

Analysis on TISA Transparency Text dated 23 January 2015 (updated from the 16 April 2014 Transparency Text)

There is a deep irony whenever governments make commitments to ‘transparency’ in contemporary pro-corporate treaties that are negotiated under conditions of extraordinary secrecy. TISA is one of the most extreme examples, with the Parties pledging to keep the documents secret for five years after a final agreement comes into force or the negotiations are formally abandoned.¹ Some governments are already releasing their own and joint documents; others are hiding behind the secrecy pact and refusing to be held accountable.

‘Transparency’ in this TISA text means ensuring that commercial interests, especially but not only transnational corporations, can access and influence government decisions that affect their interests – rights and opportunities that may not be available to local businesses or to national citizens. They may want to stop or change government decisions they don’t like, or rally to support those that are being challenged.

Chapters or provisions on ‘transparency’ have become increasingly common in recent free trade and investment agreements. In addition, there will be ‘transparency’ provisions in specific TISA annexes, such as financial services² or domestic regulation.³ They impose cumulative obligations on governments.

The leverage that foreign corporations exercise over governments is already a sore point in many countries. TISA would add more opportunities that go far beyond the limited GATS provision on transparency, both in their content and by providing entitlements to private firms.⁴ If its champions have their way, this will end up applying to the entire WTO membership, including many developing and least developed countries.

The leaked text has an escalating scale of obligations. The following describes the most aggressive versions of the proposals, unless otherwise indicated. ‘Interested persons’ is code for commercial interests.

1. Publication of all measures

All laws, regulations, procedures and administrative rulings that apply generally to any matter covered in TISA (from the foreign investment vetting regime and universal service obligations for post or telephones to health and safety standards, teaching qualifications to zoning decisions) must be promptly published and available to other states and ‘interested parties’.⁵ Some want governments to maintain a single official site for publication,⁶ and include an explanation of its purpose or rationale.⁷

Comment

This publication requirement may be perfectly reasonable for some measures, such as laws and formal regulation, depending on where and how they have to be published. But the obligation is onerous for other kinds of measures, especially if the rule applies to regional or local government and bodies that exercise delegated responsibilities. A single site and publishing explanations of the rationale may be impractical for some countries, especially as this applies to all measures and potentially to many levels of government.

2. Prior notification of proposed new measures

Proposals to adopt any ‘measure’ must be published in advance,⁸ with a ‘reasonable opportunity’ for Parties and ‘interested persons’ to comment on them.⁹

Comment

This adds further opportunities to influence governments, and launch lobbying and public campaigns against or in support of the proposals. Because it applies to the whole range of ‘measures’ it will impose compliance obligations, especially at lower levels of government, which are onerous and expensive to satisfy. Providing an opportunity to comment assumes a process and criteria for decision-making, which means it is easier to subject those decisions to review and challenge.

3. Advance notice of regulations

There are particular rules for advance notice of ‘regulations’ (in contrast to other measures – in this context, ‘regulations’ does not include ‘laws’ as they are mentioned separately. This notice should occur a minimum of 60 days before comments are due or in sufficient time for ‘interested persons’ to evaluate the proposal and respond.¹⁰ The published information must include the rationale for the measure.¹¹ The US wants to require the regulating agency to address those comments and explain substantive revisions, while others say they should be considered and be encouraged to explain the reasons.¹²

Comment

Regulations, which make laws operative, are singled out for particular attention. Minimum prior disclosure times make it difficult for governments to respond to urgent situations. Providing the rationale for the regulation means that decisions can be challenged more easily for lacking an ‘evidence’ base, not being the ‘least burdensome’ option available to achieve the government’s objective, or giving preference to non-market criteria. This needs to be viewed alongside the requirements in various other Annexes (for example, Domestic Regulation or Financial Services) that regulation is designed according to those standards.

4. Response to inquiries

Governments must set up an avenue to respond to queries from ‘interested persons’.¹³ Some countries suggest this should apply to a broad sweep of enquiries ‘related to the subject matter of the agreement’; others that it relates to regulations only.

Comment

This mechanism could open the door to a constant stream of enquiries from services firms that paralyses a ministry or agency. It would also allow them to collect information to form the basis of a review or dispute. The cumulative opportunities provided in this provision, and in the rest of TISA, allow firms to build evidence portfolios for disputes under other agreements, such as investor-state disputes under bilateral investment treaties or the investment chapters of free trade agreements.

5. Judicial or administrative review of decisions

Australia and the US want all Parties to maintain tribunals or procedures where an aggrieved service firm can obtain prompt review of administrative decisions that ‘affect trade in services’, and appropriate remedies where they are justified.¹⁴ If the procedures are not independent of the agency that made the decision it needs to provide for an ‘objective and impartial review’. Similar language has been proposed for the Domestic Regulation Annex.¹⁵

Comment

This proposal would impose additional legal opportunities for services firms (including domestic firms) to challenge a broad spectrum of decisions that ‘affect trade in services’. The nature of any remedies is unclear, including whether new forms of remedies might be required. There is no specific requirement that such reviews are as provided by, and governed by, domestic law. It could be argued that the grounds for review could include alleged breaches of this Annex, and the TISA itself. The vague scope of this mechanism would create uncertainty for decision-making and administrative bodies, especially if it applies at sub-central levels, and exposure to unpredictable legal liability.

6. Disputes

These obligations will presumably be subject to the dispute settlement chapter, as there is nothing that excludes its application, and whatever committee mechanisms are established under TISA.

Comment

The dispute mechanism will only be between states, but they will act as proxies for disgruntled services firms. It is not clear how the institutional arrangements in TISA will operate, but governments may be required to respond to complaints about individual matters or their more generic domestic regime, as well as their compliance with the ‘transparency’ rules.

7. Confidentiality

Switzerland has proposed a blanket confidentiality protection. Confidentiality is likely to be discussed as part of the core text, drawing on the wording in the GATS standard that allows information to be withheld for law enforcement purposes, the public interest, or the 'legitimate commercial interests' of a public or private enterprise.¹⁶

Comment

The GATS standard was drafted with more limited obligations in mind, and must be a minimum. Any confidentiality provision obviously needs to be subject to domestic freedom of information laws.

8. Possible limits to these rules

A number of countries have proposed qualifications to these various obligations, such as 'to the extent possible' or 'consistent with domestic law', but they are not agreed.

Another important disagreement is whether this 'transparency' provision only applies to central government or to all levels below. There will be different reasons for governments' positions, especially in federal states. Unitary states may also object that coverage of central government only, and not state or provincial governments, disadvantages them and is more onerous (an issue raised in the Trans-Pacific Partnership Agreement).

1 The Trans-Pacific Partnership Agreement, with many similar Parties (US, Australia, NZ, Chile, Canada,
Japan, Peru) has the same approach for four years.
2 TISA Annex on Financial Services: Article 16
3 TISA Annex on Domestic Regulation: Article 10
4 GATS Article III; Switzerland has reiterated this provision in the Transparency provision
5 Paragraph 1
6 Paragraph 5(a)
7 Paragraph 5(b)
8 Paragraph 2(a)
9 Paragraph 2(b)
10 Paragraph 3(b)
11 Paragraph 3(c)
12 Paragraph 3(d)
13 Paragraph 7
14 Article I[-]
15 Domestic Regulation Annex, paragraph 13
16 Paragraph 8, ref to GATS Article III*bis*.