TiSA

FOUL PLAY

UNI global union

TiSA

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CONTENTS

TiSA Glossary

4th industrial revolution
Transformation of global capitalism through new technologies that combine digital, physical and biological elements.

Algorithm
A self-contained procedure or formula for solving a problem, based on conducting a sequence of specified steps or actions, often combined in a computer programme.

Big data
Very large or complex data sets that are mined to reveal trends and patterns of behaviour, usually to use for commercial advantage.

Certification
The US domestic process of approving steps taken by another country to comply with an agreement as a precondition for US notification that its domestic requirements have been concluded.

Commercial presence
Having an office, branch, or subsidiary in a foreign country, known in GATS as "Mode 3" of service delivery.

CPCs
United Nations Central Product Classifications used to identify the services sectors and subsectors that are subject to commitments in a county's schedule. There are several versions of these CPCs, dating from 1991.

Cross-border supply
The consumer of a service and the supplier of a service are in different countries.

Developing country
A designation used at the WTO, but without any formal definitions of either "developed" and "developing" countries. Members adopt that designation for themselves, but other members can challenge their use of special and differential treatment.

Electronic commerce
The production, advertising, sale and distribution of services via telecommunications networks (eg. Amazon.com or Expedia.com).

eWTP
The World e-Trade Platform proposed by Jack Ma, the owner China's AliBaba.

FTA
"Free trade agreement" whose objective is to liberalise the rules that govern transactions between the parties, usually covering a wide range of areas, including goods, services, investment, intellectual property, government procurement, competition, etc.

GAFA
The dominant tech companies of Google, Apple, Facebook and Amazon

GATS
"The General Agreement on Trade in Services" is the agreement on services to which all WTO members are automatically a party.

Global South
A term used to describe countries of Latin America, Africa, much of Asia, and the Middle East collectively, in contrast to affluent countries, described by contrast as the Global North.

Limitations
The explicit exclusion of a government measure or an aspect of a service from a sectoral commitment in a country's schedule.

Local content measure
A requirement that the service or service supplier buys a certain amount of local content for incorporation in the service.

Measures
All forms of government regulation: statute, regulation, by-law, administrative decisions, policy, practice or any other action a government takes in relation to a service.

MFN
"Most-favoured-nation treatment" the principle of not giving services and suppliers from parties to the agreement less favourable treatment than is given to their counterparts from any other country.

Mode 1
The technical description for delivery of a service by a supplier in one party to a consumer of the service in another party.

Mode 2
The technical description for delivery of a service by a supplier in one party to a consumer of the service who uses the service in that country.

Mode 3
The technical description of a commercial entity of one party establishing a commercial presence in the territory of another party.

Mode 4
The technical description of the temporary presence of natural persons of one party in another party's territory to undertake work in a service sector.

Party's schedule
A schedule that sets out the commitments that have been adopted by a party through negotiation.

National treatment
Giving services or service providers of the other party no less favourable treatment that their national counterparts receive.

Natural persons
Real people, as distinct from juridical persons such as companies and organizations.

Negative list
A list that specifies which services, modes of delivery, and/or regulations and other measures are not subject to certain rules of the agreement.

Nullify and impair
Damage to the benefits that a party expects to receive from its membership of TiSA that is caused by another party making changes to its services regime or failing to carry out its obligations.

Offer
A party's proposal to commit to a certain level of liberalization, usually by improving access to its markets or national treatment, in response to a request from another party during negotiations; involves initial and subsequent offers.

Policy space limitation
This limitation in a party's schedule protects its right to maintain and introduce new measures that are inconsistent with its obligations to specified rules. In TiSA that applies to national treatment. These limitations are usually specified by name or by the service sub-sector or activity.

Positive list
A list that sets out which services, modes of delivery, and/or regulations and other measures are subject to certain rules of the agreement.

Ratchet
Any new liberalisation by a party is automatically locked in to that party's schedule. In TiSA that applies to national treatment (removing discriminatory restrictions on foreign suppliers or preference to national suppliers).

Request
A list of the services sectors, modes of delivery and measures that one party asks another party to commit to liberalise in its schedule during the course of negotiations.

Really Good Friends of Services
A group of WTO members formed to promote the further liberalization of services.

Schedule
A Party's list of binding commitments, primarily on market access to services markets and national treatment, but with scope to make commitments on additional matters, such as adopting an annex.

