

## **Preliminary Analysis of Leaked TISA Annex on Domestic Regulation**

(20 February 2015)

*(Important note: This analysis is based on the positions that have the support of the largest number of parties, unless otherwise indicated. It does not state which parties are supporting or opposing various proposals, and does not address the various nuances in their positions.)*

Services, from tourism, health, and environment to finance, telecoms, and transport are all crucial parts of everyday life. Governments regulate them to meet multiple objectives. Yet TISA treats them as commercial transactions between a supplier and a consumer within a market that should be subject to a light-handed and market-based regulation.

***This Annex prescribes the criteria for what constitutes acceptable regulation in key areas of services and provides multiple grounds for challenges if these criteria are not met.***

### **The goal of domestic regulation ‘disciplines’**

The transnational corporate lobby wants TISA to remove domestic policies, laws and regulations that make it harder for them to sell their services in other countries (actually or virtually), dominate their local suppliers, maximise their profits and withdraw their investment, services and profits at will. To achieve this, governments cannot be allowed to regulate services as they see fit.

The rules in the core TISA text will target regulations that restrict the size and shape of local services markets (market access), and those that discriminate against foreign firms (national treatment).

***The Annex on Domestic Regulation adds another layer of restrictions on governments’ regulatory choices, referred to as ‘disciplines’ on government regulation.***

They apply even where the regulations are not discriminatory and are manifestly designed to satisfy important cultural, social, indigenous, environmental or development rights. The fact that a government has applied the same rules to all services or those who supply them, or that it was motivated by social concerns, will not protect them from being challenged.

The Annex repeats the standard empty rhetoric that ‘parties recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet public/national policy objectives’.<sup>1</sup> What that double-speak means is that governments can regulate, provided they comply with the TISA rules, including this Annex, when they do so.<sup>2</sup>

**This Annex aims to put future governments in a neoliberal straitjacket, despite abundant evidence that their regulatory model has failed.**

### **The three targets: qualifications, licensing, technical standards**

The rules apply to certain kinds of government ‘*measures*’. ‘Measure’ is an all-encompassing term in trade-speak, meaning ‘*a law, regulation, rule, procedure, decision, administrative action, or any other form*’.<sup>3</sup>

The Annex applies where any of these measures ‘*relate to*’ (not just specifically address) three important areas of regulation:<sup>4</sup>

- *Qualification requirements and procedures* – applying, for example, to doctors, nurses and nurse-aids, dentists, radiographers, vets, engineers and electricians, accountants, maritime crew, teachers and academics, transport and drilling operators, journalists, chefs, actors and musicians.
- *Licensing requirements and procedures* – which might apply to broadcasting, rubbish dumps, domestic water supply, mining, logging and other resource extraction, schools and universities, early childhood centres, hospitals and healthcare facilities, aged care homes, casinos, race-tracks, liquor stores, ferries, taxis and other transport operators.
- *Technical standards* for the characteristics of the service or how it is to be supplied – water quality, health and safety, zoning, school examinations, staff to patient ratios, adventure and eco-tourism, shipping lanes, engineering and construction, mining practices (for example, fracking), advertising rules, sales of alcohol and tobacco.<sup>5</sup>

### **Far-reaching regulatory coverage**

TISA and this Annex apply to measures ‘*affecting*’ ‘*trade in services*’.<sup>6</sup> This refers to the main ways that foreign services firms supply a service to someone from another country: from outside the country, by foreign investment, or by a foreign person temporarily visiting to supply the service.

The government ‘measure’ doesn’t need to be directly targeted at the service to ‘*affect*’ it. A high-level change in climate change policy, for example, could affect the technical standards that apply to coal-powered electricity generation or vehicle emissions.

These rules would apply to all levels: a national legislature, state or provincial governments, local bodies or professional bodies and similar entities who have formal regulatory responsibilities.

Sectoral annexes on financial services, telecommunications, maritime transport, among others, impose tailored versions of these rules.

### **Limitations on exposure**

Most of these rules only apply where a particular sector or subsector is already exposed to the core market access or national treatment rules. That is not as clear-cut as it sounds, because those schedules are complex and their meaning is often unclear. Working out what is and is not covered by these ‘disciplines’ will be incredibly complicated for national regulators, let alone sub-national bodies and their interpretation will always be contestable.

