Written evidence to the International Trade Committee's Inquiry on UK Trade in Services

The Trade Justice Movement

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Introduction

1. The Trade Justice Movement (TJM) is a UK-wide network of seventy civil society organisations calling for trade rules that work for people and planet. Our members include trade unions, NGOs, consumer groups and faith organisations.

2. This document sets out TJM's written evidence to the International Trade Committee's Inquiry on UK trade in services. Since TJM's area of expertise is in international trade agreements, the evidence primarily addresses the following question set out in the Terms of Reference: "To what extent should the UK seek to liberalise international trade in services through: preferential trade agreements; plurilateral agreements (e.g. the Trade in Services Agreement, TiSA); and/or through other mechanisms?"

3. Our response looks at three concerns around including services in trade agreements:

    I. Public services and the right to regulate
    II. Future proofing: ratchet and standstill clauses
    III. Impact on developing countries
    IV. Democracy and oversight

I. Public services and the right to regulate

4. Trade agreements which cover services threaten to impinge upon the right of national governments to regulate in the public interest. This is a particular concern for the proposed Trade in Services Agreement (TiSA), which goes further than the General Agreement on Trade in Services (GATS) and includes over 30 countries, including the US, EU, Canada, Australia and Japan.

5. TiSA and GATS ostensibly aim to prevent discriminatory action by governments against foreign investors and service providers.[1] While the World Trade Organisation (WTO) agreement includes national treatment for goods, GATS extends this to services. This means that a national government cannot introduce policies which advantage domestic industries, including: awarding contracts to local companies, favouring domestic energy providers, procuring from local sources and requiring that board members or shareholders of companies must be from the same country. This is designed to improve competition and make it easier for investors to enter new markets.

[1] European Commission, Trade in Services Agreement (accessed Feb 2019) http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm

6. However, while the ostensible aims are anti-competitive, in practice GATS and TiSA risk restricting the policy options available to national governments to regulate in the public interest. For instance, the US was challenged under GATS for introducing restrictions on online gambling, which was perceived to be discriminatory against foreign online providers.[2] Similarly, GATS and TiSA provisions could be used to challenge governments which are encouraging local businesses, perhaps for environmental reasons or to support industry in poorer regions.[3]

7. One particular area of concern is around provision of public services, including healthcare, education, utilities and transport. Since these industries can also be covered by GATS and TiSA, governments are expected to liberalise these industries to foreign competition. This can encourage privatisation of services that were previously provided by the state or through local groups, such as cooperatives, as these providers would have to compete with market providers.[4] This element of GATS and TiSA ignores the various reasons why governments may wish to protect public services, perhaps to ensure equitable provision of a service, to avoid market fluctuations or simply to reflect popular democratic will.

8. Positive lists allow governments to explicitly state which service industries they wish to include for Market Access and National Treatment provisions. Negative lists assume that all industries are covered, with particular exemptions.[5] The problem with negative lists is that it is difficult for the government to predict what future industries or technologies they might wish to exclude. Which industries are protected may also depend largely on the politics of the day, and which political party is in power, rather than what is in the long-run public interest. The use of negative lists is therefore bad for democracy and restricts the ability of governments to prevent deregulation.

9. Another problem with negative lists is the complexity of listing excluded services in the annexes of FTAs. Whilst the text of an FTA may say that a service (such as health provision) is excluded, this has to be replicated in the annexes in relation to Market Access and National Treatment using UN International Standard Industry Classification. There are four iterations of these and an FTA also needs to specify which one it is referring to. Reservations can be entered for say, health, but there are a whole series of subsections for health (including General Practitioners, dentists, nurses, hospitals, nursing homes, ambulance services, etc.) for which reservations may or may not be entered. In the UK, for instance, most residential nursing homes are privately provided but most hospitals are state provided. This means that a blanket exclusion of health cannot work and reservations would have to be entered for each sub-section. A further layer of complexity is added by the wide variations for the NHS across the four nations depending on the decisions of devolved authorities. The negative listing set out in services agreements does not recognise or account for this kind of complexity.

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[2] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p10 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf
[3] The Trade Justice Movement, Trade and Services (accessed Feb 2019) https://www.tjm.org.uk/trade-issues/services
[4] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p12 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf
[5] European Commission, 'Services and investment in EU trade deals: Using 'positive' and 'negative' lists' (2016) http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf

Future proofing: ratchet and standstill clauses

9. TiSA includes ratchet and standstill clauses, which are designed to 'future-proof' deregulation and ensure continuity and predictability for investors. In practice, however, future-proofing mechanisms make it hard for national governments to change policy in response to democratic demand, new economic circumstances or new technologies.[6]

10. Ratchet clauses commit governments to not reversing any privatisation or opening up of markets. This means that if, under the provisions of a trade agreement, they unilaterally decide in the future to further open up their respective markets in one specific sector, such opening would be "locked in" – there can be no step backwards.

11. Standstill clauses commit governments to keep a market at least as open as it was as at the time of the agreement. This means that new industries and markets cannot be nationalised or regulated in ways that they are not already - even if there is democratic demand or good reasons for such regulation.

12. An example of how this might work in practice is Norwegian alcohol regulations. Norway has traditionally advocated policies to control alcohol consumption, but recently has considered changing some of these policies. Under a ratchet clause in TiSA, it would be impossible to reverse any liberalising changes, even if the policy changes were unpopular or ineffective. Equally, a standstill clause would prevent Norway from introducing restrictions beyond what it had in the first place.[7] A more UK-relevant example would be the introduction of the Health and Social Care Act in 2012.[8] If health were included in a future trade deal by the UK a standstill clause would prevent a future government reversing the privatisation of large parts of health services in England.

