Open Letter on TTIP and Financial Regulations to U.S. and EU Negotiators

Ambassador Michael Froman
United States Trade Representative

Commissioner Karel De Gucht
Commissioner for Trade, European Commission

October 1, 2014

Your Excellencies,

We, the undersigned civil society organizations from the United States and the European Union (EU), write with regards to the Transatlantic Trade and Investment Partnership (TTIP) negotiations and their potential impact on financial regulations.

We understand that a goal of the TTIP is to further liberalise the transatlantic financial services market. We further understand that liberalization would be done using rules that simultaneously constrain countries' ability to maintain or create regulatory policies with respect to liberalized sectors.

We believe it is highly inappropriate to include terms implicating financial regulation in an industry-dominated, non-transparent "trade" negotiation. Financial regulations do not belong in a framework that targets regulations as potential "barriers to trade." Such a framework could chill or roll back post-crisis efforts to re-regulate finance on both sides of the Atlantic whereas further regulation of the sector is much needed. Further, proposals to negotiate TTIP rules affecting regulation of the financial sector could turn financial regulations into bargaining chips that could be traded away for other concessions. We urge you to consider and respond to our specific concerns regarding specific TTIP proposals that would threaten financial stability measures and would limit States' ability to restore the financial system's role of serving the real economy.

First, we believe that **including regulatory cooperation on financial services in TTIP is misguided** and we support the U.S. government's rejection of that EU demand. While some degree of cross-border financial regulatory and supervisory cooperation is advisable to prevent regulatory arbitrage, such cooperation is already occurring in other international and bilateral fora. Should further cooperation be needed, it should take place in these fora, which should be reinforced for that purpose.

A TTIP-created process, particularly one conducted away from parliamentary and public scrutiny with heavy involvement from industry advisors, is not the appropriate forum to discuss regulatory cooperation. The EU proposals on regulatory cooperation would require U.S. and EU regulators to consult each other before new rules even are proposed to parliamentary bodies. Worse, the EU proposals would give industry "stakeholders" multiple opportunities to see regulations in preliminary draft form and to lobby policymakers against their enactment. These "stakeholders" are the same European and U.S. banks that have proven their resolve – and success – in chilling and weakening the re-regulation of finance in the EU and United States. Unsurprisingly, they are lobbying hard for a TTIP "regulatory cooperation" mechanism for the financial sector. **At best, this mechanism would delay implementation of needed financial reforms. At worst, it would result in a watering down or outright blockage of said reforms.**

This proposal is all the more dangerous given the terms in the EU's leaked proposal that U.S. or EU regulations would need to be analysed to determine whether they would have an unacceptable impact on trade. Such a requirement could impose a presumption that regulations must be judged on the basis of their trade impact rather than their effectiveness as public interest policies promoting financial stability. Such a requirement would also threaten regulatory safeguards that rightly restrict trade by their very design (e.g. restrictions on risky financial products).

While other trade limitations arise out of the differences between U.S. and EU approaches to regulation rather than the regulations themselves, the notion that a TTIP-created process should eliminate all such differences is also misguided. First, financial regulators and central bankers recognise that highly interconnected, financial markets exacerbated the financial crisis. Second, differences between nations in approaches to normative measures, monitoring and enforcement should be allowed and expected as the normal outgrowth of democratic policymaking. The proposed regulatory cooperation framework is premised on limiting the costs for the financial industry that can result from divergence in financial regulations. **But if convergence, or substituted compliance/equivalence, results in a weakening of democratically-enacted safeguards and more financial instability, the costs to the majority of U.S. and EU residents, our economies and democracy would be enormous.**

We support the U.S. position that the financial sector should be excluded from any TTIP terms on regulatory cooperation. However, we also believe that to adequately safeguard policy space for financial regulation requires that the financial sector not be subjected to market access terms proposed for TTIP that would invite challenges to regulations in liberalized sectors. We understand that TTIP negotiators are contemplating using market access rules borrowed from the Understanding on Commitments in Financial Services and Article XVI of the General Agreement on Trade in Services (GATS), both negotiated during the deregulatory period of the 1990s. Should a country commit to "liberalise" its financial services sector, these rules could expose certain types of financial regulation, to challenges before international tribunals, even when the regulations apply equally to domestic and foreign firms. **Were the EU or United States to subject financial services to these rules under TTIP, it could result in legal challenges to bans and other regulatory restrictions on risky financial services or products.** Other increasingly common regulations that could potentially be challenged under these market access rules include policies that limit the size of financial firms so that they do not become "too big to fail," structural reforms that limit the ability of deposit-taking banks to engage in hedge-fund-style bets and rules requiring certain legal structures as a condition for offering certain financial services.

