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Sent: 28 October 2014 13:46
To: Consultation-OI-10-2014
Subject: [EOWEB] TTIP consultation
Attachments: FFII-Ombudsman-TTIP-consultation.pdf

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Date Tuesday, October 28, 2014 1:45:33 PM CET

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Subject TTIP consultation
Content

TTIP consultation

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This is the Foundation for a Free information Infrastructure (FFII) submission to the European Ombudsman public consultation in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations. (Ombudsman, 2014)

Contents

1 General remarks

1.1 The stakes are high

"One of the reasons that we are in such bad shape is that we have mismanaged globalization." Stiglitz (2014)

It is hard to foresee the effects of political decisions. Argentina had to undo its linkage with the dollar; the euro is the result of a political deal – it now necessitates strong measures; investor-to-state dispute settlement (ISDS) turned out to be a rigged system. (FFII, 2014)

Modern deep integration trade deals are hardly reversible. Systemic flaws in these deals will have long lasting and deep effects, may deeply change societies.

1.2 A regulatory convergence treaty

Pascal Lamy, former director-general of the World Trade Organisation and European commissioner for trade, notes TTIP is not just another trade agreement; it is "a different beast".

"Most old-fashioned barriers have already disappeared. Trade negotiators are focusing instead on removing discrepancies between the regulations in force in the American and European markets. These talks are no longer about removing protections; they are about harmonising precautions that prevent harm to consumers.

The political economy of this sort of endeavour differs from those of past negotiations. When you work to reduce tariffs, consumers praise you for lowering prices while producers complain that you have stripped away their protections. Things are different when we start talking about regulatory harmonisation. Producers are excited by the prospect of such measures, which could have serious implications for medicine, food, financial products, vehicles – everything. But they make consumers anxious because they fear it means giving up the precautionary safeguards from which they benefit. (...)

We need to embrace transparency. We must explain, frankly and openly, that 80 per cent of these negotiations deal with a realm of regulatory convergence." (Lamy, 2014)

1.3 Legitimacy, quality and balance

The EU and US will seek regulatory convergence and aim to set global rules.

Legitimacy, quality and balance are essential aspects of regulations. The Treaty on European Union (TEU) provides guidance on how to ensure legitimacy, quality and balance. Article 1 TEU formulates openness as an inextricable characteristic of the EU: "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".

Article 1 of the TEU implies the Union can not take a path that leads to confidentiality, if a path leading to openness is available. International negotiations have to take place as openly as possible and as closely as possible to the citizen.

International agreements are also problematic as in the ratification process the European Parliament can only vote yes or no. The EU has "fast track" by constitutional design. In a yes or no vote it may easily happen that badly drafted definitions slip through or that systemic failures are not noticed. A tension exists between the aim to reach legitimacy, quality and balance, and the way international agreements are negotiated and ratified.

1.4 Openness leads to better results

Negotiations in international organisations show that openness is possible. Geist (2012) noted regarding ACTA, the Anti-Counterfeiting Trade Agreement:

"Yet a closer examination of similar international IP negotiations reveals that ACTA's opaque approach was not 'an accepted practice', but rather was out-of-step with many other global norm-setting exercises. The WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, and an assortment of other conventions were all far more open than ACTA."

Openness is not only possible, it also leads to better results. Geist argues that confidentiality had a negative effect on the quality of the ACTA text:

"The damage created by the lack of transparency extends beyond public distrust of ACTA. The failure to include experts throughout the negotiation process has caused significant damage to the substance of the agreement with numerous legal concerns as a result. (...) While the public concern over these provisions appears to have resulted in changes to the ACTA text, the lack of transparency associated the negotiations meant that these cases constituted the rare instance of public feedback having an impact on the final text. Had the negotiations followed more conventional global norms, it is much more likely that the final text would better account for the remaining substantive concerns."

