feed laden with growth-promoting chemicals in pig and turkey production must be prohibited
- Chemical treatment of animal carcasses to reduce pathogens: exposure to pathogens must be reduced and controlled during animal husbandry and production processes. Treatment of the final product to correct hygiene deficiencies that have occurred during these processes must be rejected
- Artificial nanomaterials and their labelling: an admissions procedure and specific controls on the labelling of products using nanomaterials must be put in place before such products are allowed to reach consumers
- Protected geographical status: consumers must be able to rely on the fact that respective quality standards have been fulfilled in the case of designated regional specialities
- Pesticides and their maximum residue levels in food: maximum residue levels of pesticides must be regularly evaluated to ensure the highest level of safety for consumers. This includes setting strict standards on these residues

Iris Strutzmann

## Policies on GMOs should not form part of trade agreements such as TTIP and CETA

Consumers in the European Union have definitively rejected the use of genetically modified organisms and this has led to strict labelling requirements for GMOs in food and feed. Accordingly, GMO seed cultivation in the EU is quite low, and only spreads to about 140,000 hectares of land. The US, however, is the world leader in GMO cultivation. In 2013, 73.1 million hectares of land were cultivated with GMOs in the US. Moreover, US firms have been attempting to force their products onto the EU market for years and demand a faster GMO approval process.

### **There are large differences in GMO regulation in the EU and the US**

The EU and the US have completely different legal regulations and approaches to the use of genetically modified organisms.<sup>19</sup>

- Admission procedures: in the EU, decisions on GMOs are taken by political decision-makers. This means that responsibility rests with politicians, whereas the administration authority merely takes on a review function. In the US, however, it is the civil service that decides which GMOs should be approved, not the politicians.
- Labelling: there are no labelling requirements at all in the US associated with the use of geneti-

cally modified plants. In contrast, the EU has clear regulations on labelling and tracking GMOs. In addition, food and feed that has been produced with genetically modified organisms must be labelled accordingly.

- Precautionary principle: in the EU, the precautionary principle is applied to the approval of GMOs. This means that uncertainties with respect to scientific knowledge are taken into account during the approval process. The US requires scientific studies to prove the existence of a health risk; only then GMOs will not be approved.
- Protection of GMO-free agriculture: there are clear rules in the EU to prevent the uncontrolled spread of GMOs (coexistence rules); in the US, there exists no such regulation.

### **Strict regulation on genetic engineering could come under pressure**

The European Commission continuously claims that the basic regulations on GMOs do not form part of the TTIP negotiations. Furthermore, the EU's commissioner for agriculture and rural development, Phil Hogan, calls for clear labelling of GMOs as part of any free trade agreement with the United States. He argues that genetically modified

maize in food must be clearly labelled and that European consumer protection standards should be left untouched.<sup>20</sup>

However, genetic engineering firms in the US are expecting easier access to the EU for their GMOs. For years, US agribusinesses have criticised strict EU regulations on GMOs and viewed them as a barrier to trade. Despite this, it is still possible that EU law on GMOs will remain untouched. Nonetheless, the procedures for the approval of GMOs and the rules on traceability could be simplified. In addition, regulations banning food and feed in the EU that have been contaminated with non-approved GMOs may also change in the future. Consequently, TTIP could lead to the erosion or weakening of existing standards in the approval process and/or in the labelling of genetically modified food and feed.

The EU has always faced problems with GMO contaminated feed from the US. There are clear regulations specifying that GMO contaminated food and feed need not be labelled as such as long as the level of contamination remains below a specific threshold. This, however, only applies to contamination with GMOs that have EU approval. Products that have been contaminated with GMOs that have no EU approval cannot be sold in the EU. This is the so-called 'zero tolerance' policy towards GMO contamination. For a number of years, the US has been pushing for a policy that enables food and feed contaminated with non-approved GMOs to be sold in the EU. Until now, however, the European Commission has been able to deny this request.

The long-term regulatory coordina-

tion proposed in TTIP could become problematic, as regulations might become anchored in the treaty after it has come into force. This process, which is to be institutionalised via the Regulatory Cooperation Body, could lead to the relaxation of existing food standards. In fact, as soon as the US and the EU even agree to talk about this issue, the future of food standards is no longer safe. In the future, the US government could argue that GMOs pose no demonstrable danger to people or the environment; under TTIP, there would no longer be a case for stricter labelling or the prohibition of GMO contaminated seed.

The text of the agreement between the EU and Canada (CETA) does not explicitly exclude the issue of GMOs; instead, the agreement proposes regular exchange on this issue. Again, it is likely that this form of dialogue will undermine existing regulations on GMOs, as Canada has a great interest in exporting GMOs to Europe. Consequently, full transparency must be ensured on this issue. This means informing the European Parliament in advance about such dialogue and providing the parliament with regular reports about the results of the discussions.



## The AK's Demands

- The text of the TTIP agreement must explicitly state that genetically modified organisms and patents on animal breeding and plant culture do not fall under the scope of the agreement and are excluded from it
- The EU's precautionary principle must be explicitly anchored in the TTIP text and other trade agreements
- Binding GMO labelling must be maintained for food and feed to protect consumer choice
- New bodies such as the Regulatory Cooperation Body should be rejected as they could be used to circumvent the current high standards of approval and the strict labelling of genetically modified organisms

Nikolai Soukup

## Public services under pressure

Public services, such as for example education, healthcare and social services, sewage, waste disposal, water supply, energy, public transportation, and cultural and audiovisual services, constitute a key element of the European social and welfare model. However, multinational services companies are particularly interested in realising new business opportunities also in sectors of public services through trade agreements. The new generation of EU trade agreements could put considerable pressure on states' capacities to regulate how public services are provided, organised and financed.

### **Far-reaching liberalisation of trade in services at the centre of the negotiations**

The question whether public services should form part of the negotiations within the framework of trade agreements and whether the respective exemption provisions are sufficient to guarantee that governments can regulate on public services without restrictions has been at the focus of very intense political debates since the negotiations on the multilateral General Agreement on Trade in Services (GATS).