TTIP should also not include the provisions of past deals that restrict the use of capital controls. The International Monetary Fund has officially shifted from opposition to qualified endorsement of capital controls as legitimate policy tools to prevent and mitigate financial crises caused by destabilizing floods of speculative money into and out of countries. Many mainstream economists have also vouched for capital controls as common sense measures with a proven track record of supporting financial stability.

The standard U.S. free trade agreement text ignores this emerging post-crisis consensus on the legitimacy of capital controls by banning their use under "transfers" provisions drafted before the crisis. The leaked EU negotiating mandate for TTIP includes similarly worrisome language, borrowed from existing EU FTAs, envisioning the "full liberalization of current payments and capital movements" with narrow exceptions ("e.g. in case of serious difficulties for monetary and exchange rate policy, or for prudential supervision and taxation"). Such provisions could not only restrict the usage of capital controls, but also financial transaction taxes, which eleven EU member nations are currently planning to implement to curb the destabilizing impacts of speculative, high-speed financial trading.

If any provisions on transfers or capital movements would be included, much broader exceptions would be required to safeguard the full range of legitimate policy objectives that governments pursue in enacting capital controls. These include preventing – not just responding to – balance-of-payment crises, stemming asset bubbles, avoiding currency appreciation, eliminating rent-seeking activities, protecting effective monetary policies, and ensuring a stable climate for long-term domestic investment. TTIP should not include any provisions limiting the usage of capital controls enacted for these or other legitimate policy objectives, or the usage of financial transaction taxes, regardless of whether such measures are temporary or permanent.

One of TTIP's greatest threats to the re-regulation of finance is the unpopular proposal to include investor-state dispute settlement (ISDS) in the deal. Doing so would empower the very firms that financial regulations seek to govern to skirt host country domestic courts and directly challenge domestic policies as violations of expansive, TTIP-created foreign investor "rights." Were ISDS to be included in TTIP, foreign banks and other financial firms could pursue these challenges against the U.S. government and the EU before extrajudicial tribunals comprised of three private attorneys. These lawyers would be authorised to order unlimited taxpayer compensation for the non-discriminatory enforcement of new financial regulations on such sweeping grounds as that the policies frustrated foreign investors' "expectations." Financial and non-financial firms have increasingly used ISDS provisions in other pacts to challenge financial regulations and emergency financial stability measures, including Belgian bank restructuring, the Czech Republic's response to a systemic bank debt crisis, and actions taken by Greece to comply with the debt restructuring conditions imposed by the Troika bailout during the Eurozone crisis. Including ISDS in TTIP would newly empower the world's largest banks to launch investor-state claims against U.S. and EU financial regulations, which could chill regulators' resolve to enact the bold financial stability measures needed to prevent another crisis and/or result in major new liabilities for government treasuries. To foreclose this threat, TTIP must not include ISDS.

Financial regulations could be particularly threatened by TTIP if the deal included weak protections for prudential measures that could be interpreted by tribunals as insufficient to protect financial regulations challenged as TTIP violations.

The prudential clauses found in the leaked European Commission draft TTIP text on services, investment and e-commerce require that prudential measures “shall not be more burdensome than necessary.” Such a stipulation could significantly constrain policy space by inviting tribunals to require governments to prove a negative – that financial regulations intended to prevent a financial crisis were “necessary” to achieve an observed lack of crisis and/or that no less “burdensome” option plausibly could have been pursued instead of the challenged measure. Such a difficult burden of proof must be avoided.

TTIP also should not replicate the prudential “exception” for financial regulations found in the GATS. While this exception may be invoked as a defence if a financial measure is challenged, the existing language contains a clause requiring that the challenged measure not be used to contradict the Party’s commitments. But a Party would not use the exception unless it felt that the challenged financial measure did just that. This circular wording could invite a tribunal to interpret the exception as ineffective for safeguarding a challenged financial regulation. Legal scholars, including those that have served on the WTO’s Appellate Body, have noted that the meaning of this aspect of the GATS exception’s language is not clear and that it should be clarified to ensure that it can be effectively applied.

In addition, the GATS text defines “prudential” as covering only a narrow range of financial measures. Financial regulations can be enacted for an array of legitimate policy objectives beyond those narrowly defined as “prudential,” such as measures to finance a transition to a climate-friendly economy. Such policies should also be protected from TTIP-based challenges.

Rather than replicate weak language from past deals, TTIP should include an actual *carve-out* for financial regulatory measures. A true carve-out, unlike the clauses that EU texts have misbranded as “carve-outs,” would state that the terms of the entire agreement simply are not applicable to financial regulatory measures. Such a clause would forbid foreign investors or States from bringing claims against financial regulatory measures in the first place.