Flynn (2013) compares the secrecy of ACTA ("dead on arrival") with the openness of the negotiations on the WIPO treaty for the visually impaired. In the latter case, there were ongoing releases of draft negotiating documents, WIPO webcasted negotiations, and even established listening rooms where stakeholders could hear break rooms where negotiators were working on specific issues. The openness led to the "Miracle In Marrakesh". (Saez, 2013)

1.5 Discrimination leads to biased results

"Corporations are attempting to achieve by stealth – through secretly negotiated trade agreements – what they could not attain in an open political process." Stiglitz (2013)

On the US side, KEI (2013) notes that several hundred "cleared advisors" have special privileges as regard access to the text, and that the current advisory board system focuses too much on big corporate interests, and provides almost no input from consumer and public interest groups. KEI:

"Without the text being publicly made available, it is almost impossible to provide appropriate feedback for the very proposals that will affect the general public the most. When negotiations are kept secret, the general public is denied access to important information and also denied the opportunity to effectively engage in the democratic process. The general public should not be forced to rely on leaks in order to access the text. Leaks are not a reliable or predictable source of information, and people should not have to risk jail terms or career ending sanctions just to enable to broader public debate. (...) The precise working of the provisions, references to other documents or

international instruments, and crossreferences throughout the text are vitally important to fully understanding the impacts of the agreement as a whole. Oral briefings, without benefit of the actual text, are therefore inadequate sources of information. The U.S. government is now ignoring the expertise of the plethora of individuals who specialize in particular areas."

The EU also has a system of advisors with special privileges as regard access to texts. For instance, in the context of the EU-India trade agreement, the European Commission (hereinafter "commission") created an advisory committee to assist it in the identification of barriers to market access in India. The committee is composed of representatives of the Member States and chaired by the representative of the commission. Representatives of trade associations or companies were involved in this process and participated, as experts, in the work of the advisory committee and of working groups established on the basis of sector-specific expertise. The commission denied Stichting Corporate Europe Observatory access to texts distributed among trade associations and companies. The CJEU (2013) General Court allowed this discrimination, failed to notice that the experts represent special interests, failed to notice that the public interest suffers from this discrimination. The Court failed to provide useful guidance that could have been found in TEU articles 1, 9 and 10(3) and human rights instruments.

Privileged access creates a real risk that negotiations will lead to biased results.

1.6 Participation is a human right

Regulation 1049/2001 on access to documents has to be interpreted in a way that is compatible with the EU's human rights obligations.

1.6.1 Charter of fundamental rights

The Charter of Fundamental Rights of the European Union gives citizens a right of access to documents. Any limitation must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The EU meets the first condition; with Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission doc-

uments the EU limits access to documents by law. But the secrecy of TTIP documents fails the necessity test – we saw above that openness is possible and leads to better results. Secrecy does not genuinely meet objectives of general interest recognised by the Union. It takes a (very) wide margin of appreciation to deem the secrecy compatible with the Charter.

For the freedom to receive and impart information see below.

1.6.2 ICESCR

All EU member states have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). The EU's obligation to respect, protect and fulfil the human rights enshrined in the ICESCR results from the constitutional traditions common to the Member States (article 6(3) TEU). The US signed but not ratified the ICESCR – the US should not undermine it.

The EU's obligation regarding the ICESCR was confirmed by the Court of Justice of the EU; in the case C-73/08 Bressol and Others, the Court gave a judgment on an alleged conflict between the Treaty on the functioning of the European Union and the ICESCR. (CJEU, 2010)

Citizens have a right to participate in an active and informed way, which is only possible with access to information. Everyone has the right "to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a)" of the International Covenant on Economic, Social and Cultural Rights, according to the UN Committee on Economic, Social and Cultural Rights, in its authoritative General comment No. 21. (ECOSOC, 2009)

The right to participate in an active and informed way is not absolute. States may limit ICESCR rights, but only under three cumulative conditions as defined in Article 4 ICESCR:

"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The EU meets the first condition; with Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents the EU limits access to documents by law. But the secrecy of TTIP documents is not compatible with the human right to participate in an informed way. Nor is the secrecy solely for the purpose of promoting the general welfare in a democratic society – we saw above that openness is possible and leads to better results. It takes a (very) wide margin of appreciation to deem secrecy compatible with the ICESCR.