The intended level of liberalisation in current EU trade agreements such as CETA and TTIP goes far beyond the level of liberalisation under GATS, and these agreements are

aimed at increasing cross-border trade in services between contracting parties by undertaking liberalisation commitments for as many service sectors as possible. Moreover, the enlarged scope of these agreements and the offensive approaches to negotiation could put additional pressure on public services.

The cross-border exchange of services is to be liberalised through a series of trade agreement provisions. These include commitments to market access that will prohibit different restrictions from being placed on access to the respective service markets in the areas in which they apply. Such restrictions include monopolies, exclusive rights for certain providers, quotas or economic needs tests. The latter are instrument which states can use to predicate service provider authorisation on additional economic need. Market access commitments also generally include a provision prohibiting the limitation of legal forms for foreign companies and of foreign equity participation in domestic enterprises. Furthermore, the national treatment obligations included in TTIP and CETA specify that US and Canadian service providers and their services should not be treated less favourably than comparable domestic providers and services within the EU.

### **Democratic regulatory space for public services exposed to rising pressure**

Under GATS and in existing bilateral trade agreements, the EU applied the positive list approach to list the sectors subject to liberalisation obligations. Therefore, liberalisation commitments were explicitly stated. However, with the new generation of trade agreements the EU has been increasingly adopting the more liberalisation-oriented so-called negative list approach. According to this approach, which the EU applied for the first time in the CETA treaty, all service sectors are generally subject to the liberalisation obligations if they have not been explicitly excluded.

The first offer in the service sector which EU officials made to US negotiators in the context of the TTIP negotiations was based on a mixed approach and provided a negative list for national treatment obligations. The negative list approach puts considerable pressure on public bodies to justify and precisely define exemptions from liberalisation in order to avoid restrictions of their future regulatory capacities. In addition, it has to be viewed very critically that a number of exemption clauses in negative lists are subject to what is referred to as 'standstill' or 'ratchet' clauses. These mechanisms ensure that regulations such as legislation on certain service sectors, which fall under the scope of these clauses, must not be modified in a way that would lower the level of liberalisation and that future liberalisations in this area automatically become part of the agreement.

Moreover, in the current trade negotiations the EU aims at creating provi-

sions that ensure domestic regulation on services, such as requirements for authorisation, like in relation to the qualification of a service provider, or licensing procedures, do not unduly restrict trade in services. However, there is a danger that essential regulations in the service sector, such as measures aimed at creating an appropriate framework for providing public services, might be considered 'unnecessary' trade barriers. Furthermore, if CETA and TTIP include provisions on investment protection and ISDS, changes in the legal framework aimed at ensuring a comprehensive provision of high-quality public services could be made subject to complaints and thus high claims for compensation by profit-oriented multinational corporations.

### **Public services are not generally excluded from trade agreements**

In the public debate, the European Commission and other actors often create the impression that public services are entirely excluded from CETA and the TTIP negotiations. However, the EU has never announced nor sought to effect a general carve-out of public services from the scope of trade agreements. Instead, the EU intends to introduce several exemption clauses which, however, have significant shortcomings and fail to provide sufficient protection for public services.

For example, one of the exemption clauses only applies to services which are supplied neither on a commercial basis nor in competition with one or more service providers. Yet, public and private providers compete with each other in numerous fields of public services such as health care, education or essential supply and disposal services. Another ex-

emption clause included in CETA (referred to as the “public utilities clause”) states that services which are considered at the national or local level as public utilities may be provided by a public monopoly or through exclusive rights for private operators. However, this only exempts those services which fall under this clause from some of the prohibitions contained in the market access commitments but not from all provisions in the agreement. Therefore, this and other exemptions cannot rule out for instance that future regulations on or subsidies for public services could become the subject of investor-state claims.

## The AK’s Demands

- Public services must be bindingly carved out from the full scope of trade agreements
- On no account must disciplines on domestic regulation limit governments’ policy space to regulate public services. The introduction of so-called ‘necessity tests’ that would determine whether service sector regulations are ‘more burdensome than necessary’ for companies must be fiercely rejected
- Negotiations on services liberalisation must solely apply the positive list approach. The negative list approach together with associated mechanisms such as ratchet clauses must not be adopted in any part of trade agreements
- It is necessary to create simplified procedures to allow for reversing liberalisation commitments that have already been undertaken

Nikolai Soukup

## Access to public procurement: a highly contested field of negotiations

One of the main goals of TTIP and CETA, as well as the currently negotiated services agreement TiSA, is to further open up the public procurement markets to companies from the contracting parties' countries. Public procurement (the purchase of goods and services by public authorities) represents a significant share of economic activity. Therefore, many companies have strong interests in obtaining better access to public tenders in different countries and regions.

Provisions on public procurement are supposed to ensure that contracts are awarded transparently and that discrimination is prevented against potential service providers due to their nationality. However, there are concerns that the focus on the lowest price, which is typically applied in public procurement procedures, could lead to a harmful dumping of prices and subsequently to a dumping of wages. It has also been criticised that competitive procurement procedures in which the lowest bid is preferred often make it very hard for not-for-profit providers to compete. Against this background, the negotiating agenda on the opening of public procurement markets are in many aspects a highly controversial issue.

### **The EU aims to weaken US rules on the promotion of local and national economies**

Public authorities must comply with very strict regulations when awarding

public contracts. For example, EU public procurement law determines when public authorities are obliged to implement Europe-wide tender proceedings and how they should take place. The EU member states (along with other countries such as the US and Canada) are also signatories of the WTO Agreement on Government Procurement (GPA). A key aim of trade agreements such as CETA and TTIP is to further facilitate access to public procurement for foreign companies and thus open up public procurement to third countries beyond the GPA commitments.

One element of the negotiations that is fiercely contested is the question which public tender proceedings should be covered by the specific rules of the agreement. The size of public contracts that are covered by international agreements is defined according to specific thresholds. This, however, undermines possible future initiatives to set higher threshold values that would facilitate the direct award of contracts by public entities. Moreover, the negotiations include the question of which public bodies – also at the regional and local level – and which goods and services should be covered.

