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From: Eve Mitchell <[REDACTED]>
Sent: 22 October 2014 13:18
To: Euro-Ombudsman
Subject: [EOWEB] Consultation on TTIP transparency
Attachments: ttip ombudsman letter.pdf

Sender

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Date Wednesday, October 22, 2014 1:18:03 PM CEST

Your data

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Language you would like to receive an answer in en - English

Part 2 - Data

Subject Consultation on TTIP transparency

Dear Ms O'Reilly,

Please find attached Food & Water Europe's contribution to your own-initiative investigation.

Thank you,

Content

Eve Mitchell

Emily O'Reilly
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By email to: http://www.ombudsman.europa.eu/email?to=contactform_email_consultation-2014-10

20 October 2014

Dear Ms O'Reilly,

Re: Contribution to TTIP transparency inquiry consultation

Food & Water Europe thanks you for this own-initiative inquiry and for the opportunity to contribute our views for your consideration. We support the framing of and aims for your inquiry.

To be clear we do not support so-called free trade agreements because we do not believe they contribute to the type or quality of economic development needed anywhere in the world. Such agreements, including TTIP, undermine laws and policies that protect the environment and farmers' livelihoods while helping countries maintain agricultural self-sufficiency, rein in corporate interests, protect food safety, promote renewable energy, and curb risky practices like fracking.

We respectfully offer these views for your consideration:

1. Please give us your views on what concrete measures the Commission could take to make the TTIP negotiations more transparent. Where, specifically, do you see room for improvement? (We would ask you to be as concrete as possible in your replies and also to consider the feasibility of your suggestions, in light of the timeframe of the negotiations. It would be most helpful if you could prioritise your suggestions.)

While we fully appreciate your request to bear in mind the feasibility of any suggestions in light of the timeframe of ongoing negotiations, we respectfully suggest that in fact the TTIP process is so flawed that it must be halted and a process entered into to seek legitimacy for any restart of talks.

Before TTIP or any other trade negotiations can go forward legitimately, we suggest that a three-part programme for public engagement is the minimum required to gain the legitimacy such agreements currently lack.

Phase I: Before negotiations commence

The case for any agreement needs to be made and agreed in Member States. The process must give meaningful opportunities (see comment below on current public consultation processes) for academics, industry, civil society, trade unions and individual citizens to investigate the claims made (usually by politicians and industry leaders or their lobbyists), interrogate those advocating the move toward any negotiations and determine if the promises both stack up and are worth what will inevitably have to be sacrificed in the course of the negotiations. Supporters of so-called free trade talks do so allegedly in our names and for our benefit, but do so on a self-appointed brief without actually asking citizens if this is either an overall direction in which we wish to proceed or a specific deal in which we wish to enter.

Member States could then take these positions to European level discussions in order to arrive at a decision on proceeding with the proposed talks. The discussions should be fully open to the public, with minutes and decisions published.

Phase II: During negotiations

The pre-negotiation phase should develop stages in the negotiations at which Member State Parliaments can evaluate progress against the agreed outcomes, check areas that overstep agreements and request information on any areas of concern or interest.

Simple lists of meetings, while progress of a kind from the unacceptable situation we currently face, are entirely insufficient if their contents are vague and the overarching drive of the talks disputed. In any case, thanks to Corporate Europe Observatory we already know that 92% of meetings the Commission had about TTIP were held with private lobby interests and only 4% with public interest groups, so such lists serve to underpin the concern but do little if anything to address it.¹

We support the suggestions you made to the Commission in your letter of 29 July 2014 as the beginning of a discussion about how information should be published during trade negotiations²:

- (i) The Commission could consider making available on its website the many documents it has now released in response to the access to documents requests it has dealt with in relation to TTIP.
- (ii) The Commission could consider — for the remainder of the negotiations and to the extent possible — establishing a public register of TTIP documents held by it, in line with Article 11 of Regulation 1049/2001.

We also support your suggestion for a list of all meetings between negotiators and officials with lobbyist of any stripe that discuss the talks, including meeting agendas.

However we would recall that there is a history of difficult discussions with the Commission about this issue, and many view the Commission as part of the problem (particularly with regard to revolving doors with industry) because it is too close to interests that stand to gain from trade deals as currently organised. In this was leaving public relations to the Commission alone may not be viewed as sufficient safeguard of a properly democratic outcome.