### **Light-handed, pro-market regulation**

The Annex is driven by an ideology of light-handed, pro-market regulation. Following the fashion of regulatory management theory, it assumes that risk should be tolerated in the interests of supporting economic growth and innovation. People, as consumers, are expected to take responsibility for informing themselves of risk, and assuming the consequences of any failures. The communities that are affected by regulatory failures are invisible and irrelevant.

The global financial crisis shows the massive social and economic cost of those false assumptions.

But there are many other examples where light-handed, risk-tolerant regulation profits the services corporations and leaves people and communities bearing the costs: mining disasters, construction site deaths, failed public–private partnership schools.

### **Core obligations**

This Annex reinforces that model through three core obligations.

#### **1. Governments must ensure their chosen measure is *not more burdensome than necessary to ensure the quality of the service*.**<sup>7</sup>

- ‘*least-burdensome*’ means that decisions start by considering no regulation or self-regulation, then co-regulation that relies on private mechanisms, disclosure and external monitoring, with an active regulator as the last resort;
- ‘*necessary*’ sets the criteria for deciding which of these options to adopt – essentially, the most light-handed approach that can achieve the regulatory goal. The shifting interpretations of ‘*necessity*’ by WTO dispute panels has produced a complex, multi-faceted test that has almost always failed when governments have tried to argue it. On any reading, it is virtually impossible to adopt a precautionary and multi-purpose approach to regulation that reflects community concerns and priorities;
- the ‘*quality*’ of a service is the only regulatory goal that is recognised here. The GATS provision from which this is drawn gives ‘the competence of the supplier’ as an example of quality, a narrow consumer-based criteria that excludes broader social considerations.

#### **2. Regulation of qualifications, licensing and technical standards must be based on ‘*objective and transparent criteria, such as competence and the ability to supply the service*’.**<sup>8</sup>

- the illustration implies that factors not focused on consumer satisfaction, such as community or indigenous concerns, or that are precautionary due to the uncertainty of potential impacts, will be ‘*subjective*’ and hence invalid considerations;
- ‘*transparent*’ criteria suggests that relevant factors, and the weightings to be given them, must be spelt out by the decision-making agency in advance, removing the ability of decision-makers to apply discretion and make judgements appropriate to the circumstances.

#### **3. All measures of general application or all measures ‘*affecting trade in services*’ must be ‘*administered in a reasonable, objective and impartial manner*’,<sup>9</sup> and where authorisation is required to supply a service the procedures must be ‘*impartial with respect to all applicants*’,<sup>10</sup> and decisions reached ‘*in an independent manner*’.<sup>11</sup>**

- it is hard to think of a more subjective term than ‘*reasonable*’ – to whom, measures against what standards and criteria, considering what range of competing factors, in the context of which and whose legal and administrative traditions;
- ‘*impartial*’ implies neutrality on its face, which counts against proactive moves to seek out opinions or support for those with fewer resources to participate in decision-making processes;
- decisions reached in an ‘*independent*’ manner potentially raises problems for consultation processes, commissioning of evidence and reports, and inquisitorial practices common to bodies considering applications for authorisations and licences, or when establishing environmental, health and safety or construction standards.

## **Interference with regulatory decisions**

TISA is a direct assault on the regulatory sovereignty of governments. The mechanisms for scheduling commitments are reported to include a negative list approach to non-discrimination (national treatment), meaning everything not listed will be covered by the rules, including where new technologies change the nature and impact of those obligations. Standstill and ratchet mechanisms are intended to lock in existing and future liberalisation to prevent governments from re-regulating for broader objectives.

The disciplines in this Annex would intrude far more deeply into the regulatory domain than those more commonly discussed rules. The cumulative factors outlined above would make it almost impossible for regulators to predict how these 'disciplines' might apply. Their interpretations and decisions will come under pressure in a number of ways.

In the name of 'transparency', governments would be expected to ensure that all general measures covered by the Annex were published in advance,<sup>12</sup> provide opportunities to comment on relevant regulations before they entered into force,<sup>13</sup> and provide 'maximum transparency' for the processes that non-government bodies, such as law societies, use to develop local and international standards.<sup>14</sup> The obvious purpose is to give commercial interests the chance to lobby in favour of or against the proposals. These obligations are additional to similar obligations in the general transparency provision proposed for TISA.