13. Standstill and ratchet clauses restrict the ability of governments to regulate in the public interest, and can encourage harmful, deregulatory policies. The UK should not seek to include these clauses in any services agreements after Brexit.

Impact on developing countries

14. There is evidence that services agreements primarily benefit multinational corporations rather than developing countries. This is because services agreements restrict the policy options available to developing countries to manage their national economies and services provision, and also because of the lobbying influence of multinationals over the negotiation process and the content of trade agreements.

15. Trade in services agreements prohibit governments from offering any favourable treatment to local providers over foreign ones. This includes small local startups,

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[6] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p13 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf
[7] Ibid, p.13
[8] UK Legislation (National Archives), Health and Social Care Act 2012 (accessed Feb 2019) http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted

nonprofits and cooperatives, even where these firms might have a specific local link. This would preclude business models which rely on links to a local area, such as credit unions, which provide affordable credit to people based on their membership of a local community.[9] Equally, there may be other positive spillovers from state or nonprofit provision of services which are precluded by TiSA-style agreements.

16. There is evidence that multinational firms have a privileged level of influence over direction of trade negotiations, and therefore the content of resulting agreements. This was documented during the Transatlantic Trade and Investment Partnership (TTIP) and Comprehensive Economic and Trade Agreement (CETA), where institutional design - particularly in relation to regulatory cooperation - benefited multinational firms.[10] This largely boils down to the fact that trade deals - and therefore their institutions - are fundamentally about trade, rather than other policy objectives like social rights or sustainable development. Whilst trade is undoubtedly a key component of development, it is important that developing countries are not under pressure to accept terms of agreements which primarily benefit Western multinational companies.

17. It is finally worth noting that many developing countries have underdeveloped regulatory frameworks to deal with various social and environmental challenges. As countries develop, they may wish to introduce new regulations - such as workers' rights, food safety regulations and measures to protect the environment. Ratchet and standstill clauses make it difficult for governments to introduce such legislation, since countries are expected to keep the level of regulation they have when entering into the agreement. This particularly disadvantages developing countries with underdeveloped regulatory frameworks.

IV. Democracy and oversight

18. As the evidence above has illustrated, trade in services agreements are not just about trade: they have an impact on regulation, public services and democracy. TiSA is a good example of this. A report by Public Services International highlights how even some of the economic provisions within TiSA are not that relevant to trade; e.g.: "regulations on store hours and size are applied to local retail stores and transnationals alike, international retail corporations want them eased simply because they do not like how they are affected."[11] In other words, the deregulation goes beyond removing barriers to trade to moving barriers to economic activity more generally. Importantly, many of these barriers may be in place for social or welfare reasons.

19. This raises important questions about on which forum decisions about public services and regulations should take place. Modern trade agreements often mean that many of these decisions are made in secretive trade negotiations, arbitration courts or regulatory

[9] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p12 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf
[10] Bartl, M, 'Making transnational markets: the institutional politics behind the TTIP' (2017) https://www.scienceopen.com/document_file/e8b3083d-a912-449a-8a8c-ce1664f51f62/ScienceOpen/Article4.pdf
[11] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p17 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf

cooperation councils. This is intrinsically undemocratic, as many of these decisions will affect domestic legislation and individual rights. Even where it is in the public interest to privatise or deregulate a service, this should be the result of public consultation, democratic debate and popular support. The process for negotiating and agreeing trade in services agreements such as TiSA does not guarantee any democratic oversight, despite the wide reach of such deals.

20. Furthermore, the UK political system means that trade agreements receive very little scrutiny by Parliament. The process set out in the Constitutional Reform and Governance Act (CRAG) means that although treaty texts must be laid before Parliament for 21 sitting days, there is no guarantee that MPs or Lords will have a chance to debate or vote on treaties before ratification.[12] Unlike many other countries, including the EU, Australian and US processes, there is very little transparency and no involvement for Parliament in setting the mandate for trade negotiations.[13] This issue is explored further in TJM's written evidence to the Constitution Committee's Inquiry on Scrutiny of Treaties.[14]

Conclusions and recommendations

21. Jonathan Kallmer, who until recently was a senior US trade official, explains that TISA is 'not your father's trade agenda'. By this he means that "differential regulatory burdens, forced localization measures, government influence and control, and restrictions on cross-border data flows" are now the focus of agreements like TiSA.[15] The point of this is to say that the nature of trade agreements has changed: they have expanded to cover a wide range of public policy, including public services, which intrinsically requires trade officials to make substantially normative decisions.

22. Kallmer's quote sums up how services trade agreements restrict the ability of governments to regulate in the public interest. TJM therefore recommends that public services and other deregulatory mechanisms are excluded from trade agreements. The UK should not seek membership of deals which (a) include provisions affecting public services, (b) include ratchet and standstill clauses, (c) limit the policy options available to developing governments while advantaging big business, and (d) do not ensure adequate democratic oversight, both from Parliament and the wider public.

[12] House of Commons Library, 'Parliament's role in ratifying treaties' (2017) https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855
[13] The Trade Justice Movement, 'Written Submission to the Constitution Committee's Inquiry on Parliamentary Scrutiny of Treaties' (2018) https://www.tjm.org.uk/documents/briefings/Constitution-Cttee-Written-Evidence.pdf
[14] Ibid.
[15] Public Services International, 'The Really Good Friends of Transnational Corporations Agreement' (2014), p19 https://www.tjm.org.uk/documents/reports/report_tisa_eng_lr.pdf