As U.S. and EU regulators undertake the difficult work of re-regulating finance, TTIP cannot be allowed to undermine this historic task. We do not want the deregulatory rules that led us to financial crisis, such as those in GATS, inserted into any more binding trade agreements. This is particularly true for any agreements that could have investor-state enforcement. Nor do we want to empower financial service firms to undermine regulators’ nascent efforts to rein in these firms’ ability to take undue risks for the sake of profits.

While supervisory and regulatory cooperation across the Atlantic is needed and welcomed in other international fora, rules covering financial regulation do not belong in the confines of an industry-advised TTIP negotiation. **We request a response to this letter from EU and U.S. negotiators and financial regulators to explain how they plan to take our concerns into account.**

We are only now implementing the lessons of the last financial crisis. Let us not lay the groundwork for the next one.

Sincerely,

EU Organizations

Africa Europe Faith and Justice Network
AGE Platform Europe
ATTAC Hungary
Attac Iceland
Both ENDS
Campact e.V.
Centre for Global Education
Centre for Research on Multinational Corporations (SOMO)
CNCD-11.11.11
Collectif Roosevelt
Consumers' Protection Center (KEPKA)
Corporate Europe Observatory
Ecologistas en Acción
European Network on Debt and Development (Eurodad)
Federation of German Consumer Organisations (vzbv)
Finance Watch
Friends of the Earth Europe
Global Policy Forum Europe
INKOTA-netzwerk e.V.
Jubilee Debt Campaign UK
Kairos Europe WB
PowerShift e.V.
Presentation Justice Network
Slovene Consumer's Association (ZPS)
Südwind
Tax Justice Network
UNI Europa
World Economy, Ecology & Development

U.S. Organizations

AFL-CIO
American Federation of State; County and Municipal Employees (AFSCME)
Americans for Financial Reform
Campaign for America's Future
Center for Digital Democracy
Center for Effective Government
Center for Responsible Lending
Center of Concern
Citizens Trade Campaign
Communications Workers of America
Consumer Action
Consumers Union
Food & Water Watch
Friends of the Earth
Global Policy Forum
Government Accountability Project
Institute for Agriculture and Trade Policy
National Association of Consumer Advocates
New Rules for Global Finance Coalition
Public Citizen
Service Employees International Union
U.S. PIRG
United Food and Commercial Workers International Union
United for a Fair Economy

Cc:

EU Negotiators: Ignacio Garcia Bercero (Chief Negotiator, DG Trade), Damien Levie (Deputy Chief Negotiator, DG Trade), Marco Düerkop (Services Negotiator, DG Trade), Martin Merlin (Regulatory Cooperation in Financial Services Negotiator, DG MARKT), Leopoldo Rubinacci (Investment Negotiator, DG Trade), Colin Brown (Investor-State Dispute Settlement Negotiator, DG Trade), Geraldine Emberger (Regulatory Coherence Negotiator, DG Trade); Cecilia Malmström (Nominee for Commissioner for Trade)

EU Financial Regulators: Michel Barnier (Vice-President of the European Commission), Jonathan Faull (Director General for Internal Market and Services, European Commission), Andrea Enria (Chairperson, European Banking Authority), Steven Maijoor (Chair, European Securities and Markets Authority), Gabriel Bernardino (Chairman, European Insurance and Occupational Pensions Authority), Mario Draghi (President, European Central Bank), Finance Ministers of the 28 EU member states

U.S. Negotiators: Dan Mullaney (Chief Negotiator, USTR), David Weiner (Deputy Chief Negotiator, USTR), Amanda Yarusso-Horan (Financial Services Negotiator, USTR), Gavin Buckley (Financial Services Negotiator, Department of the Treasury), Jai Motwane (Investment Negotiator, USTR), Rachel Shub (Regulatory Coherence Negotiator, USTR), Jim Sanford (Regulatory Cooperation Negotiator), Barbara Norton (Regulatory Cooperation Negotiator)

U.S. Financial Regulators: Richard Cordray (Director, Consumer Financial Protection Bureau), Thomas Curry, (Comptroller of the Currency), Martin Gruenberg (Chairman, U.S. Federal Deposit Insurance Corporation), Jacob Lew (U.S. Secretary of the Treasury), Timothy Massad (Chairman, U.S. Commodity Futures Trading Commission), Mary Jo White (Chair, U.S. Securities and Exchange Commission), Janet Yellen (Chair, Board of Governors of the Federal Reserve System)