1.6.3 ICCPR

All EU member states have ratified the International Covenant on Civil and Political Rights (ICCPR). The EU's obligation to respect, protect and fulfil the human rights enshrined in the ICCPR results from the constitutional traditions common to the Member States (article 6(3) TEU). The US signed and ratified the ICCPR.

Regulation 1049/2001 has to be interpreted in a way that is compatible with the International Covenant on Civil and Political Rights. Under the ICCPR citizens have the right to take part in the conduct of public affairs (article 25).

General Comment No. 25 (57) clarifies that this right includes exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves (paragraph 8). (Human Rights Committee, 1996) The General Comment also notes:

"25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."

To fully enjoy the right to take part in the conduct of public affairs the free communication of information between citizens, candidates and elected representatives, and commenting on public issues without censorship or restraint

are essential. Denying access to documents both harms the free communication of information between citizens and elected representatives and puts a restraint on the possibility to comment on public issues.

General Comment No. 25 paragraph 4 clarifies that the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. (Human Rights Committee, 1996)

The EU meets the first condition. But the secrecy of TTIP documents is not objective and reasonable – we saw above that openness is possible and leads to better results. It takes a (very) wide margin of appreciation to deem secrecy compatible with the ICCPR.

1.6.4 Freedom of expression

Access to documents and the right to participate are related to freedom of expression. This right includes the freedom to receive and impart information (article 10 European Convention on Human Rights).

The "freedom to receive information" embraces a "right of access to information". (ECtHR, 2013) See also General comment No. 34 paragraph 18. (Human Rights Committee, 2011) States do not have a wide margin of appreciation regarding political speech.

We saw above that it takes a (very) wide margin of appreciation to deem the secrecy compatible with the EU's human rights obligations. Such a wide margin of appreciation is not compatible with the freedom of expression regarding political speech.

1.7 A broken system

Regulation 1049/2001 on access to documents and EU case law are broken.

First, EU case law considers that the EU has a legitimate interest in not revealing strategic elements of the negotiations. That may seem obvious. However, publications such as Inside US Trade spell out strategic considerations of all parties in trade negotiations. The case law seems out of touch with modern reality.

Second, in EU case law "mutual trust between negotiators" is a reason for confidentiality. But this secrecy creates a serious risk on a tunnel vision.

The larger interest – a good final outcome – is missing. The case law fails to consider that modern deep integration agreements are not trade agreements but regulatory convergence agreements.

Third, EU case law accepts privileged access.

Fourth, secrecy agreements pre-empt a fair human rights assessment. However, the EU can not discharge of human rights obligations by agreeing to secret negotiations.

Fifth, the courts accept that the EU takes a path leading to secrecy while a path leading to openness is available.

Secrecy rather works to keep the public out. This does not foster legitimacy, quality and balance. It harms the public interest. And it does not comply with human rights obligations, unless we grant the EU a (very) wide margin of appreciation.

A wide margin of appreciation is not compatible with political speech. Furthermore, as real risks exist, including hardly reversible systemic failures, a (very) wide margin of appreciation is unwarranted.

1.8 Insufficient improvements

The commission moves in the direction of openness; it published proposals and created an expert group of 14 (later 16) people, half business, half civil society, with greater access to information. The commission also held a consultation on investor-to-state dispute settlement.

These are steps in the right direction. But 8 people can not represent civil society. Furthermore, during the ACTA negotiation process academics provided essential analysis. Academics are experts, but will stay uninformed, unless more documents are leaked (with associated issues, as we saw above).

We are still far away from the human right of everyone to take part in an active and informed way, and without discrimination, in any important decision making process. We are still far away from freedom of political speech. We are still far away from procedures that foster legitimacy, quality and balance.

