

Forum Shifting and Shape Making in Europe's Negotiations on Trade in (Education) Services

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Introduction

Beginning in mid-1980s, advocates wishing to put into place mechanisms to enable the global expansion of trade in services,¹ on the one hand, and protections for firms from national politics regarding their investments in services sectors,² on the other, have engaged in what Susan Sell (2009) has called a 'cat and mouse' game of 'forum shifting' in order to advance their agendas. We find this a useful metaphor to understand the current round of services negotiations the European Union is again engaged in which also involves 'education' as a sector. Specifically, the idea of forum shifting draws attention to the vertical and horizontal dynamics at work since the ongoing challenges to, and failure of, the World Trade Organization's (WTO) Doha Development Round (DDR)³ of negotiations on services, which sought to broker a new set of rules for engagement.

Education was included as a sector for negotiation in the WTO's Uruguay⁴ and Doha Rounds (Robertson et al., 2002; Verger and Robertson, 2012). However, education has proven particularly controversial as a 'services sector' subject to global trade rules in that it continues to be widely viewed as a 'public service' or 'public good' (Kelsey, 2008; ETUCE, 2014; Scherraud, 2014; Sinclair and Mertins-Kirkwood, 2014). This is despite the deep and penetrating effects of neoliberalism on almost all sectors of education around the world, including in many European countries. Higher education exports in some European countries now make a major contribution to GDP (notably the UK⁵) (OECD, 2014), whilst global education corporations own a growing number of campuses in countries like France, England, Spain, Portugal and Poland (Robertson and Komljenovic, 2016). Small and large firms now also offer a range of specialist higher education services in the sector, ranging from recruitment of international students to infrastructure developments, edu-investor

¹ The US-based, Coalition of Service industries, began pushing for the liberalisation of services in the 1980s, and was an important advocate for their inclusion in the agenda of the World Trade Organisation that was launched as a new multilateral organisation in 1995 (see Robertson et al, 2002).

² Regional agreements, like the North American Free Trade Agreement include mechanisms that enable investors to claim future lost earnings if public policy decisions were to be unfavourable toward their on-going operations.

³ The Doha Development Round or Doha Development Agenda (DDA) is the current trade-negotiation round of the World Trade Organization (WTO) that commenced in November 2001. Its objective was to lower trade barriers around the world, and thus facilitate increased global trade. Since 2008, talks have stalled over a divide on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies. The most significant differences are between the developed nations, led by the European Union (EU), the United States (USA) and Japan, and the major developing countries led and represented mainly by India, Brazil, China, and South Africa. There is also considerable contention against and between the EU and the USA over their maintenance of agricultural subsidies—seen to operate effectively as trade barriers.

⁴ The Uruguay Round was the 8th round of Multilateral Trade Negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1994, and embracing 123 countries as "contracting parties". The Round led to the creation of the World Trade Organization, with GATT remaining as an integral part of the WTO agreements. The broad mandate of the Round was to extend GATT trade rules to areas previously exempted as too difficult to liberalize (agriculture, textiles) and new areas previously not included (trade in services, intellectual property, investment policy trade distortions). The Round came into effect in 1995 with deadlines ending in 2000 (2004 in the case of developing country contracting parties) under the administrative direction of the newly created World Trade Organization (WTO).

⁵ In the UK trade in education services is calculated to generate £14.1 billion in 2011, with an estimated value of £21.5 billion by 2020 (Conlon et al., 2011).

advice, alumni donations and so on (see Komljenovic and Robertson, 2015). In 2014, in a report issued by Merrill Lynch Bank of America, education services were estimated to be worth \$4.3 trillion, assuming that the sector could be fully commodified and tariff and non-tariff barriers removed. Yet their removal in education services is both complicated and contested. As a result, commercial firms and globally-oriented higher education institutions' access to, and ease of movement within, many country's education sectors to include national treatment, and their capacity to enter policy spaces and shape the nature of national politics in ways that are sympathetic to commercial interests and profitability, continue to prove more challenging (cf. Robertson, 2013, for the case of England). One outcome is that both states and advocates of liberalising trade in services have sought to strategically advance their interests through shifting to different forums.

This paper explores two internally related forum shifting and shape making movements in current trade negotiations involving Europe, and considers the politics surrounding the inclusion again of higher education as a services sector. We begin with the consequences of what we call 'first wave' post-GATS 'forum shifting' strategies in Europe which have resulted in significant regulatory changes at both regional and national scales via a new set of market-making actors, strategies and instruments. These include: the EC's Directive on Services launched in 2006 (European Parliament and Council, 2006); the strategic targeting of national governments and agencies by edu-investor firms to open up new spaces for market activity (Hughes et al., 2013); and the explosion of Bilateral and Preferential Trading Agreements in many cases involving International Investor Dispute mechanisms.

We show the way this first wave of post-GATS activity now feeds into, yet sits uneasily alongside, a 'second wave' of trade negotiations in Europe which began in 2011; a new round of trade negotiations— in our case for this paper the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TISA).⁶ The European Commission represents Europe in these negotiations, with DG Trade Commissioner lead negotiator. In both TTIP and TISA education is included as one of the service sectors for negotiation (EC, 2013) – though what aspects of education is still under negotiation.

We trace out the who, what and how involved in these two separate trade negotiations, the reasons used to legitimate negotiations including the modelling assumptions, and the nature of the regulatory mechanisms being proposed. We reflect on the controversies surrounding these 'closed door' negotiations and agreements; the longer term consequences for higher education being included in these kinds of negotiations; the likely implications of closing down sub/national education policy spaces through binding future measures; the potential for 'regulatory hopping' by investors to secure the best deal; and the implications of multiple, overlapping, agreements. Taken together, we argue that this process of forum shifting illustrates the dynamic, contested and difficult issue of bringing rule making into services sectors to reassure investors and stabilise global markets. We begin, first with some brief comments on forum shifting.

⁶ Whist there are a range of other trade negotiations taking place including in the Balkan region, these are the two key ones. TTIP parallels the Trans-Pacific Partnership involving the USA and the Pacific region (includes Australia).