Governments would also have to set up a mechanism to receive and respond to inquiries from services firms (not just foreign ones) about any regulations relating to the professional and licensing qualifications and procedures, and technical standards.<sup>15</sup>

Some governments want the applicant to be given reasons why their application is rejected, along with information on the timeframe and procedures for appeal and resubmission.<sup>16</sup>

Services firms may also be able to challenge the implementation of the Annex when they are affected by a decision, through an Article on Judicial, Arbitral or Judicial Review proposed by Australia and the US in the general Transparency provision of TISA.<sup>17</sup>

Foreign governments would also be able to enforce the Annex through TISA's dispute mechanism. The subjective and elastic terms and obligations in this Annex would be interpreted by tribunals of 'trade' experts whose mandate is to promote the ideological and commercial objectives of the agreement, not to protect the interests of nations and their people.

Those tribunals would decide if a country's regulations to promote culture, protect the environment or ensure equitable access to services was 'unnecessarily burdensome' or if knowledge of indigenous culture or public services obligations was essential to achieve 'quality'.

Those tribunals would also decide whether the processes designed to ensure that local people and communities are properly heard and that non-commercial factors are reflected in decisions were 'reasonable', 'objective' or 'impartial'.

**In other words, unaccountable private 'trade' tribunals would decide how countries could regulate activities that are fundamental to social well-being.**

## **Power politics inside TISA**

Attempts to impose 'disciplines' on governments' freedom to regulate are not new. Similar moves proved too controversial during the original negotiations for the General Agreement on Trade in Services (GATS) and were part of the unfinished business when the World Trade Organization (WTO) was formed in 1995.<sup>18</sup>

New Zealand, Australia and Switzerland have failed to achieve more far-reaching disciplines in ongoing negotiations in the WTO. Many South governments have tirelessly resisted the proposals. The US also vigorously opposed some of these demands for constitutional reasons. It prefers to impose its regulatory model on other countries through specific services sectors such as finance, telecommunications and courier services.

The tensions from those GATS negotiations are bound to overflow into and infect TISA. New Zealand and Switzerland are again taking the lead, along with Colombia and Hong Kong, by importing their proposals from the GATS into TISA. Australia seems less aggressive than in the GATS, but may just be content to let others take the lead. The EU and Japan are sitting on the fence.

The US remains steadfastly opposed to many (but not all) of the key provisions. It has proposed its own version that would leave governments with pretty broad discretion. The US alternative is notable for four things:

1. the Annex does not apply to technical standards;
2. it applies only to measures relating to licensing requirements and procedures and qualification requirements and procedures that a service supplier must satisfy in order to obtain, change or renew the authorisation;
3. the Annex only applies to sectors that are committed on market access and/or activities, sectors and sub-sectors where a government has reserved the right to discriminate, and subject to any limitations or conditions the country has written into its schedule for them; and
4. the obligations are all couched in vague and subjective terms such as 'to the extent practicable', 'where they deem appropriate', 'a reasonable period'.

***This suggests domestic regulation disciplines may become a major battleground between the US and the other Parties during the TISA negotiations, just as they have in the WTO.***

### **Implications for non-TISA countries**

Countries that opposed the domestic regulation disciplines and are opposed to TISA will be rightly concerned at plans to export this Annex, along with the rest of TISA, back into the WTO. Application of this Annex even to their existing limited GATS commitments would seriously abridge their regulatory sovereignty. The impact would be especially severe for developing countries that made vast services commitments during their WTO accessions.

Transposing this Annex into the GATS could sabotage the social well-being, economy and governance of countries of the global South. Removing the ability of governments to give primacy to social and environmental goals would exacerbate social inequalities and deprivation. Moreover, many South countries have weak regulatory regimes, or are trying to remedy failed market models and privatisations, including in health, water, and infrastructure. Restricting authorisation fees to cost-recovery would deny a vital source of revenue.

The Annex suggests numerous obligations to provide information, meet timelines, process applications and make decisions that could be nigh on impossible for small or poorer countries to meet even at their central government level, where compliance would be onerous, costly, and divert resources from other priorities. Providing reasons for rejecting an application and the process and timeframe for appeal and resubmission would add further layers of pressure on decision-making bodies.

Pro-business regulation on the model proposed in this Annex has been a manifest failure in many richer countries that have sophisticated regulatory systems and well-resourced public agencies.