In the TTIP negotiations, the EU negotiators are putting pressure on the US to further open up public procurement markets at all levels, in particular at the state level. The European Commission considers the so-called

'Buy America(n)' provisions which are aimed at strengthening local or national economies as a major obstacle for the EU's interests.

### **Sustainable public procurement must not be undermined**

One of the concerns associated with the current trade negotiations is that provisions in trade agreements might restrict existing measures or future reforms aimed at sustainable public procurement. As the state is supposed to serve as a role model in its procurement procedures it is essential that public procurement pursue societal goals in the public interest such as compliance with a high level of labour, social, environmental and health standards. Also against the background of the economic crisis, the state has a particular responsibility to strengthen economic development amongst others through focused and sustainable public procurement and thus to act as a leading example. Focusing on procurement criteria targeted at the lowest price is not an appropriate way of reaching these goals.

Whether the trade agreements currently under negotiation may limit a contracting authority's capacity to apply social criteria in public procurement is subject to a controversial debate. This would include for example binding compliance with quality standards in terms of working conditions at general contractor and sub-contractor level. CETA does not explicitly mention the applicability of social criteria in public procurement; therefore, it is unclear in how far such criteria may be applied in public procurement procedures.

Public services must not be subject to international trade regimes; this must also be ensured in negotiations on

public procurement. Public services – and associated contracts – must be clearly excluded from these agreements. In this context, the European Commission's announcement to aim at negotiating provisions on concessions in the framework of the TTIP public procurement chapter must be firmly rejected. Services concessions, which involve the delegation of tasks of public authorities to third parties, are mostly applied to provide services of public interest in areas such as water, waste disposal, energy, health and social services. Opening up services concessions to a transatlantic market would thus risk placing additional competitive pressure on central areas of public services. As a result, their quality and accessibility for all citizens at affordable prices could no longer be guaranteed.

This issue is particularly relevant against the background of the intense political debate at the EU level on the Concessions Directive: contrary to the European Commission's initial proposal, the water sector was excluded from the directive due to massive pressure from trade unions and civil society organisations. Also the success of the European Citizens' Initiative 'Right 2 Water', which called for a rejection of any restrictions on the general access to water, should prompt the European Commission to focus its policy on the consistent and unequivocal protection of public services.

Moreover, it has to be explicitly ensured that trade agreements may not limit public authorities' possibilities to procure public tasks to publically controlled entities through in-house procurement or forms of cooperation between municipalities in the provision of public services.

## The AK's Demands

- The AK views the further opening of public procurement markets critically. In particular, any lowering of the threshold values for compulsory tendering has to be rejected. In addition, there should be no market access commitments for public procurement procedures at the sub-national level (e.g. municipalities and the regional level). Public services - and associated contracts and concessions - must be excluded from the full scope of trade agreements without exception.
- The existing Austrian and European provisions that take account of social and ecological concerns in public procurement procedures must not be undermined. The agreements cannot be allowed to limit the application of quality criteria in public procurement with regard to social or environmental goals under any circumstances. Public contractors should act as a leading example with respect to social, labour and environmental standards in order to comply with the goals of sustainability. This would prevent the costs caused by poor contractor performance and excessively low wages from being taken on by society. Public procurement reform should aim at including minimum standards for worker protection based on relevant ILO conventions.



Judith Vorbach und Susanne Wixforth

## No lessons learned from the financial crisis?

The liberalisation of financial markets has been considered a central aspect of trade agreements for some time now. After the negotiations on increasing the level of liberalisation of the GATS have come to a standstill, the EU began including provisions on financial services in its bilateral trade agreements. Apparently unimpressed by the financial crisis which started in 2008, the further liberalisation and deregulation of the financial sector is now being pursued in the context of CETA, TTIP and TiSA.

### **Despite the financial crisis: further liberalisation of the financial sector**

The trade agreements cover all insurance, banking and other financial services (such as hedge funds, trading platforms and clearing centres). The negotiations in this area are about further liberalisation of the financial markets particularly for direct investments, provisions on regulation, transparency and regulatory cooperation as well as investor-to-state dispute settlement for financial investors (as part of the chapters on investment protection). CETA includes a filter mechanism with regard to these investor privileges which could allow for investor-state claims being rejected if the respective measures are 'prudential', which include measures aimed at preserving the stability of the financial system. The rescuing of a bank could possibly be regarded as a

'prudential' measure. However, this mechanism only becomes effective if the contracting parties agree that a respective measure is in fact 'prudential'. Moreover, in the TTIP negotiations, the EU negotiators are calling for the creation of a specific framework for regulatory cooperation in the financial services sector. This framework is aimed at the transatlantic coordination of existing and future regulations. In turn, this could complicate the already slow regulatory process and put pressure on hard-won improvements. Critics rightly worry that this will push back parliaments and strengthen the role of powerful financial institutions in the legislative process. Even the United States rejects this demand. Consequently, the EU is holding back further liberalisation offers as long as these matters remain unsettled. While there are no provisions on investment protection envisaged for TiSA, there are still major concerns that financial market regulation might be undermined also by this agreement.

### **The financial markets remain unstable**

European markets have been opened to a large extent to the establishment of companies from third countries. Some EU member states are among the largest importers and exporters of financial services. Given the global competitiveness of the European financial institu-

tions, financial services are being regarded as key sectors in EU trade agreements. The EU aims to push forward liberalisation and thus extend the rights of companies from the EU to establish themselves in third countries, often against the resistance of the respective contracting partner.

Nearly a decade after the outbreak of the global financial crisis with its drastic implications for the economy as a whole, many banks in the EU remain unstable and form part of an oligopolistic structure. Governments continue to spend large sums to avoid the collapse of financial institutions or the financial system itself. Although highly complex and extensive frameworks have been adopted in response to the financial crisis, in many areas clear regulations are still missing. In contrast to the AK' demands for far-reaching restructuring of the financial markets and the implementation of high standards in financial supervision and product assurance, there is the threat of further liberalisation and deregulation via these new trade agreements. This would increase competition in an already unstable financial sector. Moreover, trade deals focusing on the removal of trade barriers are a completely inadequate means for agreements in the area of financial market regulation. The planned provisions on investment protection also lead to serious objections: already powerful transatlantic financial institutions would gain a further instrument to

enforce their interests via this way. These provisions could be used to claim large sums in compensation due to measures aimed at restoring financial stability or to create pressure on policy-makers to take back such plans.