Forum Shifting – A Game of Cat and Mouse

Following Braithwaite and Drahos (2000), Sell (2009) used the term ‘forum shifting’ to study the ways in which; “...advocates seeking to ratchet up levels of intellectual property (IP) protection have shifted forums both vertically and horizontally in order to achieve their goals” (Sell, 2009: 5). Sell shows the ways in which this ‘cat and mouse’ game of moving scales and spaces so as to change the rules of engagement around Intellectual Property in multiple (national and global) arenas can take a number of forms. Parties might move the agenda from one forum to another. Or, they might exit the forum altogether – such as when the USA left UNESCO in the 1980s - to return when its own rules for engagement were able to get traction in 2002 (Bull and McNeil, 2007: 115-134). Strong states are likely to use particular forums to optimise their power (such as bilateral forums), whilst middle state powers will often try and take on a brokering role in multilateral or regional forums where they might do the bidding of stronger states, much as Australia and Singapore did for the USA during the GATS negotiations (Jawara and Kwa, 2003). Weaker parties might also target particular forums to advance their strategies, or develop alignments in forums – such as the ‘like minded developing countries’ that enable them to bolster their power so as to have effects (ibid).

When viewed in this way, the result is that the game itself is never entirely over (Braithwaite and Drahos, 2000); rather that it is possible to see a series of internally-related movements at play – each taking a discrete form, which feeds into the longer game being played out as different political alignments advance or contest the on going forming of trade rules. As a result, policy actors and spaces shift over time; they involve different combinations of actors/institutions, goals and strategies, legitimating discourses, and governance mechanisms. Over time it is possible to see the continuity of some discourses and mechanisms, and the disappearance of others, along with new tensions, contradictions and challenges.

This way of thinking about policymaking has theoretical, methodological and political implications. Theoretically – it means viewing policy spaces – like forums - as arenas of contestation (some visible/some less visible) each with their own politics, struggles over rules for engagement, and outcomes. Methodologically - it means tracing out processes and relations over time, attentive to new terrains, ruptures and efforts to create and fix both meaning and outcomes. Politically - it means those wanting to intervene to make a difference need to see the process as not only being a longer game, and thus strategies which engage with this longer game are likely to be more effective, but that multiple forums might need to be targeted with different strategies.

Nowhere is this more evident than in the twilight years of the World Trade Organization’s negotiations on trade in goods (GATT) and services (GATS) which, by 1999 has already run into trouble in the famed ‘Battle of Seattle’ (Sinclair, 2000). Each round of negotiations, from Cancun in 2003, to Hong Kong in 2005, and Geneva in 2008 faced on going difficulties.

By 2005, those contesting these highly charged events, particularly around issues of agriculture, Intellectual Property, and sensitive service areas (health and education), viewed these difficulties as a potential success. The protestors had won the day. Game over! Yet as we will see, whilst the WTO is widely viewed as a moribund forum unable to deliver on services negotiations, those states and other actors eager to advance trade in services have shifted fora or sought to construct new ones.

On behalf of 'Europe',⁷ the European Commission had already begun to advance a number of forum shifting strategies by 2004, aimed at generating some forward momentum in opening up services sectors to trade rules. Our argument in this paper it is particularly important to take these different forum shifts into account in viewing the latest round of negotiations involving Europe in that they change the nature of the regulatory space (real regulation), as well as raise the tensions associated with multiple, overlapping, regulatory spaces.

Forum Shifting for Europe – or – ‘first wave’ post-GATS trade agreements

In this section we outline three examples of forum shifting in Europe around trade negotiations; the EU's Directive on Services, launched in 2006 (European Parliament and Council, 2006); the strategic targeting of national governments and agencies by education-investor firms to open up new spaces for profitable market activity; and the expansion of Preferential Trading Agreements on a bilateral basis that also involve new regulatory mechanisms that did not feature in quite the same way in the GATS; Investor Dispute mechanisms.

The *Directive on Services* in the internal market (commonly referred to as the Bolkestein Directive) is a law aiming at establishing a single market for services within the European Union (EU). Drafted under the leadership of the former European Commissioner for the Internal Market, Frits Bolkestein, it has subsequently been popularly referred to by his name. The Directive on Services was seen as an important kick-start to the stalling of the Lisbon Agenda initially launched in 2000 - a strategy backed by the Member States to make the EU "...the world's most dynamic and competitive economy" by 2010 (EC, 2001). By 2003, it was clear that growth in Europe had slowed, and that the dot.com bubble had burst. This coincided with on going challenges in each round of the WTO negotiations – with the European Commission the main negotiator for Europe, and growing pressure by the European Commission for policies which ensured European competitiveness (Hay, 2007; Jessop et al, 2008).

In January 2004, the European Commission published its first draft on a *Directive on Services in the Internal Market* – aimed at removing obstacles that hampered intra-EU trade in services. This first draft met with major criticisms from both left-wing European politicians in the European Parliament and also some member states. The primary concern was that it would lead to competition between workers in different parts of Europe resulting in social

⁷ Itself a changing territorial space as a result of ongoing accession and integration over this period.

dumping and a 'race to the bottom' (Milkin, 2009: 90). As a result, the original draft was substantially amended and the proposal approved on 12 December 2006 by the European Parliament and Council, and adopted as the Directive 2006/123/EC.

Yet as Hay points out, a very particular view of competitiveness now underpinned the Commission's *Directive on Services*; that there would be efficiency gains arising from heightened economic integration, and also that "...all markets for goods and services are analogous to those for cheap consumer goods - that is, both highly price sensitive and highly demand price elastic. This assumption lead the EU to privilege strategies of costs and price containment to the detriment of other strategies for enhancing competitiveness..." (Hay, 2007: 26; see also Jessop, 2008). This version of competitiveness threatened the viability of the distinctive social and economic paradigm that underpinned the European social model (Hay, 2008). Indeed, it can be shown that this turn toward more hard-line neoliberalism in trade policy has become even further entrenched following the global financial crisis in 2008, and the ensuing Eurozone crisis (Streeck, 2014).

The European Commission has used the Directive on Services to police European member state's regulations over what it views as protectionist, and out of step with the Directive. In a case directly relevant to education, the European Commission issued a statement to the Cypriot government in November 2009, on their 'provision of education services'. We quote:

Cyprus – provision of education services

The European Commission has decided to send a reasoned opinion to Cyprus in relation to certain provisions of the law regulating the establishment and operation of institutions of tertiary education.

Under this law private institutions of tertiary education in Cyprus are prohibited to "allow, by any means, to foreign educational institutions the possibility to award their own degrees in the Republic". This prohibition renders impossible the provision of services entailing the award of foreign degrees by educational institutions in Cyprus (such as services under validation, franchising or similar agreements), where recipients of such services are private institutions of tertiary education in Cyprus. The Commission considers this a restriction on the freedom to provide services and a restriction on the freedom of establishment which cannot be justified.