***It would be reckless and iniquitous to impose such a regime on developing and less developed countries through the WTO.***

***Governments considering joining TISA should understand that they will be surrendering a large part of their regulatory sovereignty.***

## **Note: Summary of the Annex provisions**

### **Substantive restrictions on regulations**

- (i) Regulations have to be based on 'objective and transparent criteria, such as competence and the ability to supply the service',<sup>19</sup> and measures must be based on 'objective and transparent criteria, related to the objectives of the measure and the service being regulated';<sup>20</sup>
- (ii) Regulations must be 'not more burdensome than necessary to ensure the quality of the service';<sup>21</sup>

### **Procedural restrictions**

- (i) All measures have to be administered in a 'reasonable, objective and impartial manner';<sup>22</sup>
- (ii) Procedures must be impartial in relation to all applicants and decisions are reached in an independent manner;<sup>23</sup>
- (iii) There must be a process to verify the qualifications of service suppliers from other parties;<sup>24</sup>
- (iv) Applicants do not have to approach more than one authority (regardless of multiple levels of government having a relevant responsibility);<sup>25</sup>
- (v) The application is processed within a reasonable timeframe from submission;<sup>26</sup>
- (vi) Fees are 'reasonable' and determined transparently with reference to the administrative costs<sup>27</sup> (meaning administration and licensing fees cannot be used even to fund other activities related to the services);
- (vii) Timelines for processing of the application, and providing information on its progress, are reasonable and do not cause undue delay;
- (viii) Procedures that non-government bodies (for example, professional bodies) use to develop and apply domestic and international standards are transparent.<sup>28</sup>

### **Influence over government's decisions**

- (i) Provide opportunities for comment (presumably by other states and commercial interests) on relevant regulations before they enter into force;<sup>29</sup>
- (ii) Where an application is rejected the applicant is to be informed in writing without undue delay;
- (iii) If the applicant asks for reasons they must be given, along with information on the timeframe and procedures for appeal and resubmission;<sup>30</sup>
- (iv) Publish all measures that apply generally, and information about them, promptly through printed or electronic means, including a long list of information that must be provided;<sup>31</sup>
- (v) Publish the measures in (iv) in advance of their adoption;<sup>32</sup>
- (vi) Establish a mechanism for inquiries;<sup>33</sup>
- (vii) Disputes for non-compliance.

- 1 Article 4. This may become even more rhetorical if shifted to the preamble, as is suggested in the Annex.
- 2 The panel in the WTO dispute *US-Gambling* 2004 said: 'Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.' (*US-Gambling*, 2004, para 6.316)
- 3 GATS Article XXVIII(a)
- 4 The scope of the Annex is limited to these three areas through Articles 1 and 2, although as noted the US and Canada are opposed to the inclusion of technical standards.
- 5 The US and Canada want to exclude technical standards; Colombia and the EU are still considering it.
- 6 The US suggests an alternative phrase 'supply of a service': paragraph 1
- 7 Paragraph 6 (with reference to Article VI:4(b))
- 8 Paragraph 5, 6 (with reference to Article VI:4(a)) and 7(a)
- 9 Paragraph 5
- 10 Paragraph 7(b)
- 11 Paragraph 7(b)
- 12 Paragraph 11
- 13 Paragraph 10(l)
- 14 Paragraph 9
- 15 Paragraph 12
- 16 Paragraph 8(k) and (*kbis*)
- 17 Noted on page 10 of this Annex; cross-reference to Article I [-] in the proposed TISA Transparency provision dated 23 January 2015
- 18 Some limited disciplines applied to sectors committed in countries' schedules under GATS Article VI:1 and VI:5.
- 19 Paragraph 5 and 6 (with reference to Article VI:4(a))
- 20 Paragraph 7(a)
- 21 Paragraph 6 (with reference to Article VI:4(b))
- 22 Paragraph 7(a)
- 23 Paragraph 7(b)
- 24 Paragraph 7(c)
- 25 Paragraph 7(d)
- 26 Paragraph 7(e)
- 27 Paragraph 7(g)
- 28 Paragraph 9
- 29 Paragraph 8(l). This may be deleted from the Annex if it is included in the Transparency provision of the text
- 30 Paragraph 8(k) and (*kbis*)
- 31 Paragraph 10. This may be absorbed within the general Transparency provision.
- 32 Paragraph 11
- 33 Paragraph 12