2 Specific questions

"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.")

First, in negotiations parties table texts, these are then known to the other party. Tabled texts can be shared with the public as well. After both (or all parties) tabled texts, the parties make a text with brackets. These bracketed texts can be published as well. This is standard practice in many international organisations.

Second, mandate and legal opinions are important (for the latter see also below).

Third, all ISDS consultation submissions have to be published.

"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."

As noted above, many international organisations are way more open.

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

As noted above, greater openness fosters legitimacy, quality and balance. And it decreases the risk on hardly reversible systemic failures.

3 European Parliament

This consultation regards the commission. We would like invite the Ombudsman to pay attention to the European Parliament's role and processing of documents as well. The "Parliament shall ensure that its activities are conducted with the utmost transparency" (Rules of Procedure 115).

3.1 Negotiation phase

According to article 218.10 Treaty on the Functioning of the European Union (TFEU) the European Parliament shall be immediately and fully informed at all stages of the procedure. Presently the Parliament faces restrictions regarding the use of the received information, this is not compliant with the TFEU. The Parliament does not fully use its constitutional rights; it is less informed than it could be.

This interferes with human rights, as restrictions on further sharing of received information, and receiving this information by staffers, experts and citizens, are interferences of the human rights mentioned above. Such interferences are only allowed under the conditions mentioned above. We saw above that it takes a (very) wide margin of appreciation to deem the secrecy compatible with the EU's human rights obligations – a wide margin of appreciation which is not compatible with political speech.

By not fighting for its constitutional right to be fully informed, the Parliament does not advance the fulfillment of human rights, and makes the risks on hardly reversible systemic failures bigger.

The Parliament, too, fails to sufficiently consider that modern deep integration agreements are not trade agreements but regulatory convergence agreements.

3.2 Ratification phase

3.2.1 Hidden documents

During the ratification phase of ACTA the European Parliament did not list all documents in a registry. This led to the Parliament recording decisions in hidden documents, providing wrong information regarding the existence of documents, and Legal Affairs committee coordinators' documents not released to the FFII. After an FFII complaint the Ombudsman started and concluded an investigation (262/2012/OV). Open questions remain:

- the Parliament declared that "in principle the committee secretariats will not prepare any separate minutes of coordinators' meetings". What will happen if they act contrary to the principle, if they do prepare separate minutes? Will the document(s) be recorded in the register of documents?

- the Legal Affairs committee made a coordinators' workspace, accessible only to the coordinators, political advisors working with the committee on Legal Affairs and the staff of the secretariat. Are the documents in this workspace recorded in the register of documents? Are coordinators' *notes* recorded in the register, or is this a hidden class of documents?
- how many committees have a coordinators' workspace? Do any further "walled gardens" exist out of sight of the registry?

3.2.2 Legal advice

In 2012 the Parliament overruled the Legal Affairs committee's decision to release the Parliament's legal service's opinions on ACTA. The Parliament's decision creates a serious risk that future legal opinions will be kept secret.

The Parliament's decision was incomprehensible as the negotiations were over; the Parliament should have applied the Turco case law. (CJEU, 2008) A future Parliament decision to keep a legal opinion on TTIP secret would be unwise.

Keeping legal opinions secret undermines informed decision making. In the case of ACTA the legal service's opinion on ACTA overlooked known issues. (FFII, 2012) A public debate on the quality of legal opinions is an essential aspect of democracy.

By filing a complaint the FFII invited the Ombudsman to pick up this issue. (FFII, 2013) The Ombudsman did not accept the invitation, as it would not have an effet utile. However, with the present consultation the Ombudsman confirms the major importance of openness in trade negotiations and ratifications. There is a serious chance proposed trade agreements will lead to legal service's opinions.

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In the pdf version, the *italic part* is a clickable link. You can find pdf and html versions at http://www.ffii.org

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