In addition, in accordance with the law in question, a company having as a shareholder or a member of its board a person who is neither a Cypriot citizen nor a citizen of a EU Member State cannot establish a private institution of tertiary education in Cyprus. As this prohibition precludes the recognition of companies duly formed in accordance with the law of another Member State, the European Commission considers it a restriction on the freedom of establishment which cannot be justified (European Commission, 2009).

In short, under the 2006 Directive on Services, Cyprus cannot deny the right of other EU countries to establish higher education institutions in Cyprus, and award their own degree. The 2006 Directive on Services thus enables the EC and its industry backers, such as the European Business Roundtable, a different spatial strategy to advance the liberalisation of

trade in services. As a result, new possibilities and constraints now emerge in national territorial spaces which, in turn, challenges national sovereignty (as we see with the case of Cyprus) and which opens up new opportunities for education investors to place pressure on national regulatory institutions. In the case of England – arguably a system that is by far one of the furthest advanced in terms market liberalism in Europe, global/for-profit providers in the education sector have targeted forums at the national and also the regional scale to advance their entry into the sector under conditions similar to existing providers.

Nationally, for-profit providers of higher education have had to put their case to the Privy Council in England; the body that recognises the right to operate as a proper HEI ‘provider’, with degree awarding capability (Robertson, 2013). However this has – until more recently – happened on a case-by-case basis, with applicants being asked to reapply for recognition every six years, in many cases having to partner with an existing non-profit HE institution (at cost) to award degrees. Furthermore, these for-profit HE institutions, with their different models of provision (some on-line/targeting part-time students), were unable to have their students access government-backed student loans (McGettigan, 2014). Aided by a radical restructuring of English higher education beginning in 2011 by a right-wing Coalition Government has now enabled part-time undergraduate students to access student loans; these can be used to study in for-profit higher education institutions.

Regionally, for-profit providers have used the rules in the EU 2006 Directive on Services to secure a VAT exemption (20%) in England, on the basis that they are a HE institution. This means that access to student loans plus a VAT exemption creates the basis for a viable that they can potentially operate in the sector and return a profit (Robertson, 2013). A favourable policy wind, along with access to propitious financial conditions, has created a more viable financial environment for the for-profit providers to operate in the sector.

Two issues emerge here, however, which the actors operating in the education services sector of a particular country have sought. First, the capacity to more easily generate economies of scale and scope – much as Laureate Education has done - through being able to expand globally. Elsewhere, we show that there is considerable work to be done in each national political space to oil the wheels of this expansion (see Robertson and Komljenovic, 2016). Second, there are on-going concerns around sub/national politics, and what this means for firms in seeking to stabilise the conditions of their investment. Locking in a set of binding conditions on national governments means governments will not be tempted to reverse pro-market policies. How and which forum to lock in these binding conditions, much as the EU Directive on Services has sought to do, is the challenge and the potential prize.

One forum where investor agreements have been advanced is through the rise and rise of Bilateral and Preferential Trade Agreements (BTA/PTA) and International Investment Agreements (IIA). Horn et al (2010) show that PTAs have grown in number since 1995 when the World Trade Organization was launched – from 50 active PTA in 1995, to around 200 active agreements in 2008. A large part of this expansion involves agreements where either the US or the EC are at the centre of the partnership. However, these newer PTAs are different to those formed prior to 1995; the earlier group largely focused on trade in goods. With services and intellectual property now part of the multilateral trade negotiations, post

1995 PTAs now include the regulatory aspects of services and trade-related intellectual property – the two areas that have been particularly difficult to achieve under the DDR (Sauvé, 2013).

Commentators argue what is notable about this new generation of PTAs is that they tend to go further in the coverage of regulatory issues than under the WTO/GATS, and include provisions and mechanisms such as; "...investment protection, competition policy, labour standards and protection of the environment" (see Horn et al, 2010: 1566). This has led some to argue that though the EC and US account for no more than 40% of world GDP and world trade, they account for 80% of the rules that regulate the functioning of world markets, and thus can be regarded as 'regulators of the world' (*ibid*).

In their 2014 *Trade and Development Report*, the United Nations Conference on Trade and Development (UNCTAD) signalled their concern over this steady erosion of national 'policy space' as a result of RTAs and International Investment Agreements, "...some of which contain provisions that are more stringent than those covered by the multilateral trade regime, or they include additional provisions that go beyond those of the current multilateral trade agreements" (UNCTAD, 2014a: 19). They go on:

Provisions in RTA have become ever more comprehensive and many of them include rules that limit the options available in the design and implementation of comprehensive national development strategies. Even though these agreements remain the product of (often protracted) negotiations and bargaining between sovereign States, there is a growing sense that, due to the larger number of economic and social issues they cover, the discussions often lack transparency and the coordination – including amongst all potentially interested government ministries (UNCTAD, 2014a: 19).

International Investment Agreements have been steadily growing; by 2013 there were some 3,236 – giving rise to major concerns over the loss of national policy space particularly in those partnerships which major asymmetries of power (Bhagwati, et al, 2015). UNCTAD (2014a: 20-21) notes that when these agreements were being concluded in the 1990s, a common view was this was a small price to pay for increased Foreign Direct Investment (FDI). However, by 2000, this view had changed in that it was evident investment rules could also obstruct a wide range of public policies – including the policy areas we are concerned with in this paper - education, and related sectors such as industrial policy, and its implications labour markets and employment.

More troubling are the processes surrounding the dispute processes built into these International Investment Agreements. UNCTAD (2014b) shows that there has been a steady rise in cases, particularly over the last 5 years (see Table 2), with 56 cases filed in 2013 – the second largest number of known cases in a single year.

