



NEXT GENERATION TRADE AND INVESTMENT AGREEMENTS: UPCOMING CHALLENGES FOR PUBLIC SERVICES

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ENTRY POINT:

WHAT MAKES „NEXT GENERATION“ TRADE AND INVESTMENT AGREEMENTS SPECIAL?

>> *The **first thing** you need to know about trade deals in general is that they **aren't what they used to be.*** <<

(Krugman 2014)

>> As trade agreements move into these **new areas**, the **role of business lobbies** changes as well. Governments have to rely on knowledge and expertise from businesses to negotiate complex **regulatory changes**. Hence, business lobbies become partners and collaborators for the trade negotiators: they help **define the issue, provide information and expertise, and mobilize support** from other business groups transnationally <<

(Rodrik 2018)

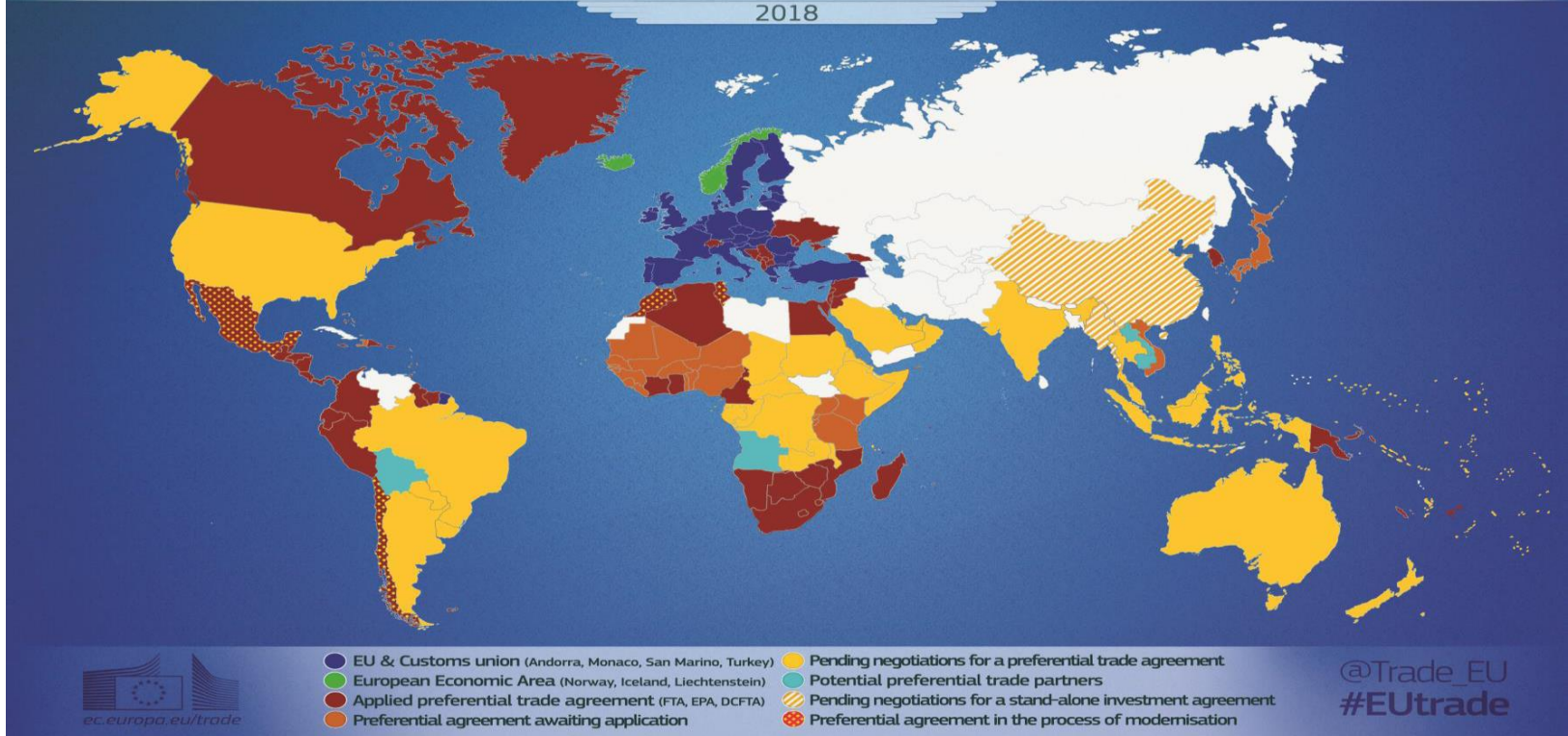


source: [kahn](#) auf [Pixabay](#)

EU GOES GLOBAL – PENDING NEGOTIATIONS

THE STATE OF EU TRADE

2018



TISA: WHAT DOES „IN THE FRIDGE“ & WHEN THE „TIME IS RIPE“ ACTUALLY MEAN?