Sector
The description of the general service category that is subject to commitments or rules.

Smart products
Physical things that have digital systems embedded in them that transmit information for purposes relating to the thing.

Source code
Instructions to a computer written in a form that is readable by humans before being converted into object or machine code.

Standstill
The rule applying in a particular subsector at the time the agreement comes into force (unless another time is stated) cannot be made any more restrictive. This applies in TiSA to national treatment, where domestic services and suppliers receive better treatment than their counterparts from other TiSA parties.

State-owned Enterprise
An enterprise in which central government owns more than 50% of shares or can appoint a majority of directors, which is principally engaged in activities undertaken with an orientation towards profit-making and which can decide its own production and prices.

Subsector
A more specific service category within a general category of a service.

Supply of a service
All stages of production, distribution, marketing, sale and delivery of a commercial service.

TISA
Trade in Services Agreement being negotiated among 23 parties.

TPP or TPPA
Trans-Pacific Partnership Agreement negotiated between the Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, USA.

TTIP
Transatlantic Trade and Investment Treaty negotiation between the US and EU

Universal service obligation
Obligation that government placed on certain regulated services to supply a baseline level of the service

Universal postal service obligation (UPSO)
Obligation on government to provide a baseline level of a postal service to every resident in the country.

WTO
"World Trade Organisation"; whose (currently 164) members are committed to obey the organisation's trade rules. These rules cover services through the GATS.

TiSA

UNI's FUTURE ON THE LINE

Summary of the report

The Trade in Services Agreement (TISA) could literally change the lives of UNI's affiliates and their members as unions, workers, consumers, citizens and human beings.

Trade in services agreements are designed to serve capital. Labour is treated as a commodity, a mode of delivery, or a 'barrier to trade'- even though workers provide the services that are being 'traded'.

Since 2013 a group of governments have been secretly negotiating a deal that would lock the world into the failed neoliberal model of the past four decades. They call themselves **The Really Good Friends of Services.**

These governments are working with, and largely for, a corporate lobby known as **Team TiSA**. Its six US co-chairs come from the world's most powerful financial, technology, logistics and retail corporations: Citigroup, IBM, UPS, Walmart, MetLife and Liberty Mutual.

Team TiSA want a '21st century agreement' that removes all barriers to their global expansion and profitability and **puts handcuffs on national governments'** right to regulate, even when new services and technologies pose unforeseen risks in the future.

TiSA follows the failed model of other **anti-democratic mega-agreements**: the Trans-Pacific Partnership Agreement (TPP or TPPA), the TransAtlantic Trade and Investment Partnership (TTIP), the European-Canada Comprehensive Economic and Trade Agreement (CETA).

TiSA is *especially* important for two reasons: 1) its main purpose is to clear the path for the 4th Industrial revolution, or the **new wild west of capitalism** where a globalised economy is driven by digital technology; and 2) TiSA is the 'last man standing' since the collapse of the TPP and TTIP.

The TiSA talks have been held in Geneva under **a cloak of secrecy**. Only a handful of governments have released even some of their own documents. Analysis and critique has to rely on leaked texts.

The centrepiece of TiSA is **e-commerce**. The tech industry describes digital platforms as the new trade highway of the 21st century, likening their impact to the printing press in the 16th century and electricity in the 19th century.

Their model for success celebrates **constant disruption, reorganisation, relocation and automation**. Corporate wealth and power are concentrated at the top of a pyramid, with no social responsibility. Protections for workers and unionisation are seen as barriers to be stripped away.

High value activities of mega-corporations cluster in the North, along with élite employment. Workers are made dispensable, especially in the global South, through layers of competitive contracting, offshoring, automation, and bogus self-employment. **Precarious work becomes the norm**.

Three layers of TiSA **bind governments for the indefinite future**: 1) a core text sets the basic rules; 2) proposed annexes impose restrictions in policy areas (eg. labour mobility, finance, domestic regulation, transparency (for corporations)) and service sectors (eg. energy, telecommunications, maritime transport); and 3) schedules commit each country to these rules.

Team TiSA is demanding **unlimited rights to supply e-commerce, financial, telecom, and delivery services from outside the country**. So it is not surprising they are the targets of TiSA's most potent rules.