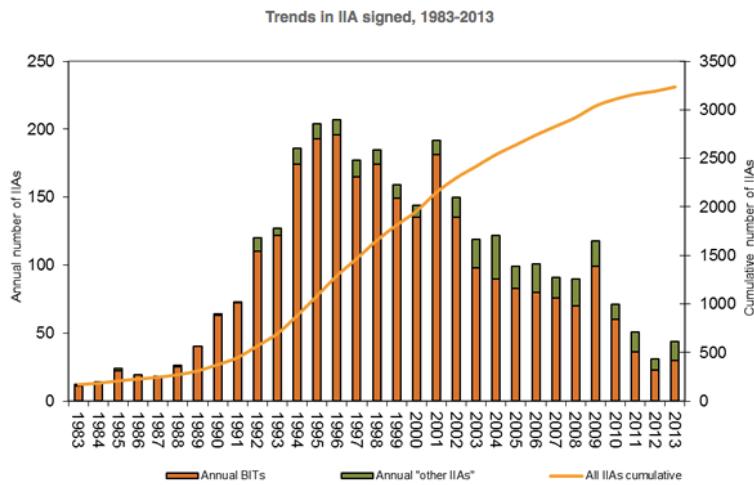


Table 1: Trends in International Investment Agreements signed 1983-13
(Source: UNCTAD, 2014b IIA database)

However, UNCTAD also notes that the tribunals established to adjudicate disputes tend to display a pro-investor bias, and there is typically a lack of transparency around the arbitration process. UNCTAD has called for the reform of the ISDS system through the introduction of an International Investment Court, an appeals system, limiting investor access to ISDS, and by promoting new attitudes toward investment that align with the intentions of the Sustainable Development Goals launched to carry the post-2015 development space (Tuerk, 2014; UNCTAD, 2014a, 2014b).

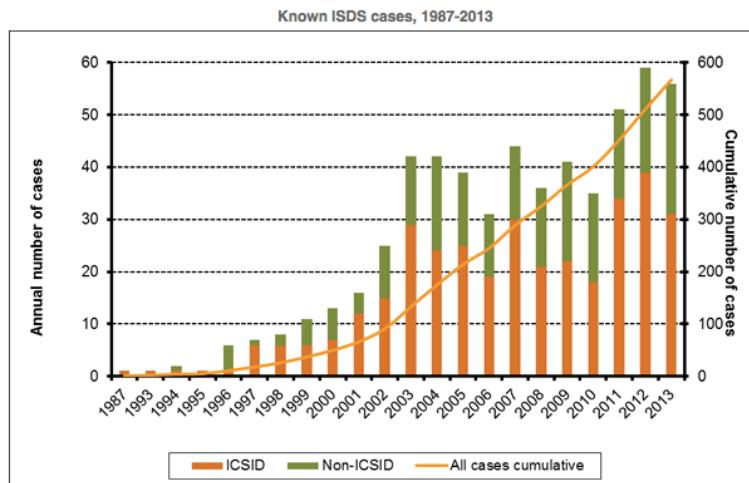


Table 2: Known Investor State Dispute Settlement cases 1983-13
(Source: UNCTAD, 2014b, IIA database)

Others have called for the *elimination* of ISDS mechanisms in that they are antithetical to sustainable development (Friends of the Earth, 2014). Even *The Economist*, not known for its anti-investor stance – reported in October 2014:

Multinationals have exploited woolly definitions of expropriation to claim compensation for changes in government policy that happen to have harmed their business. Following the Fukushima disaster in Japan in 2011, for instance, the German government decided to shut down its nuclear power industry. Soon after, Vattenfall, a Swedish utility that operates two nuclear plants in Germany, demanded compensation of €3.7 billion (\$4.7 billion), under the ISDS clause of a treaty on energy investments. This claim is still in arbitration. And it is just one of a growing number of such cases (Economist, 11 October, 2014)

The Economist goes on to argue the sharp rise in contentious arbitrations are the result of companies having learnt how to exploit ISDS clauses, going as far as buying firms in jurisdictions where they apply simply to gain access to them. Arbitrators are also paid \$600-700 an hour, giving them little incentive to dismiss cases out of hand; the secretive nature of the arbitration process and the lack of any requirement to consider precedent allows plenty of scope for creative adjudications (Economist, 2014).

Shopping around for firms in jurisdictions where they can make a claim is not just a case of 'forum shopping' – a term used to describe firms who look around for agreements that will give them most 'return' regarding potential investor pay-outs – but also of 'place hopping'; that is, looking for those places, or jurisdictions, that enable them to launch a more lucrative claim – much as capitalists have used tax havens and states with a low taxation floor. This uneven terrain is the result of different degrees of economic and political liberalisation operating vertically and horizontally, as well as overlapping and competing spaces and places regarding trade rules.

Our purpose in bringing this 'actually existing' regulatory landscape into view is because it feeds into the on-going trade negotiations as part of the 'game is never really over' (in our case TTIP and TISA). When investments in 'public services' – such as education or healthcare – enter this kind of regulatory terrain, there is growing evidence the costs to governments of making different national policy decisions can be very high. In a report by *Friends of the Earth* (2014), a number of cases are cited that raise concerns as to the constrained nature of the public policy space which now accompanies ISDS clauses. We quote their account of Slovakia and health policy:

In 2008, Achmea (formerly Eureko) initiated an arbitration case against the Slovak Republic under the Slovak-Netherlands BIT claiming they had violated the 1992 agreement on encouragement and reciprocal protection of investments. Achmea had previously incorporated and funded Union *zdravotn poist'ovna* (Union Healthcare) in the Slovak Republic. Multiple legislative measures were introduced following a change of government in 2006 which reversed "the 2004 liberalization of the Slovak health insurance market that had prompted Eureko to invest in the Slovak Republic's health insurance sector" (p. 71). The claimants argued that the introduction of these measures destroyed the value of their investment – constituting an unlawful indirect expropriation of their investment in Union Healthcare.

Achmea sought compensation of approximately €100 million for damages incurred. One of the key questions in this case related to the tribunals jurisdiction over the dispute

and whether the European Community Treaty supersedes the BIT – rendering the BIT inapplicable. The Slovak Republic objected to “...the tribunal's jurisdiction based on the interaction of the BIT with substantive provisions of EU law” (p. 72). The tribunal ruled that the BIT was not terminated with the Slovak Republic's accession to the EU. The tribunal ultimately awarded Achmea damages in the amount of €22.1 million, as well as €2,905,350.94 for legal fees and assistance, and a further €220,772.74 to reimburse the costs of the merits stage of the arbitration process (Friends of the Earth, 2014: 9).

One of the pinch points in the ongoing TTIP and TISA negotiations is the incorporation of Investor-State-Dispute Settlement mechanisms, an issue we pick up again in the following section on TTIP and TISA.