The overarching aim of Phase II public engagement should be to enable citizens to check back against original agreed aims of talks as they proceed. Any potential trade partners who refuse to engage in talks based on democratic accountability and openness with EU citizens should suffer the EU's refusal to entertain the possibility of gaining the allegedly mutual benefits such talks claim.

However we are not naïve, and it is entirely possible that given the current situation such requirements would lead to documents or other means to disguise the pressure wealthy and influential vested interests exert on governments and negotiators. We as citizens have a responsibility to do what we can to prevent this happening and expose it if it does.

¹ Corporate Europe Observatory. "Who lobbies most on TTIP?" Accessed 13 October 2014. Available at <http://corporateeurope.org/international-trade/2014/07/who-lobbies-most-ttip>.

² European Ombudsman. "Letter to the Council of the EU requesting an opinion in the European Ombudsman's own-initiative inquiry OI/11/2014/MMN concerning transparency and public participation in relation to the Transatlantic Trade and Investment Partnership (TTIP) negotiations." 29 July 2014. Accessed on 13 October 2014. Available at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54634/html.bookmark>.

Phase III: After negotiations

While conducting negotiations in a more transparent manner should foster a better outcome, it is not sufficient to do so.

In particular the habit of putting negotiated deals to the European Parliament as a single undertaking (ie, with only the possibility to vote for or against the entire package, regardless of content) is a problem. This ideally would be assuaged by better preparation and transparency in previous phases, but the Parliament should have the right to scrutinise parts of the draft deal individually and give a view on each. Indeed this could lead to better negotiations and clearer mandates for negotiators – everyone would know what was agreed in advance and that any draft deal would be analysed for compliance with that agreement, so negotiators would have a stronger mandate to stand their ground.

If the prize is as big and as important as is often claimed, which as we noted above we doubt when it comes to so-called free trade deals, then the current process for approving trade deals is effectively back-to-front as it hides from the public and effectively forces results on citizens under a mist of partial information and dramatic assurances. This needs to change, and the claimed need for strict confidentiality (even from elected representatives) has gone far too far, but a much stricter regime may help restore public confidence.

Another, and probably more serious, problem with concluding and accepting the outcomes of trade negotiations is that they can be implemented by agreement of the Council and Commission without actually being ratified, and that in fact this situation can apparently persist indefinitely as there is no provision in the Lisbon Treaty to end such “provisional” application of treaties. As full ratification can take years, this binds EU citizens to treaties they have not yet decided this wish to enter. Such provisional implementation is not unusual precisely because ratification takes so long, and has been seen in deals with Ukraine, Colombia and Peru.³ The discussion is ongoing with the Canada trade treaty,⁴ and there is no reason to believe provisional implementation will not be possible under TTIP.

What’s worse the provisions of agreements provisionally implemented are clearly enforceable, as was the case under the Energy Charter. In 1994 Russia provisionally implemented the Energy Charter Treaty until October 2009.⁵ In 2005 a UK company filed a case for “discriminatory measures and expropriation of investments” under the investor/state dispute provisions (ISDS) of the treaty, which Russia lost, and was ordered to pay US\$100 billion in compensation.⁶

Given the huge sensitivities raised by the belated public recognition that ISDS provisions appear in many existing and planned trade agreements, including TTIP, it will be unwelcome news that these apply even if the deal is not ratified and that citizens will have to pay the price of any cases that rule against the EU.

No deal should be enforceable without a clear democratic mandate.

Finally we are aware that public opinion on limited issues is occasionally sought via public consultations run by the Commission or others. While these may offer a fig leaf of credibility to the policies adopted, they are in fact totally inadequate for gauging the needs or wishes of the citizens affected. Examples of the difficulties faced by citizens attempting to make their voice heard include:

³ European Commission. “The EU’s free trade agreements – Where are we?” 18 June 2013. Available at [http://europa.eu/rapid/press-release MEMO-13-576_en.htm](http://europa.eu/rapid/press-release_MEMO-13-576_en.htm).

⁴ Kirby, Peter. “Canada-EU Trade (CETA) Negotiations – Racing to the Finish Line.” Originally published in *North American Free Trade and Investment Report*, Vol. 21, No. 11, June 15, 2011. Available at <http://www.fasken.com/en/canada-eu-trade-ceta-negotiations-racing-finish-line/>.

⁵ The Energy Charter. “Russia.” Accessed on 13 October 2014. Available at <http://www.encharter.org/index.php?id=414>.