▶ European Services Forum (ESF) asks to the incoming EP and EC:

....“To support the *resumption* of the
Trade in Services Agreement (TiSA)
negotiations *when the time is ripe*“

(2019)



source: netzpolitik.org

THE 2011 REFLECTION PAPER of the EC reveals long-term LIBERALISATION AGENDA

	Non-economic services of general interest	Services of general economic interest (i) „Network Industries“	Services of general economic interest (ii) „Services of general interest other than network industries“
Scope	Police, judiciary, prisons, ... (non-exhaustive list)	„Large networks structures“: telecoms, energy, transport, postal, environmental (exhaustive list)	healthcare, social services, education, employment and training services, certain cultural services, ... (non-exhaustive list)
Interest	„no commercial interest for either party“	„where privatised, of offensive commercial interest “	„ some potential interest for both parties“
Proposal	Should be excluded from the scope of all services and investment commitments	List explicit reservations on a sectoral basis, <i>requires all monopolies / providers with exclusive rights</i> in these sectors to be listed	A more general non-exhaustive horizontal reservation for market access

3 STRATEGIES TO EXTEND CORPORATE CAPTURE: LOCK-IN, TOP-DOWN, OUTWARD-LOOKING

Lock-in	Top-down	Outward-Looking
<ul style="list-style-type: none"> •<i>binding autonomous liberalisation within the internal market and at the level of member states</i> •<i>especially in the area of “network industries”</i> •<i>Example GATS & telecommunication services</i> ... 	<ul style="list-style-type: none"> •<i>ISDS / investment protection (across all sectors)</i> •<i>Enhanced „transparency“ rules and tightened notification procedures (as building block for „market making“)</i> •<i>New „techniques“: living agreements, regulatory cooperation, enhanced regulatory disciplines, ratchet effect</i> •<i>Public procurement – lowering of thresholds / PPPs - service concessions</i> •<i>Failed in the case of water services & GATS</i> ... 	<ul style="list-style-type: none"> •<i>special focus on f.ex. on “network industries”</i> •<i>Water, sewage, disposal services as part of environmental services</i> •<i>Failed in the case of water services & GATS</i> •<i>Public procurement – lowering of thresholds / PPPs - service concessions</i> •<i>Limits to foreign ownership („equity caps“)</i> •<i>State owned-enterprises, service subsidies</i> ...

ROLLING AGENDA: PPP, SERVICE CONCESSIONS, EXCLUSIVE RIGHTS OF SERVICE SUPPLIERS, STATE-OWNED ENTERPRISES ... (>> MOVING TARGET)

- “The *European Union stands ready*, should the ongoing revision of European Union legislation on public procurement result in a widening of the scope of services and *services concessions* covered by that legislation, to take up negotiations with Canada in view of *extending the mutual coverage of services and services concessions of this Chapter.*”

[CETA, Annex 19-5]

- “Within six months after the date this Agreement enters into force, each Party shall provide to the other Parties (...) a *list of its state-owned enterprises*, and thereafter shall update the list annually”

[TiSA, Annex on State-Owned Enterprises]

- “In addition, the annex could incorporate also information on business opportunities relating to *PPPs* such as the sectors in which the Parties largely use /intend to use of PPPs”

[TTIP, Non-paper on the Coverage of public private partnerships (PPP) for the Public Procurement Chapter]

- “The Agreement should also consider covering commitments for *public private partnerships / concessions* in line with respective legislation in this area”

[FTA EU-Australia, negotiating directives]

► MOVING FORWARD >> 3 QUALITY CRITERIA FOR PUBLIC SERVICE PROTECTION

Definition of public services which covers diversity of concepts & changing needs of citizens

- Keep in mind **what makes public services special**
- Need for **regulatory flexibility** and **democratic accountability**
- Take into account **changing „collective preferences“** (Lamy) between different states and across different regulatory levels (municipal, regional, national, ...) >> has to **prevail over self-constraining, long-term binding trade obligations** and „regulatory chill“-effect