Enter TTIP and TISA – ‘Second Wave’ Forum Shifting

We turn now examine two sets of trade negotiations which began in 2012/2013 involving the EU; the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, and the Trade in Services Agreement (TISA) involving a self-styled ‘Really Good Friends of Services’ (RGFSs) group of 25 countries⁸ (with the European Union representing its 28 Member States – bringing this to a total of 52). In both cases, the negotiations have taken place in secret, giving rise to considerable unease amongst the wider public. In the case of TISA, negotiating takes place in Geneva, but outside the WTO structures.

TTIP

TTIP emerged out of recommendations of the final report of the joint *High level Working Group (HLWG) on Jobs and Growth* following a EU-US Summit held in Washington in November 2011. The HLWG was directed by EU and US leaders to identify policies and measures to increase transatlantic trade and investment so as to boost growth following the 2008 global financial crisis.

The Transatlantic Economic Council established in 2007 had tried to manage some of these issues but with little success. However, “...concerns over slow economic growth, job creation, and increased competition from emerging markets promoted calls by public and private stakeholders for a renewed intensive focus on eliminating or reducing tariff and non-tariff barriers to UE-EU trade and investment” (Akhtar and Jones 2014: 3). According the European Commission (2013) reforming services matters as they account for as much as 60% of the global economy. The US and Europe account for nearly half of global GDP, about 30% of global exports and have \$3.7 trillion in each other's economies, but EU firms still faces major hurdles when it tries to sell their services in the US marketplace.

The justification for the TTIP negotiations is that the two economies have not maximised their economic relationship, and there continue to be major regulatory and tariff barrier challenges (Akhtar and Jones, 2014) and that TTIP represents – in the words of the UK Prime

⁸ The 25 TISA countries comprise Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, Lichtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Republic of Korea, Switzerland, Turkey, United States of America, and Uruguay.

Minister – David Cameron, a “once-in-a-generation” prize (Cameron, 2013) allowing the EU and the US to boost their economies by eliminating barriers to trade and setting global standards (Siles- Brügge, 2014: 1).

The purpose of TTIP is to increase market access through: (i) the elimination of barriers to trade and investment on goods, services, agriculture, and government market procurement; (ii) enhancing regulatory coherence; and (iii) developing new rules, especially in the area of FDI, intellectual property, labour, and emerging new trade areas, such as data flows. TTIP is the largest FTA ever negotiated by the US (see Figure 3). Akhtar and Jones note the EU and USA have also “...expressed an interest in using the TTIP to present common approaches for the development of globally-relevant rules and standards in future multilateral trade agreements” (2014: 3).⁹

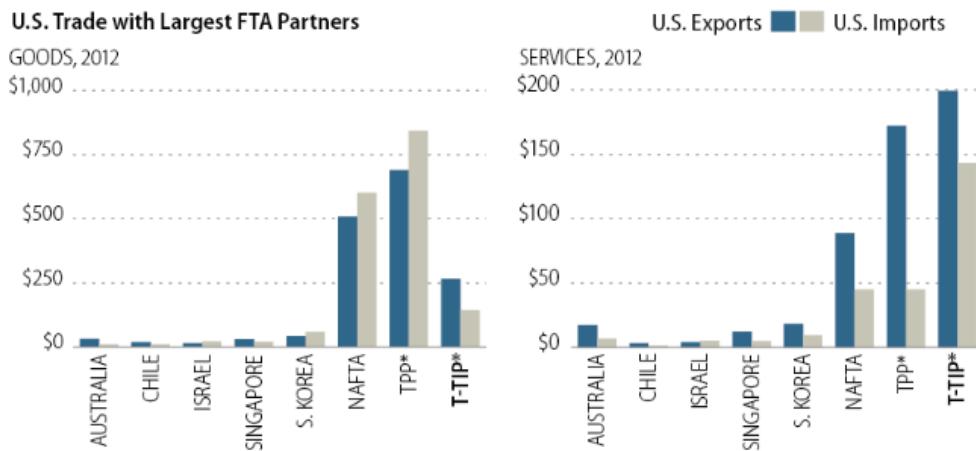


Figure 3: US Trade and Investment with Free Trade Agreement Partners

On February 11, 2013, the HLWG released a final report, and in February this was used to launch preparations for the TTIP negotiations. In March 2013 the Obama administration notified Congress of its intent to negotiate under the procedures of the Trade Promotion Authority (TPA) (otherwise known as the Fast Track), though Davies (2015: 2) reports that this was not given the green light in 2015, largely as the Democrats have been deeply opposed to TTIP. TTIP negotiations began in July 2013.

On the EU side, the EC agreed to draft a concept paper (European Commission, 2013a) to establish a mandate for the TTIP negotiations, which was then sent to the Council of Ministers for approval by the Member States. Though not formally required to do so, the European Parliament (by simple majority) passed a resolution supporting TTIP, whilst at the same time noted sensitivities, particularly around the ISDS mechanisms and some services sectors. On June 14, 2013 the Council of Ministers approved the mandate for the EC to

⁹ It should be noted, however, that the regulatory mechanisms are different making it difficult to anchor in WTO (Sauvé, 2013).

negotiate TTIP. It should be noted that since the Lisbon Treaty, the Parliament's role in EU trade policy has increased a great deal and is thus an important forum regarding rules for engagement. The EU Parliament is therefore an increasingly important space for contestation for Member States.

By July 2015 there had been 10 rounds of negotiations (EC, 2015: 1) with a further round to be negotiated in Sept/Oct 2015 in the United States. However, like other forums, such as the WTO, TTIP has become "...increasingly mired in controversy and buffeted by the volatility of global politics. It is now widely accepted that negotiations will continue well into 2015" (Davies, 2014: 3). As in the WTO/GATS process, guiding the negotiations forward has been particularly tricky. It has not helped that the process is conducted in secret, with only leaked documents - often via Wikileaks, and growing public opposition through organised protest and the use of social media. This has led to a great deal of speculation and guessing; the nearly completed Comprehensive Economic Trade Agreement between the EU and Canada (CETA) is often referred to as a potential prototype.

The boosters are attempting to face down the sceptics around the likely economic impact on Europe regarding jobs, the consequences for the multilateral system of trade, and the likely outcomes of these deals for developing countries (see Table 1).