⁶ The Energy Charter. *Yukos Universal Ltd. (UK - Isle of Man) v. Russian Federation*. Available at <http://www.encharter.org/index.php?id=213&L=0#Yukos>.

- a) Language that is opaque and too dense to seriously encourage citizens to say what they think. The Consultation on the future EU initiative on No Net Loss (NNL) of biodiversity and ecosystem services⁷ was based on a technical report over 300 pages long, and there are other background documents on operational principles, scope and objectives one should be familiar with in order to understand the full implications of the questions put.
- b) The online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Partnership Agreement (TTIP)⁸ was used publicly by negotiators and the Commission as a demonstration of public accountability in their push for TTIP, but the consultation itself was in fact strictly limited in scope (“[W]hether the EU’s proposed approach for TTIP achieves the right balance between protecting investors and safeguarding the EU’s right and ability to regulate in the public interest”). The decision to include ISDS provisions in TTIP was already taken, and all the public was invited to discuss was the “balance” in the proposal when a good deal of us turned out to oppose the concept as a whole.
- c) EFSA’s consultation on the safety reassessment of glyphosate required one to “register” personal details before being permitted to see even the consultation documents (prepared at the public expense) or to see what questions were being asked.
- d) A host of technical barriers prevent citizens from meaningful involvement, including:
 - The electronic system that provides the required means to submit responses often does not work. As was the case with the NNL and TTIP consults noted above the system crashed completely.
 - The mandatory questionnaires are only available as pdf downloads, making meaningful discussion with colleagues about drafts tedious at best.
 - Character limits in what free text options still exist amid multiple choice questions are now ridiculous. In the NNL consult the maximum character count for a free text response 500 or 750 *characters* (including spaces).
 - The deceptively simply multiple choice questions often drive responses in a set direction, framing questions so that one is forced either to accept the preconceived position (and therefore potentially misrepresent one’s actual opposition to the proposals) or to answer “no opinion” (which is very likely not the case).

We think problems like these now discriminate against wide swathes of the public being consulted, like the poor (who may not have access to computers), the elderly (who may not have the computer skills, vision or confidence to work online) or those who sadly do not speak English (the Commission says, “Responses are, however, acceptable in all EU languages, unless explicitly stated otherwise on the consultation documents themselves,” but we could only find the NNL questionnaire available in English, and how one is meant to answer questions one cannot read is not revealed⁹). Other options, like postal submissions, Braille versions of papers, etc, are lacking or hard to find. If the public cannot respond it is often portrayed as acquiescence or disengagement, neither of which may be true.

Such “consultations” cannot be taken as more than a rough straw poll of public opinion.

⁷ European Commission. “Consultation on the future EU initiative on No Net Loss of biodiversity and ecosystem services.” Available at http://ec.europa.eu/environment/consultations/nnl_en.htm.

⁸ European Commission. “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP).” Available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

⁹ European Commission. “Your voice in Europe: About this site.” Accessed on 20 October 2014. Available at http://ec.europa.eu/yourvoice/about/index_en.htm#background.

2. Please provide examples of best practice that you have encountered in this area (for example, in particular Commission Directorates-General or other international organisations) that you believe could be applied throughout the Commission.

We are not able to think of any examples of trade negotiations we would consider models for the future.

3. Please explain how, in your view, greater transparency might affect the outcome of the negotiations.

In addition to the improvements noted above, benefits of a more appropriate approach to trade negotiations could include:

- Any genuine need for confidentiality would be more likely to be respected, and unauthorised disclosure of documents therefore reduced if not eliminated.
- A lighter burden on the Commission to reply to the “numerous and broad-ranging requests for public access to documents” noted in your letter of 29 July because the rationale and framework for the negotiations would be clear and public, so the perceived need, which we share, to uncover the motivations for and process of negotiations and adoption of resulting deal far less pressing.
- Increased chances the deals would be respected by citizens due to a more democratically accountable process.

Yours sincerely,

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EU Food Policy Advisor

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Food & Water Europe is the European program of Food & Water Watch, a nonprofit consumer organization based in the United States that works to ensure the food, water and fish we consume is safe, accessible and sustainable. So we can all enjoy and trust in what we eat and drink, we help people take charge of where their food comes from, keep clean, affordable, public tap water flowing freely to our homes, protect the environmental quality of oceans, force government to do its job protecting citizens, and educate about the importance of keeping shared resources under public control.