Adequate level of protection

- Mind the „**rolling agenda**“ of offensive commercial interests, new liberalisation techniques and **expansionary dynamic of next generation trade and investment agreements**
- Fix the **loopholes** & get beyond the „sandcastle approach“
- **unambiguous and comprehensive protection**

Sufficiently binding legal quality

- **Clear-cut exclusion from the scope of application:** reliable protection of PS demands for highest legal quality
- Fallacies of mere „**interpretative guidelines**“ and **symbolic proclamations**
- Substantial carve-outs **strengthen the power of public policy objectives** against the biased judgments of trade tribunals

HOW TO EXCLUDE PUBLIC SERVICES FROM NEXT GENERATION AGREEMENTS

“1. This agreement **does not apply to public services** and to measures regulating, providing or financing public services.

2. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the **competent national, regional or local authority in the general interest.**

3. Special regulatory regimes or special obligations include, but are not limited to, **universal service or universal access obligations, mandatory contracting schemes, fixed prices or price caps, the limitation of the number of services or service suppliers through monopolies, exclusive service suppliers including concessions, quotas, economic needs tests or other quantitative or qualitative restrictions and regulations aiming at high level of quality, safety and affordability as well as equal treatment of users**”

(Krajewski 2016)



EXAMPLE: RESOLUTION OF THE OUTGOING EP ON THE FOLLOW UP OF THE „RIGHT2WATER“-INITIATIVE – WHAT DIFFERENCE DOES IT MAKE?



► EP not only demanded to exclude water services, sanitation services and wastewater disposal services from TTIP and TiSA – but also to grant the right to water for the people of so called “third countries” – as precondition for future FTAs

*“47. Stresses that the special character of water and sanitation services, such as production, distribution and treatment, makes it **imperative that they be excluded from any trade agreements the EU is negotiating or considering; urges the Commission to grant a legally binding exclusion for water services, sanitation services and wastewater disposal services** in the ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement; stresses that all **future trade and investment agreements should include clauses on genuine access to drinking water for the people of the third country to which the agreement pertains** in line with the Union’s long-lasting commitment to sustainable development and human rights, and that genuine access to drinking water for the people of the third country to which the agreement pertains **must be a precondition for any future free trade agreements**” (September 2015)*

► Proper answer to an “outward-looking”-liberalisation strategy

of the EU and TNCS in the field of water and *sanitation, wastewater disposal services?*

5 EXPERIENCES – GATS 2000 & BEYOND ...



- #1) Force supporters of neoliberalisation to react, trigger the “awareness effect” and make decision makers accountable*
- #2) Link your agenda to already existing concerns about the loss of democratic control, privatization of everyday infrastructure and “corporate capture” of public interest*
- #3) Take care of your field of action, emblematic issues, capacity building and the division of labour in overarching platforms*
- #4) Make sense of different strategies for imposing a straitjacket on democratic decision making – and anticipate attempts for the reframing of “red lines” and sidelining of concerns*
- #5) Support the development and stabilisation of a “winning coalition”*

EXAMPLE STOPP GATS & FAILED WATER LIBERALISATION

- ▶ “the explicit *inclusion of water distribution* into the environmental services classification, as well as the EU requests in that sector have been met with strong (...) criticism from the side of *civil society*. This ‘campaign’ (...) has raised considerable interest, and support, by *MEPs* (...), *national parliamentarians, municipalities* (in particular in those Member states where provision of these services is under municipal control) and *development organisations*. (...) In short, there is strong opposition (...) against greater involvement of the private sector in the supply of water services (...)” (background note, EC 2003)



- ▶ *shared concerns across different services sectors* (e.g. GATS) - “*issue-coalitions*” behind different protests – *shared user & producer concerns*

ROLLING AGENDA: NEW WTO MOMENTUM?: JOINT INITIATIVE ON DOMESTIC REGULATION & NEGOTIATIONS ON E-COMMERCE ... (>> MOVING TARGET)



Joint initiative on Services Domestic Regulation



source: The Policy Times, <http://thepolicytimes.com/india-to-skip-negotiations-with-wto-over-e-commerce-policy/>