Dimension	Boosters	Sceptics
Economic Impact	Boost transatlantic economic growth and jobs by eliminating tariff and non-tariff barriers	Trade liberalisation leads to unequal distribution of benefits
Impact on transatlantic relationship	Reinforce US/EU relationship whilst the US is also trying to renegotiate the Asia/Pacific relationship; the political turmoil in Ukraine means shoring up strong Europe	If the negotiations stall then this might also raise questions about the strength of the EU/US relationship
Impact on multilateral trade liberalisation	Allows the two sides to advance a rules based trade liberalisation in the absence of progress in the WTO; a US-EU consensus might break the impasse on the issues remaining in the Doha round.	This kind of initiative detracts from pushing the multilateral negotiations in the WTO
Other policy implications	EU-US cooperation in establishing rules might help address challenges with the growing role of emerging markets	Globally relevant rules might adversely affect civil society, consumer interest, internet freedom, health, public services. Would infringe on US and EU sovereignty

Table 1: Boosters versus Sceptics in TTIP

In both cases/sides, there has been limited and highly staged consultations with 'stakeholders'. The US International Trade Commission has investigated the probable economic effects of TTIP, as well as requested public comments. The EC has also been pressed to consult with stakeholders. In 2014, 150,000 responses were sent to EC's Director General of Trade, though there is a strong view that the Commission listens, but it does not give much back.

Within the European Parliament, the Chair of the influential International Trade Committee (INTC), Bernd Lange, has been critical of the lack of transparency in the TTIP process.¹⁰ In particular, Lange has raised doubts over the EC's commissioned 'impact assessment' of TTIP conducted by the Centre for European Policy Studies (CEPS) (see Pelkmans et al., 2014). CEPS is a pro-business think-tank located in Brussels. INTC have commissioned their own review of CEPS' Impact Assessment; the review raised doubts about CEPS methodology, and whether an impact assessment was actually feasible.

It is important at this point to look closely at the Impact Assessment (IA) and its methodology. The IA has been used by the European Commission to manage the political hostility it is encountering, and which in the past has bought similar kinds of negotiations to a standstill. For example, the Commission has used the IS's projected annual gains; of €119b for the EU and €95b for the USA (which translates into €545 for a family of four annually in Europe) to bring the public alongside. But it is the underlying assumptions built into the IA that are more problematic.

De Ville and Siles-Brügge's (2015) show that CGE embraces neoclassical economic assumptions; that there is no excess demand, and that all markets clear under conditions of perfect competition. Moreover, they assume we can model market processes through numerical data and results. Yet they argue CGE models have been subject to critique, even within economics, in that there are information asymmetries, individuals are often driven by more complex sets of values, and labour and product markets rarely clear at the same time.

Yet the CGE acts rather like a black box; it skews the terms of the economic and political debate in directions that suit the Commission's agenda. It also does not include the costs that result from macro-economic adjustments – such as alignment to new standards, the displacement and retraining of workers, potential welfare losses in the society, and the threat to public policy goals (De Ville and Siles-Brügge, 2015: 669). Despite this, CGE is used to model three kinds of policy options; from a baseline option to a comprehensive and ambitious one, of removing all duties, reducing tariff and non-tariff barriers (NTBs) on goods and services, and on government procurement. For the base-line option, the gains were negligible. The gains on the more comprehensive scenario, the one used by the Commission to make the economic case for TTIP, are presented as more substantial. Yet as De Ville and Siles-Brügge (2015) show, in the case of the North American Free Trade Agreement which also used the CGE, comparing the ex-post evidence with the ex-ante claims shows that both Mexico and Canada fared significantly worse in terms of economic gains (especially around costs over labour displacements).

This leads to the next question of *how* are these barriers to be eliminated. That is, what will be the regulatory mechanisms used to achieve the elimination of NTBs: harmonisation, mutual recognition, or national treatment? Harmonisation refers to a common TISA

¹⁰ National governments and MEPs from the European Parliament's Trade Committee have only limited access to documents. MPs at Westminster have no access to the texts being negotiated. Both the European Court of Justice and the European Ombudsman have criticized the high level of secrecy and the European Commission has been forced to publish some negotiating texts (UNISON, 2015: 2).

regulatory space between the US and the EU. Mutual¹¹ recognition means that the regulatory frameworks in the US and Europe respectively are recognised (this gives primacy to the market, and assumes a level of common identity - whether or not this is the case). National treatment means that the foreign investor is treated like a local firm or organisation (thus national politics holds sway). TTIP is promoting Mutual Recognition (MR) of standards (as more feasible) rather than the harmonisation or national treatment. In other words, the standards (labour, safety, worker protection, qualifications, and so on) of the 'home' country will be recognised.

This is likely to lead to the exploitation of uneven development by investors, giving rise to even further uneven development as place-based actors try to use their less demanding regulatory environment to attract investors. De Ville and Siles-Brügge (2015) show that the combination of the assumptions built into the CGE, the regulatory mechanism to be used, and the capacity to liberalise across the board, ends up exaggerating the potential economic benefits of TTIP while under-playing other likely outcomes – such as where bilateral MR without a minimum floor of harmonisation may lead to a race-to-the-bottom in social, educational and environmental standards.

For those not only sceptical, but deeply opposed, to TTIP, the inclusion of an Investor-State Dispute Settlement mechanism has been particularly controversial. They argue this will give foreign companies the right to sue national and regional governments for compensation whenever their access to markets is impeded by what they see as unfair legislation, or whenever their expectations as legitimate inward foreign investors is thwarted. For its own part, the EC Trade Commissioner and Chief Negotiator for TTIP has, until recently, argued that the inclusion of ISDS in regional and preferential trade agreements has not placed any pressure on national sovereignty. However, this view is not widely shared and indeed UNCTAD has become increasingly concerned about the limits on national policy spaces.

Perhaps as a means of easing the difficulties still facing TTIP, in 2015 Report on the 10th TTIP Round held in July 2015, the European Commission now refers to a State-to-State Dispute Settlement (SSDS) mechanism as opposed to an ISDS. They state that discussions on the SSDS have, "...focussed on the rules of procedure, the EU's proposal for a voluntary and complementary mediation mechanism, and on the compliance phase" (EC, 2015: 5). But quite what this means in practice is too early to say. However it does suggest that TISA negotiators have had to respond to public demand that the investor-driven dispute mechanism be dropped. However we also note that the EU's Directive on Services with its investor dispute mechanism in place opens up the possibility for investors to use that as a mechanism to dispute regulatory changes.