### **Regulatory process should not be endangered**

The proposed agreements may not endanger or reverse the already slow regulatory process in the financial market sector. An intensified competition is linked to the danger of repeated financial crises. The bargaining power of the financial sector currently needs to be reduced and not extended. This means that decisive steps are needed towards stable financial markets that serve the needs of society.

The financial crisis has shown that stable financial markets are a highly valuable public good that represent the public interest. The AK therefore demands that financial services be excluded from the scope of trade agreements such as TTIP, CETA and TiSA. Further liberalisation commitments, the intended regulatory cooperation and privileged rights for foreign investors via ISDS in the financial services sector would result in intensified competition, undermine regulatory efforts and place the interests of financial market actors above the common good.

## The AK's Demands

- Financial services need to be carved out from the scope of trade and investment agreements such as TTIP, CETA and TiSA.
- A critical review of liberalisation commitments in the financial services sector under existing EU trade agreements is needed with the aim of reversing excessive liberalisation commitments.
- Trade agreements must include comprehensive rights to apply restrictions on capital movements in the case of a potential threat of the stability of the financial sector.
- Existing international bodies focused on international cooperation on financial regulations must be developed into transparent institutions and provided with democratic legitimacy. They are supposed to establish binding common standards at a high level in the financial sector. This should ensure that financial markets comply with their duty to serve the common good and that comprehensive protection of employees and consumers is safeguarded.

Éva Dessewffy

## Sustainable development: minimum labour and environmental standards must be binding

TTIP's proponents like to refer to their goal of reaching high standards in both economic areas. They also mention labour and environmental standards. In terms of sustainability, future free trade agreements should take into account social and environmental objectives in addition to economic interests.

### **The US has only ratified two of the ILO's eight core labour standards**

The EU and the US must ensure consistency in all policy sectors, including trade policy, and meet their international obligations particularly in human rights as well as those stipulated in the conventions of the United Nations, International Labour Organization (ILO) and the Organisation for Economic Cooperation and Development (OECD). Respecting the ILO core labour standards is an important requirement to avoid a race to the bottom in terms of labour conditions. All ILO member states must ratify, implement and respect the core labour standards. However, the US has only ratified the conventions on child and forced labour. To this day, the US administration refuses to ratify the six other minimum labour standards.

### **Labour unions face a very difficult climate in the US**

In its 2012 annual overview, the International Trade Union Confederation described US employers as "extremely hostile towards unions".<sup>21</sup> In the pri-

vate sector only less than 7% of employees are unionised. Even though public employees have a 37% rate of unionisation, the Republican Party prioritises the abolishment or reduction of the right to collective bargaining for public sector employees.

About half of federal states in the US have adopted Right-to-Work Laws, and these should be viewed highly critically. In Ohio, the opposition was able to prevent these anti-union laws as they target the funds of trade unions. Within the US system, trade unions have traditionally negotiated over union dues with the employer and defined them in collective agreements. With the entry into force of the Right-to-Work Law union dues are to become voluntary. Trade unions, however, are supposed to represent the interests of all employees in a particular establishment, even those who do not pay fees. As a result, the number of union members and therefore the trade unions' funds quickly has dropped in all federal states that have passed a Right-to-Work Law. Yet, wages will also fall in the longer term and so will the employer's contribution to health and pension insurance. Under the Right-to-Work Law, worker protection has also suffered. As the Center for American Progress states, employees in Right-to-Work states earn US\$ 1,500 less a year on average than employees in states that have not passed this type of legislation.<sup>22</sup>

It is with deep concern that the AK has observed how US trade unions have been weakened financially. Excessively low wages in the US are a direct result of this development. Moreover, it could also have consequences for employees in Europe, as the same business interests that promote competition through low labour costs at the expense of an equitable distribution of income and social justice are also gaining strength in the EU.

## Excursion: The 8 ILO core labour standards

It is compulsory for the 185 ILO member states to ratify the ILO's core labour standards, implement them as part of national legislation, and respect them

- **Trade union rights:** freedom of association for trade unions, and the Right to Organise Convention
- **Child labour:** the effective abolition of child labour, particularly the worst forms of child labour, and a minimum age for workers
- **Discrimination in respect of employment and occupation:** the right to equal remuneration for men and women, and non-discrimination in the workplace
- **Forced labour:** elimination of all forms of forced or compulsory labour

## Examples of labour law violations in the US<sup>23</sup>

### **Republican politicians manipulate a union representation vote:**

in February 2014, Republican politicians in Tennessee set up an intense anti-union campaign lasting several weeks before an important union election at a VW plant in Chattanooga. The politicians pushed the workers to vote against the United Auto Workers union and threatened to pull tax breaks and other financial benefits if the workers joined the union. United Auto Workers filed an appeal before the National Labor Relations Board (NLRB) and called for the vote to be declared invalid,

citing that the Republicans had violated labour law provisions by interfering in the vote. According to these provisions, employees have the right to participate in votes on union representation without facing coercion, intimidation or other actions aimed at influencing the vote.

### **Employers' influence over votes on unionisation**

Since the legal framework in the US provides possibilities for anti-union campaigns and does not offer sufficient protection against anti-union discrimination there is a whole

consulting industry built around this issue. These consultants thwart union campaigns and hinder the right to association by intimidating and putting pressure on employees. In more than 80% of all union organising campaigns the employers have hired external advisers.

In September 2013, Metro PCS employees in a New York store started an NLRB case to have their choice of union recognised by the official state body on tariffs for workers on a

particular tariff level, and to secure acceptance of their right to collective representation by their union. The T-Mobile management responded with an intense campaign to prevent nine employees from establishing a trade union. The employees voted 7-1 in favour of joining the union, but the company's management put considerable pressure on them and summoned the workers to more than 30 meetings where they were informed of the reasons why they should not join the union.