MAKING TRADE SERVE A JUST TRANSITION

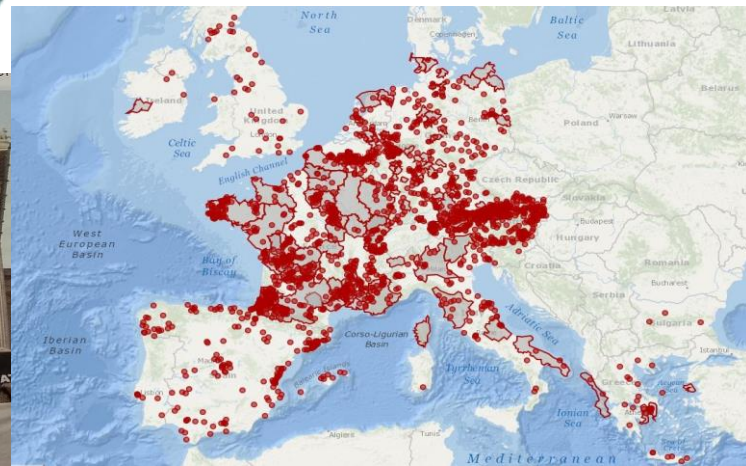


<https://futureispublic.org/>

source : S2B, Twitter



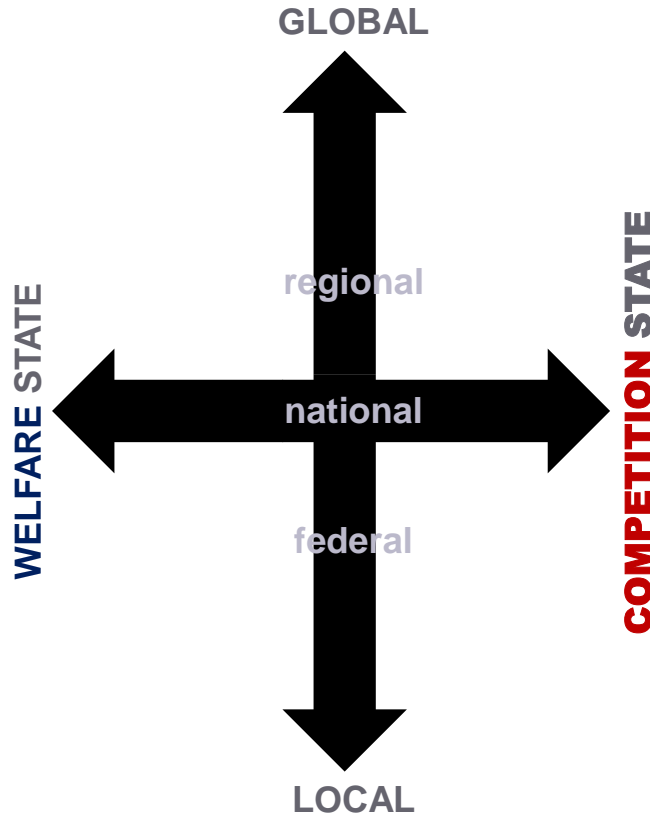
source: WTO, Twitter



BACKGROUND MATERIAL

CONTENDING FORCES AND MODELS: EXTENDED VS. RESIDUAL PUBLIC SERVICES

- *strengthened and extended public services*
- *democratisation vs. corporate capture*
- *solidarity-based financing*
- *strategies for reclaiming public interest and advancing deprivatisation*
- ...



- *weakened and residual public services*
- *corporate capture vs. democratisation*
- *pushing for private profits, financialisation and privatisation of costs*
- *Market-making by austerity*
- *strategies for enhancing privatisation*
- ...

PRIVATISATION: STATE OF PLAY?

Privatisation is *coming back* into focus in a number of countries. Following an initial weakness in the wake of the international *financial crisis*, estimates of global trends indicate that privatisation activity is now on the rise. Privatisation revenues have risen from around USD 110 billion in 2008 to USD 266 billion in 2016. Governments, already under *pressure to raise fiscal revenues and reassess the role of the state in the commercial economy*, have increasingly chosen to take advantage of opportunities for privatisation that have emerged with internationalisation, market de-regulation and technological progress.