¹¹ The USA has not ratified a number of the most important ILO Conventions, including the rights to freedom of association and collective bargaining. The US has also passed 'Right to Work' legislation in 24 states, meaning a union's capacity to organize is limited. This will encourage a firm to set up in one jurisdiction in the US, and operate using these regulations in Europe.

TISA

On February 15th, 2013, the European Commission formally proposed to the European Council to open a set of pluri-lateral negotiations on a new international agreement on trade in services (EC, 2013b). A Trade in Services Agreement (TISA) arose out of these discussions in July 2012, led by the United and Australia. Their aim was for a stand-alone agreement on trade in services that would advance the DDA negotiations amongst willing WTO members.

The participants in this initiative, calling themselves the ‘Really Good Friends of Services’, were an ad-hoc coalition of all those WTO members who had putatively shown willingness to advance services negotiations. Since these first discussions, participation has expanded from 16 to 25 parties, with the European Union representing its 28 Member States, making up a total of 52 WTO Members. The 25 TISA parties (as of August 2015) comprise: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, European Union (representing its 28 Member States), Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Republic of Korea, Switzerland, Turkey, the United States and Uruguay. Most TISA parties are also forum shoppers; many of them participate in often more than once PTA in services amongst themselves (Marchetti and Roy, 2013), along with inclusion in other plurilateral negotiations.¹²

We can get a good sense of the overall aims of TISA by examining the European Commission’s communication to the European Council (European Commission, 2013b) when seeking a mandate to negotiate. The main elements are:

- An agreement compatible with the GATS agreement to be later multilateralized;
- comprehensive in scope with no exclusions of services sectors at the outset or mode of supply (this means education is included); commitments should reflect reality on the ground (hence very liberalised education sectors would need to remain so, and from there go further);
- new and better rules to be developed to cover new economic developments – including e-commerce, data, and so on;
- a combination of positive¹³ and negative¹⁴ lists (WTO/GATS only works with a positive list);
- national treatment that applies horizontally to all service sectors and modes of supply; and
- the future elimination of discriminatory measures to be locked in (that is there is no return to a different regulatory environment; the so called ‘ratchet clause).

Despite the mix of developed and developing countries, what is striking in TISA is the dominance of OECD members. TISA parties collectively account for around 70 per cent of global trade in services, and it is argued that for these economies, services is both a

¹² For example, the Trans-Pacific Partnership Agreement (TPP), the Regional Comprehensive Economic Partnership Agreement (RCEP), the Pacific Alliance (PA) and Transatlantic Trade and Investment Partnership (TTIP)

¹³ A positive list refers to only those measures and regulations that are listed concerning modes of supply¹³/categories within a sector¹³ are included.

¹⁴ A negative list means all measures and regulations are covered, unless specifically listed for exclusion.

significant and rising component of domestic output and employment particularly for the developed economies. As Sauvè (2013) shows, amongst the TISA participants, the EU (36.4 %) and the USA (26.9%) dominate in terms of share of world services trade.

Yet more than 30% of world trade in services is still amongst WTO members outside the TISA process. This matters in that, like with TTIP, whilst the argument is that the negotiators of the TISA architecture will attempt to align it with the WTO GATS Sauvè (2013) points out this will be particularly challenging in that there will be little appetite to take on a set of rules that have been negotiated in secret.

Of the top 20 services exporters/importers globally - China, India, Singapore, Russia, Brazil, Malaysia, Saudi Arabia, United Arab Emirates and Indonesia are not currently in TISA (Marchetti and Martin, 2013). This would have major implications for sectors like education, where international student flows and international branch campuses occur from, or are located within, countries not included in the TISA negotiations (Marchetti and Martin, 2013: 21). In other words, there are more markets of interest for TISA members *outside* (judging by WTO requests received and requests sponsored) rather than *inside* TISA. But their exclusion is also political, and there is a widely shared view that the EU and US are attempting to create a set of rules for the global economy that work in their interest rather than those of the developed and developing worlds (cf. Bhagwati et al., 2015).

Much discussion on TISA, as with TTIP, also concerns the way in which the negotiations are being conducted – yet with ambitions to anchor it in the WTO architecture in the future – with invitations to others to join once the rules for engagement have been worked out. Sauvè (2013: 7), a veteran WTO negotiator, remarks that TISA is proceeding without the formal ascent of the broader WTO membership, negotiations are taking place in Geneva, but outside of the perimeter of the WTO, it is at arm's length to the WTO secretariat, and the RGFS do not allow observers, including the WTO.

This exclusive 'club mind-set' of TISA is viewed as problematic; it reduces the overall legitimacy of the agreement and it is unlikely to get buy-in from a very significant group of developing countries much as with the WTO negotiations. The ultimate outcome, in Sauvè's (2013: 5) view, is that TISA is likely to face the very same fate of the services negotiations under the Uruguay and Doha Rounds.

A key issue with TISA are the regulatory mechanisms being developed. Currently TISA offers for *market access* will take a positive list approach, whilst national treatment will take a negative list approach (remember a negative list means listing all exemptions; otherwise all else is in; a positive list means listing all inclusions for offer with the rest remaining outside trade rules). Those sceptical or opposed to the TISA negotiations have called for a positive list only, much as under the WTO/GATS round of negotiations which avoided the need to list all non-conforming measures. The argument here is that a negative list assumes all exemptions can be known now and into the future – surely madness – as all new services not known now will be deemed to be included. Equally as important is that this also places TISA at odds with any potential GATS architectural alignment, in the same way that TTIP is not aligned with GATS.

TISA is also promoting a 'ratchet clause'; a mechanism currently found in the Canada-EU Comprehensive Trade Agreement (CETA) that requires the parties to automatically bind

any autonomous liberalisation. Those concerned with wider social and economic issues view the ratchet clause as undermining social and other equity goals (see ETUCE, 2014; Scherrard, 2014; EUA, 2015). Sauvè (2013: 19-20) calls for a more flexible approach to rule making; one that is less binding and more experimental in approach to the regulatory architecture so as to, "...acknowledge the increasing diversity of collective preferences"; he goes on: "Concluding plurilateral outcomes in an open setting that allows for economies of scale and learning is not the same thing as negotiating behind closed doors. History has not been kind to the latter initiatives".

A New Geometry of Higher Education, and the Loss of Policy Space?