## The AK's Demands

The TTIP's chapter on sustainable development should cover the following aspects in order to reach higher standards in these areas:

- Human rights must be included in the form of a so-called 'essential elements' clause, which should have the same wording as that found in the EU-Colombia free trade agreement. It is not enough to merely mention human rights in the preamble; human rights must be explicitly stated in a separate part of the agreement
- All eight LO core labour standards need to be ratified, implemented and effectively applied by all contracting parties
- The core labour standards must be enforceable and there should be a possibility to impose sanctions via TTIP. TTIP should provide for dispute settlement in cases where labour standards have been breached with the ultimate aim of imposing financial penalties
- The US must ratify, implement and apply further ILO conventions according to their level of development. Finally, the US should strive to implement the Decent Work Agenda as a long-term objective. In addition to the ILO core labour standards, the Decent Work Agenda includes ILO conventions on social security and social dialogue

Nikolai Soukup

## Temporary labour migration: problems for worker protection

Since the conclusion of the General Agreement on Trade in Services (GATS) within the framework of the WTO, the different forms of cross-border service supply have been categorised into four different 'modes'. One of them, which in trade vocabulary is referred to as 'Mode 4', covers the temporary migration of natural persons for the provision of services. CETA, TTIP and TiSA aim at further liberalisations of this form of temporary labour migration. From the perspective of labour market policy, however, this area is highly sensitive, especially because of the lack of adequate possibilities of imposing cross-border sanctions in cases of violations of wage provisions and labour law infringements.

### **An unknown negotiation agenda with risks for workers**

TTIP and other trade agreements define which groups are entitled to temporarily access the labour market of a contracting party and in which service sectors. TTIP would for example establish rules for EU employees who are sent by their companies to the US to provide services for a client on a contractual basis or for workers of a transnational US company who work for a limited period in an EU subsidiary. Transnational companies have a great interest in provisions on temporary labour migration in the context of 'Mode 4' because they facilitate the temporary employment of workers in other locations.

From the perspective of employees, however, the question whether liberalisation commitments in this area can be used by employers in practice to bypass labour law regulations and worker rights is of utmost importance. Temporary labour migration, as conceptualised in trade agreements, is usually limited to very short periods. Therefore, it is in practice very difficult to control whether temporary migrant workers are paid less than the minimum wage or whether provisions for worker protection have been undermined. Moreover, there are no legal and administrative tools to be able to enforce workers' rights and to penalise violations thereof across borders. Provisions in trade agreements that call for compliance with domestic legislation and collective agreements alone are not sufficient because of the lack of cross-border cooperation of legal and administrative authorities and the absence of a mechanism in trade agreements to impose sanctions across borders due to labour law infringements. Moreover, these commitments must not be permitted to lead to disturbances in national labour markets, especially in times of high unemployment.

## The AK's Demands

- Negotiations on the further liberalisation of the cross-border provision of services by workers ("Mode 4") have to be rejected as long as an effective cross-border cooperation of administrative and legal authorities is not guaranteed. This is a precondition in order to be able to ensure compliance with the respective provisions on the minimum wage, working conditions and other labour standards set out in social and labour law and collective bargaining agreements.
- At any case, a potential chapter on this topic in an agreement must ensure that in case of violations of provisions on labour and social law and collective agreements it should be possible to use the general state-state dispute settlement mechanism and to impose substantial monetary sanctions.
- Moreover, at any case the principle of applying host country regulations to temporary workers from third countries in terms of labour and social law, collective agreements and any other remuneration provisions has to be retained. Furthermore, any agreements must include the so-called 'labour clause' that states that relevant EU and national regulations must not be undermined.

Daniela Zimmer

## Privacy in danger

Although individual liberties such as the right to privacy are anchored in both legal spheres, the EU and the US differ considerably on their interpretations of what constitutes privacy. For example, instead of binding legislation, the US focuses much more on the self-regulation of data processing companies.

When negotiating free trade agreements, the European Commission should not avoid the conflicts arising from different privacy traditions. The digital economy and current trends such as 'industry 4.0' or 'big data', which are very sensitive in terms of data protection, are considered as a motor of growth. However, data protection regulations are of major relevance to competition and therefore play a central role in free trade agreements with the US. The EU must demonstrate to European citizens that the right to control the use of personal data has not been undermined, and rather, that it is better protected than before. It is therefore indispensable that the EU agrees upon a high standard in harmonised data protection before an agreement is signed. The EU should not make any concessions on European data and privacy protection in free trade agreements. Instead, the US should provide equivalent data protection standards as a precondition for free data exchange.

### 'Safe harbor'

If data is transferred to third countries that do not offer an equivalent level of protection, the Data Protection Directive 95/46/EC requires an official permit.

This is an important legal principle that does not apply to the US due to a decision of the EU Commission in 2000. The 'Safe Harbor' framework is an important measure ensuring that data exchange between the US and the EU does not come to a standstill. US companies can agree to meet the standards described in the Safe Harbor Principles. Under 'Safe Harbor', they can voluntarily agree to respect obligations to notify and gain consent, the right to objection, principles in data sharing, data security, the right to obtain information, and law enforcement. However, research has proven that 'Safe Harbor' does not work. Some US companies that have claimed to be safe-harbor-privileged were not even registered with the Department of Commerce. In addition, many of the companies that were registered with the department could not present current certificates. The European Parliament and the Article 29 working party on data protection requested a review of the effectiveness of 'Safe Harbor' 10 years ago.

In 2014, the European Parliament suspended 'Safe Harbor'; the US, however, drew no particular conclusions from this decision. The European Commission would like to continue applying 'Safe Harbor', but negotiations with the US on improving law enforcement for European citizens involved in data processing have so far been unsuccessful. The European Commission must repeal 'Safe Harbor' and instead negotiate conditions for data transfer with the US that are compliant with fundamental rights.