FREE TRADE AGREEMENTS: TWO ESSENTIAL EFFECTS

They >> put domestic policy makers under the pressure to consider only measures which are in conformity with these agreements (“regulatory chill” effect) and effectively bind governments to the current level of liberalisation which makes a review and reconsideration of liberalisation measures difficult (“lock-in” effect)<<

(Krajewski)

NEW MODEL FOR THE (NEO)LIBERALISATION OF PUBLIC SERVICES IN FTAs (CP. KRAJEWSKI)

„standard“ GATS-model	Elements of an emerging new model (cp. Rationale of the EC „reflections paper“)
<ul style="list-style-type: none"> Level 1: exclusion of „services supplied in the exercise of governmental authority“ (Art. I:3 (c) GATS) 	<ul style="list-style-type: none"> Level 1: exclusion of „services supplied in the exercise of governmental authority“
<ul style="list-style-type: none"> Level 2: horizontal, non-exhaustive EU´s „Public utilities“-clause: “services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.” 	<ul style="list-style-type: none"> Level 2: horizontal exemption is reduced to a limited scope of Services of General Economic Interests (based on EU-definitions) and only to the local level (cp. Reflections Paper of the EC)
<ul style="list-style-type: none"> Level 3: specific obligations/exemptions in the sectoral part of the list of commitments 	<ul style="list-style-type: none"> Level 3: member states have to list all existing monopolies/providers with exclusive rights and it is forbidden to introduce new ones („stand still“, „transparency“)
<ul style="list-style-type: none"> Positive list-approach 	<ul style="list-style-type: none"> Negative list-approach („list it or loose it“) plus „Ratchet“-mechanism
<ul style="list-style-type: none"> problems: narrow exemption (governmental authority), no consensus about the scope of the PU-clause and the latter only addresses market access (not national treatment) 	<ul style="list-style-type: none"> problems: like GATS model PLUS enhanced restriction of policy space and less protection against offensive commercial interests

SOME BACKGROUND MATERIAL

Web:

- AK Europa – trade section: <https://www.akeuropa.eu/filters/all/13>
- AK Vienna – research reports: <https://wien.arbeiterkammer.at/service/studien/eu/index.html>
- EPSU – trade section on EC's reflection paper: <https://www.epsu.org/article/eu-trade-and-public-services>
- OEFSE – research & information centre on international development: <https://www.oefse.at/en/>
- Corporate Europe Observatory – trade section: <https://corporateeurope.org/en/trade>
- Watch out: Conference “The future is public – Democratic Ownership of the Economy”, 4-5 December 2019, <https://futureispublic.org/>

Further Reading:

- EUROCITIES (2016): Statement on the Transatlantic Trade and Investment Partnership and future trade agreements, http://nws.eurocities.eu/MediaShell/media/EUROCITIES_statement_on_TTIP_final.pdf (z.a. 12.11.2019)
- Krajewski, Markus (2016): Model clauses for the exclusion of public services from trade and investment agreements, study commissioned by AK Vienna and EPSU, http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_de_406.pdf (z.a. 12.11.2019)
- McGuire, Donna (2014): Analysing Union Power, Opportunity and Strategic Capability: Global and Local Union Struggles Against the General Agreement on Trade in Services (GATS), in: Global Labour Journal 5/1, 45-67 [online: <https://mulpress.mcmaster.ca/globallabour/article/view/1147/1203>]
- Prausmüller, Oliver (2019): Background note for the Joint AK EUROPA/EPSU/ ÖGB Europabüro/ETUC workshop 'Next generation trade and investment agreements: Upcoming challenges for public services', 19 November 2019, https://www.epsu.org/sites/default/files/article/files/Modelclause_PublicServices_FTAs_background_note.pdf
- Prausmüller, Oliver (2017): The impact of free trade agreements on water services, in: Prorok, Thomas/et al. (eds.): The future of Europe – built on strong municipalities, Wien/Graz, 66-68.
- Raza, Werner/Tröster, Bernhard/von Arnim, Rudi (2018): ASSESS_TISA. Assessing the claimed benefits of the Trade in Services Agreement (TiSA), study commissioned by AK Vienna <https://www.akeuropa.eu/assesstisa-assessing-claimed-benefits-trade-services-agreement-tisa> (z.a. 12.11.2019)
- Raza, Werner (2016): Politics of scale and strategic selectivity in the liberalisation of public services – the role of trade in services, in: New Political Economy, 21/2, 204-219 [online: <http://dx.doi.org/10.1080/13563467.2015.1079172>]
- Sinclair, Scott (2016): Flimsy CETA declaration leaves public services, water policy vulnerable in Canada-EU deal, <http://behindthenumbers.ca/2016/10/14/flimsy-ceta-declaration-leaves-public-services-water-policy-vulnerable-canada-eu-deal> (z.a. 12.11.2019)