And what of higher education in TTIP and TISA, which is our main concern in this paper? Given the secrecy surrounding both sets of negotiations, those concerned with not whether but how education will be included as a services sector can only guess at what the final outcomes might be. Concerned bodies, including UNISON (2015), Public Services International (2014), the European Universities Association (2015), Education International (ETUCE, 2014) and Universities College Union/UK (Scherrard, 2014) have been monitoring developments, holding meetings, making public statements, and leading demonstrations.

Howard Davies has produced a series of updates on TTIP and TISA for EUA that also includes EUA's statement on the matter (Davies, 2014a, 2014b, 2014c, 2015). The EU negotiating mandate in TTIP aims to bind the EU and US to the highest degree of service liberalisation envisaged as part of the WTO's GATS, much as TISA appears to be doing. This means that both adult education and higher education, two of five education services sectors identified in GATS, are of concern here. The 'negative list' principle for national treatment adopted by TISA and TTIP is that, in principle, no service is excluded; in TTIP, the only exclusions are water and audio-visual services – the latter the result of French insistence.

Like under GATS, only those are services that are truly 'public' – that is services supplied in the exercise of 'governmental authority' – see Article 1.3 (WTO, 1999) – can be exempted in both TISA and TTIP. But higher education has become so thoroughly marketized over the past two decades – with countries like the UK actively pursuing a free-market model of governance in the sector. Most other systems across Europe would therefore find it extremely difficult to show that they are not some kind of hybrid – public private system – with the end result being that there is no basis for exemption – aside from political pressure.

Davies (2014c: 8) reports that: "In March EUA asked the lead negotiators whether their proposals included higher and adult education. Dan Mullaney for the US replied that they were not excluded, and that it would be useful to include them, but that no discussions had so far taken place". Davies (2014c) goes on to note the US is particularly interested in privately operated adult and other educational services, particularly those that are digitally delivered. This, of course, is the territory of the for-profit firms who, until recently, have generated lucrative profits in the higher education sector (Kinser, 2006). Yet a tighter regulatory environment in the US has limited their expansion locally. It is also a space in

which Massive Open Online Courses (MOOCs) now operate. MOOC platforms, such as Stanford's spin-out company, Coursera, have been backed – Silicon Valley style - by venture capital hoping for a return in their investment.

In all, it can be concluded that higher education will be affected in multiple ways. First, through the easing of the conditions of entry into the sector of commercial firms seeking the liberalisation and marketization of higher education – using those member states of the EU with a very low regulatory floor – such as England or the USA – as the place from which to claim mutual recognition. This will result in growing fragmentation and diversification in the sector. It will likely sever the relationship between the idea of a university and research often used as a basis for recognition as a HEI provider, as research is viewed as a non-tariff barrier to trade. It will result in the conservative use of policy in national regulatory environments, for as UNISON (2015: 5) states – the investor dispute mechanism and ratchet effects create “...a ‘regulatory chill’ that stays the hand of governments to regulate in the public interest for fear of litigation”. Academic autonomy, and other conditions of work will be viewed as non-tariff barriers that should be done away with, whilst quality assurance and other mechanisms are regulatory mechanisms that place undue burden on the provider.

It is also as yet unclear how the differences and synergies between the competing agreements will yet play out. The move by TTIP toward a State to State Dispute Settlement Mechanism versus the Investor-State Dispute Settlement mechanism, currently part of TISA and most PTAs, will create a proliferation of uneven development spaces that will encourage forum shifting and place hopping. This in turn may well lead to the shaping of education sectors in ways that will place limits on the capacity to respond politically, culturally or socially to a highly unequal present, and an unknown future.

Concluding Thoughts

We began this paper by noting the proliferation of trade agreements involving Europe and education as a services sector in what we have been calling the post-GATS era – and suggested that it is possible to see two waves – a first wave that is mostly shaped by national strategies, and regional and bilateral negotiations, and a second wave that now includes the Trade in Services Agreement and the Transatlantic Trade and Investment Partnership.

Our argument was that these two waves are shaped by forum shifting, as those actors/institutions seeking to advance trade rules have strategically developed new spaces and relations that in turn has resulted in the reshaping of the higher education regulatory space. This proliferation of regulatory spaces creates opportunism, as we see with the ways in which investor claims can then be advanced. On the other hand, they create a new layering of differently regulated spaces that means that there is unlikely to be as Siles-Brügge, describes it, one big deregulatory ‘big bang’ (2014: 1).

At one level, the overall unevenness of the spaces being negotiated, the overlaying of multiple regulatory regimes, the sheer difficulty for member states to make all of the appropriate reservations both now and into an as yet unknown, and unknowable, future

that constitutes the basis of a negative list, will bring its own pressures and tensions. Add to this the likely tendency to ‘forum shop’ and ‘place hop’ – an outcome of the proliferation of negotiations and their uneven development, means it will also be a space full of frictions, and one that is difficult to stabilise.

That said, the rules of the trade negotiation games, as they begin to be played out across a range of these different forms, are all aimed at constraining the regulatory autonomy of the state and its citizens, by entrenching competition as the dynamic shaping the sector (with no concessions as to whether it is for car making, chemical production, or providing learning), and to put downward pressure on those non-tariff barriers (such as standards) that chews into and erodes both profit margins and flexibility. And whilst final deals will have to be approved by the European Council (national governments) and the European Parliament, neither the Council, the European Parliament, nor national parliaments, will be able to make amendments to an agreement; they can only accept or reject the final deal (UNISON, 2015). Much depends, of course, on the mood of national governments, and on how (if at all) this is sold to the public.

And it is those investors in the developed economies, and most particularly the OECD countries with Europe and the US major players, who have aggressively advanced this anti-democratic and anti-development post-GATS agenda in each of these waves. When linked to the dominance of the US and Europe in the rapid expansion of Preferential Trade Agreements, and their roles in TTIP and TISA, it is clear trade is being politically used to contain the rise of China and the BRICs, especially around rules driving the global economy.

What is at stake for education is its incorporation into binding trade rules; it ceases to be an arena for national/local contestation, on the one hand, and a space of democratic possibility, on the other hand. Given the sub/national state’s role in the provision of welfare and other public services, and in the area of education an obligation under the Universal Declaration of Human Rights (United Nations, 1947) to provide free public education, it is of the utmost importance that any trade agreement and its regulatory apparatus do not privilege the rights of capital to make claims about future returns by placing serious limits on the sovereignty of sub/national states to deliver on this. Equally as important is the expectation that citizens have the possibility to imagine a different world, and to implement these policies so as to bring this about.

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