#### **Swift and flight passenger data**

The European Parliament and the European Commission are at odds on the future of the SWIFT agreement between the US and the EU. This agreement provides the US access to the financial data of EU citizens who transfer money abroad. With regard to the exchange of passenger data, the European Parliament argues that the agreement does not comply with basic European rights and that legal protection for EU citizens is insufficient. The EU should consider the negotiation process an opportunity to ensure the agreement's compliance with fundamental rights.

#### **Internet companies with strong market positions**

Companies such as Google, Apple, Facebook and Amazon, which have a quasi-monopoly status, have almost absolute control over markets

and a global presence; they also process customer data on a large scale. Out of the seven most popular email providers, three store customer data from European customers on US servers. This makes it very clear that the protection of European citizens does not only depend on the compliance of European data processing companies. The EU's role is therefore to ensure that US internet companies comply with European data protection laws through an enforcement treaty with the US. The European Commission is currently seeking an informal settlement that will encourage global corporations to respect consumer and data protection in compliance with EU regulation. It is a primary goal that US companies that process the personal data of European citizens fully respect European regulations. In this regards, a violation of the provisions should lead to law enforcement measures.

## The AK's Demands

- The 'Safe Harbor' and other agreements that are controversial from a data protection perspective must be suspended. Equivalent levels of data protection are a precondition for free data exchange
- In terms of data transfer to the US, the EU should continue its tradition of fundamental rights and not abandon its comparably strict privacy regulations. If the US does not massively raise its data protection standards, free data exchange should be completely excluded from TTIP
- EU data protection should be extended to US companies that offer services or goods to EU citizens or process their data. Future data protection regulations should also be applicable to third countries such as the US. Simultaneously, the EU must promote enforcement treaties and legal protection in order to enforce the legal claims of European citizens
- Protection from excessive police and intelligence service activities: according to Snowden's surveillance revelations, the online communications of European consumers is constantly monitored. The EU needs to strengthen legal requirements on data security. The TTIP negotiations must ensure that the
  - US maintains high standards towards EU citizens and companies without exception
- Article 3 (trust and confidence) of Chapter 10 (electronic commerce) in CETA must be improved. According to the draft text, both contracting parties can adopt or maintain laws or administrative decisions to protect the personal data of users of communication services; however, certain international organisations determine data protection standards at the international level. These standards are not as strong, nor are they even binding; consequently, CETA must be based on EU standards and not on weaker international ones

Sonja Auer

## Copyright law is unwelcome in free trade agreements

Free trade agreements usually contain provisions on intellectual property rights (copyright law, patent law, trademark rights etc.) to harmonise the legal framework of the contracting parties. The AK is highly critical of the inclusion of provisions on intellectual property rights in these agreements – particularly concerning copyright law – for a number of reasons.

### **ACTA through the back door**

The European Parliament rejected the highly controversial Anti-Counterfeiting Trade Agreement (ACTA), which contained a set of highly questionable provisions on copyright to the disadvantage of civil society and internet users. There is a clear risk that future international agreements will attempt to enforce the repressive approach included in ACTA and its highly controversial provisions, such as internet censorship or the criminalisation of internet users.

### **Copyright law should not be consolidated through binding international agreements**

The inclusion of intellectual property provisions in free trade agreements would freeze the current legal framework because they would be binding for the EU and its member states. However, national and EU copyright laws urgently need to be reformed and adapted to current developments in the digital world.

Particular attention should be paid to establishing a balance between different interests that takes into account the needs of users and the public (access to information, the right to use a specific work, and respect for basic rights such as data protection and privacy); this is currently lacking.

For example, technical measures against copying and its prohibition infringe the right to use content and to make private copies, because doing so is protected by law. Furthermore, these regulations could also be pitted against future principles such as 'fair use'. In-built protection against copying is an infringement of the legitimate right to make private copies and goes against current legislation.

In such cases, a balance of interests must be established. Should the particular legal status of copyright be maintained in CETA (Article 5.3 – Protection of Technological Measures), the EU would be committed to that legal framework and therefore unable to find the necessary solutions at the EU level.



## The AK's Demands

- Negative experiences with ACTA demonstrate that its controversial provisions must not be allowed to become part of a free trade agreement through the back door
- The inclusion of copyright provisions in trade agreements is to be rejected, as an agreement and its related contractual obligations lead to a consolidation of existing copyright law. This could prevent reforms that are necessary in the digital age
- The rights of a copyright owner to protect their work should be balanced with public interests (access to information, the right to use a piece of work, respect for basic rights such as data protection and privacy). This requires a negotiation process that is fully transparent and actively involves civil society and all stakeholders

Frank Ey

## The EU pursues REFIT's deregulation agenda at the international level

For several years, the EU has given the impression that deregulation is highly beneficial. However, actual experiences with deregulation provide a very different picture. Instead of constantly repeating that deregulation is fundamentally useful, the deregulation agenda needs to be challenged: who really benefits from deregulation? Are there stakeholders who would face disadvantages because of deregulation? Would the costs and benefits of deregulation be positive or negative?

### **The 'Think Small First' principle for SMEs**

In 2002, the European Commission implemented its Better Regulation Agenda, an initiative aimed at simplifying and suspending unnecessary and obsolete EU legal texts. This culminated in the adoption of the Regulatory Fitness and Performance Programme (REFIT) in 2012. In order to facilitate these measures, the EU created the High Level Group on Administrative Burdens in 2007. In its final report in 2014, this group stated very clearly that the 'Think Small First' principle should be applied consistently and that new legislative proposals should always be examined under the aspect of competitiveness. The European Commission's Working Programme 2015 and the planned REFIT measures certainly take these demands into account.

### **Anything that does not benefit trade is considered an 'administrative burden'**

Due to REFIT's report, planned legislative proposals regarding safety and health at work (for example musculoskeletal disorders, passive smoking, regulations in the hair-dressing sector) are no longer being pursued. The obligation to inform and consult employees as well as issues of consumer protection (food legislation, regulations on misleading advertising and pre-packaging) may also become subject to review.<sup>24</sup> Apparently, the European Commission considers these issues nothing more than 'administrative burdens'. This includes health, traffic and environmental regulation. The European Commission seems to ignore the fact that many of these regulations provide considerable benefits for society.

### **Trade agreements disregard fundamental social and political standards**

It should not be surprising that the European Commission is pursuing this same agenda at the international level. Binding regulations on, for example, labour and environmental issues are not included in EU trade agreements. This does more harm than good to the EU's competitiveness. How can EU member states that comply with certain minimum standards in labour law and

environmental protection compete with third countries that have much lower standards in labour or environmental law? The REFIT measures show very clearly that this kind of policy questions our social and political standards in the medium-term. The negative impacts of this policy, however, do not seem important to the European Commission. Consequently, European officials have even shifted into a higher gear with CETA and TTIP. The agreements provide for an investor-to-state dispute settlement (ISDS) that would massively inhibit or entirely block new regulations in important areas. Canadian or US companies will be able to use the threat of law suits to prevent new legislation in important areas.

## The AK's Demands

- The objectives set out in EU treaties on the negotiation of trade agreements must be taken into account. These objectives include the welfare of the people of Europe, social justice and protection, equitable growth, the improvement of the environment, and fair and equitable trade<sup>25</sup>
- The REFIT measures and the negotiations on free trade agreements must include all socio-political groups on an equal basis. Negotiations that either privilege or disadvantage the interests of individual stakeholders must be rejected
- Impact or cost-benefit analyses in trade agreements must cover all social and political sectors and not simply concentrate on individual sectors
- Trade agreements with third countries must provide arrangements for relevant socio-political issues. This includes joint measures against tax avoidance by multinationals and affluent individuals
- The European Commission must ensure that trade agreements do not block necessary regulations at EU level (caused, for example, by global disruptions such as the financial crisis in 2008 and 2009)

Nikolai Soukup

## TiSA: an agenda in the interests of transnational services corporations

The EU not only pursues far-reaching liberalisation of trade in services at the bilateral level through agreements such as CETA and TTIP; it also does so on a larger scale. As the negotiations on a further reduction of trade barriers in the framework of the General Agreement on Trade in Services (GATS) within the WTO have faltered – not least due to the varying interests of industrialised and developing countries – a ‘coalition of the willing’ initiated negotiations regarding a new services agreement outside of the WTO framework in March 2013. These negotiations will have a massive impact on the policy space of countries to regulate services, and essential public services could also come under pressure.

### **‘Coalition of the willing’ aims at further liberalisation of trade in services**

GATS, which came into force in 1995, aimed to progressively increase the level of liberalisation in the international trade in services through successive rounds of negotiation. However, in the negotiations on an expansion of the GATS within the WTO Doha Round the far-reaching liberalisation ambitions of the governments of the industrialised countries, above all those of the EU and the US, have met with resistance from several countries, especially developing countries. In order to expand market access for

transnational services companies, a group of liberalisation-oriented WTO Members calling themselves the ‘Really Good Friends of Services’ proposed to start negotiations on a follow-up agreement to GATS outside of the WTO framework. Currently, 24 WTO Members are participating in the negotiation process, including the EU, the US, Canada, Japan and several other countries.<sup>26</sup> The obligations arising from the agreement will only apply among the TiSA signatories. The agreement will remain open for other countries to sign after it has entered into force; however, these countries will have had no possibility to have a say on the included provisions.

### **Public services may come under pressure**

The negotiation agenda clearly reflects the wishes of transnational services corporations and their lobby groups. They are not only aspiring that countries expand their commitments to refrain from restricting market access for foreign service providers and from discriminating against foreign providers as compared to domestic providers in as many sectors as possible. In addition, business organisations are also pushing to include regulatory disciplines in the agreement that would ensure that regulations on services do not constitute trade barriers.

The listing of liberalisation commitments in the various sectors is currently being pursued according to a mixed ('hybrid') approach in the TISA negotiations. Under this approach, market access commitments must be explicitly included in a positive list, whereas the obligation not to discriminate against foreign providers as compared to domestic ones applies automatically to all sectors unless exemptions have been explicitly made in a negative list. The increased adoption of the negative list approach is highly problematic because it is related to the use of 'standstill' and 'ratchet' clauses which apply to a part of the exemptions cited in the negative list. In certain areas, future liberalisation would thus become automatically part of the agreement (see chapter 'Public services under pressure').

Representatives of workers, municipal associations and several civil society organisations have demanded a general carve-out of public services from the TISA negotiations. However, the EU has not supported this position. The exemption clauses that the EU usually applies in trade agreements have several shortcomings (see chapter 'Public services under pressure') and are not sufficient in order to comprehensively protect public services from competitive pressure.

The AK clearly rejects an expansion of the liberalisation of trade in services beyond GATS in the plurilateral framework of TISA which

we consider as a step in the wrong direction. Instead, the reasons for the deadlock within the GATS negotiations need to be taken seriously. In this context, it is especially problematic that thus far there has not been a reform of the GATS in order to ensure a better protection of the regulatory policy space and public authorities' capacity to maintain and expand a comprehensive welfare state at the national, regional and local. In future GATS negotiations, it is essential to include binding social standards as well as to ensure the comprehensive protection of regulatory policy space in the area of public services. In contrast, the shift towards a 'GATS 2.0' agreement may very likely undermine reform proposals in this regard and ignore resistance to further liberalisation. Thus, the TISA negotiations may hinder the necessary reform of the multilateral trade regime.

## The AK's Demands

The AK clearly rejects the negotiations on TiSA. Negotiations on a plurilateral GATS follow-up agreement aimed at increasing liberalisation are a step in the wrong direction. Rather, future GATS negotiations must implement necessary reforms leading to including binding social standards as well as ensuring the comprehensive protection of regulatory policy space in the area of public services. TiSA would undermine the proposed necessary reform of the multilateral trade regime.

Without prejudice to this general rejection of TiSA, at any case there must be a binding carve-out of public services from the full scope of the agreement.

- The negative list approach or a hybrid approach (as well as the associated standstill and ratchet clauses) must not form part of any agreement.
- Provisions on domestic regulations that would limit regulatory policy space for public services must be clearly rejected.
- Financial services must not be included in the scope of the agreement.
- Negotiations on the further liberalisation of the cross-border provision of services by workers ("Mode 4") have to be rejected as long as an effective cross-border cooperation of administrative and legal authorities is not guaranteed. This is a precondition in order to be able to ensure compliance with the respective provisions on the minimum wage, working conditions and other labour standards set out in social and labour law and collective bargaining agreements (see chapter 'Temporary labour migration: problems for worker protection').

## Footnotes and bibliography

- <sup>1</sup> European Commission, Overview of FTA and Other Trade Negotiations [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)
- <sup>2</sup> European Commission, Press Release, 25th November 2014: [http://europa.eu/rapid/press-release\\_IP-14-2131\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2131_en.htm)
- <sup>3</sup> European Commission, Decision, 25th November 2014: [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9048\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9048_en.pdf)
- <sup>4</sup> CEPR (2013): Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment. Centre for Economic Policy Research. London, [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf)
- <sup>5</sup> ECORYS (2009): Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis. Rotterdam, [http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc\\_145613.pdf](http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf)
- <sup>6</sup> Bertelsmann Stiftung/Ifo (2013): Transatlantic trade and investment partnership (TTIP): Who benefits from a free trade deal? Part 1: Macroeconomic Effects, [http://www.bfna.org/sites/default/files/TTIP-GED\\_study\\_17June\\_2013.pdf](http://www.bfna.org/sites/default/files/TTIP-GED_study_17June_2013.pdf)
- <sup>7</sup> ÖFSE (2014): ASSESS\_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership. [http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Polycynote/PN10\\_ASSESS\\_TTIP.pdf](http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Polycynote/PN10_ASSESS_TTIP.pdf)
- <sup>8</sup> Capaldo, Jeronim (2014): The Trans-Atlantic Trade and Investment Partnership: Implications for the European Union and Beyond. Global Development and Environment Institute. Tufts University
- <sup>9</sup> Breuss, Fritz (2014): TTIP und ihre Auswirkungen auf Österreich. Ein kritischer Literaturüberblick. WIFO Working papers Nr 468/2014 (in German)
- <sup>10</sup> ÖFSE (2014). ASSESS\_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership [http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Polycynote/PN10\\_ASSESS\\_TTIP.pdf](http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Polycynote/PN10_ASSESS_TTIP.pdf). (in German). The Austrian Foundation for Development Reserch (ÖFSE) has based on the Replacement Index presented in the CEPR study and the employment rates presented by Eurostat (labour Force of 2007) calculated a shift in employment for 430,000 - 1.1 Million employees
- <sup>11</sup> Capaldo, Jeronim (2014): The Trans-Atlantic Trade and Investment Partnership: Implications for the European Union and Beyond. Global Development and Environment Institute. Tufts University
- <sup>12</sup> Breuss, Fritz (2014): TTIP und ihre Auswirkungen auf Österreich. Ein kritischer Literaturüberblick. WIFO Working Papers, Nr. 468. S 12 (in German)



<sup>13</sup> Breuss, Fritz (2014): TTIP und ihre Auswirkungen auf Österreich. Ein kritischer Literaturüberblick. WIFO Working Papers, Nr. 468. S 14 (in German)

<sup>14</sup> Statistik Austria

<sup>15</sup> Feigl, Georg; Zuckerstätter, Josef (2012): Wettbewerbs(des)orientierung. Wien: AK (Materialien zu Wirtschaft und Gesellschaft, Nr 117), [http://wien.arbeiterkammer.at/service/studien/MaterialienzuWirtschaftundGesellschaft/Ausgabe\\_117.html](http://wien.arbeiterkammer.at/service/studien/MaterialienzuWirtschaftundGesellschaft/Ausgabe_117.html) (in German)

<sup>16</sup> Eberhardt, Pia / Olivet, Cecilia (2012): Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom, hg. von Corporate Europe Observatory, Transnational Institute, CAMPACT, PowerShift, Seite 14 ff

<sup>17</sup> Most recently in the Commission's brochure, 30th March 2015  
[http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc\\_153266.pdf](http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153266.pdf)

<sup>18</sup> Answers to questions of the German Bundestag, June 2014: [http://www.bundestag.de/blob/285528/06f3f2e05961988245dc531f817d19e7/stellungnahme\\_dbv-data.pdf](http://www.bundestag.de/blob/285528/06f3f2e05961988245dc531f817d19e7/stellungnahme_dbv-data.pdf)

<sup>19</sup> Christoph Then: Freihandel – Einfallstor für die Agro-Gentechnik. Auswirkungen von CETA und TTIP auf die EU-Regelungen im Bereich der Landwirtschaft – eine kritische Betrachtung. Eine Studie im Auftrag der Fraktion Bündnis90/Die Grünen im Deutschen Bundestag (in German)

<sup>20</sup> EurActiv, 16th January 2015: <http://www.euractiv.de/sections/verbraucherschutz/agrarkommissar-hogan-gentechnik-trotz-ttip-klar-kennzeichnen-311309>

<sup>21</sup> International Trade union Conference: <http://survey.ituc-csi.org/Neue-Ubersetzung-USA-background.html?lang=de> (in German)

<sup>22</sup> Center for American Progress Action Fund: <https://www.americanprogressaction.org/issues/labor/report/2012/02/02/11103/right-to-work-101/>

<sup>23</sup> International Trade Union Conference: [http://survey.ituc-csi.org/USA.html?id\\_edi=336&print=yes](http://survey.ituc-csi.org/USA.html?id_edi=336&print=yes)

<sup>24</sup> Communication from the Commission about the Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368

<sup>25</sup> Consolidated Version of the Treaties on the Function of the European Union March 2010, Article 3: [http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012\\_en.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en.pdf)

<sup>26</sup> The List of participants in the TISA negotiations include the following WTO members: Australia, Canada, Chile, Colombia, Costa Rica, the EU, Hong Kong, Japan, Liechtenstein, New Zealand, Norway, Mexico, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Taipei; Turkey, the US and Uruguay (status: April 2015)

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