Very few restrictions currently govern the Internet; Team TiSA wants to keep it that way. TiSA's rules are designed to serve their needs 20 or 30 years from now by removing governments' ability to regulate their technologies, services and practices **whatever new technologies may evolve**, and irrespective of their economic, social, environmental or development impacts.

Strategies and **policies to support the domestic economy and jobs**, and require firms to transfer technology or hold data and have a presence inside the country would be **prohibited**.

TiSA's proposed rules on **telecommunications** have 5 main goals: 1) to undermine telecoms as a public service; 2) deregulate and guarantee all private and foreign telecom suppliers, from within and outside the country, access to services and networks; 3) force major telcos to facilitate competition, but defining them so that applies mainly to the global South; 4) require national regulators to police public telco's compliance with the TiSA rules; and 5) provide minimal consumer rights and protections.

For the **telecoms workforce** that means more cross-border services that kill local jobs; fragmenting and corporatising state-owned telcos to promote privatisation and sub-contracting; competitive pressures on labour costs, workloads, safety standards, and social rights like pensions and healthcare; deprofessionalisation of technical workers; feminisation of telecom servicing operations; and a fractured and unstable industry that is hard to organise.

Team TiSA wants unrestricted rights to supply **banking, insurance, investment and other financial services** across the border, including for e-commerce, and ensure regulations don't make business more difficult or less profitable. The industry becomes even more high-risk, high-profit, globally mobile and unstable.

Governments are asked to **lock in their current levels of financial deregulation and liberalisation**, promise never to regulate new and potentially toxic financial products and services, and sign away their rights to take effective measures to prevent a future financial crisis.

The globalised finance industry **minimises the costs of its workforce** by cutting wages, de-unionising, contracting out, offshoring and automation. Workers in state-owned banks and insurers, especially in the global South, face intense pressure from corporatisation and competition. Women are clustered in low paid, stressful and insecure back office work.

The TiSA agenda for **postal, courier and express delivery** services is set by DHL, Fedex, TNT and UPS. The globally integrated logistics chains they organise through digital platforms require **seamless cross-border flows of transport, goods, data, money and people**, free from government regulation. Public postal systems have to be minimised, while still providing access to a universal network. Amazon will piggy-back on these gains, forcing the Big Four to compete harder to survive.

Postal workers will face intensified competition from express delivery firms and the bogus 'self-employed' workforce. That means increased churning, short-term contracts and casualisation, and delivery through automation and artificial intelligence using drones, driverless vehicles and their successors. Fewer public sector jobs, lower union numbers and less bargaining power will threaten pay, conditions and social protections.

Overall, TiSA would mean intensified hyper-competition, contractualisation, digitalisation and automation for UNI workers, controlled by an oligopoly of super-powerful corporations. Workers, especially in the global South, become more vulnerable and expendable as work is automated and re-shored to the corporations' home base. Further **feminisation of the vulnerable, lower paid services workforce** widens the gender gap. Traditional national strategies of **unionisation, collective bargaining and industrial action** no longer work.

This trend is not new, but TiSA will **worsen the international race to the bottom** for labour in at least four ways:

- **Internationally**, corporations play countries off against each other to secure the least burdensome regulations and taxes;
- **Within nations**, a race to the bottom among layers of contracts, contract workers and the nominally 'self-employed' erodes hard-won protections, poses new barriers to the organisation of labour and undermines the bargaining position of those who are unionised;
- As new technologies enable **cross-border supply of services** that were once territorially bound, jobs are outsourced and offshored from one country to another, and create precarious new jobs that can easily be moved elsewhere or displaced by new technologies and re-shored; and
- In the guise of 'trade', **foreign workers** are imported for short periods to deliver services in another country under terms of employment that are often exploitative of the worker and exacerbate social dumping in the host country.

There is a common theme: **workers are pitted against workers in a battle for survival** that is not of their making.

UNI's workers are also disenfranchised as citizens. TiSA negotiations are secret. The rules guarantee corporate rights and put handcuffs on future governments' right to regulate in the national interest, even with an electoral mandate. Foreign governments and corporations are given the right comment on proposed new laws, while tribunals of trade experts pass judgment on the sovereign state's policies and regulations.

What to do? The TiSA negotiations were **unofficially suspended** in late 2016 for three reasons: 1) other countries don't know or trust what the Trump administration will do; 2) the EU has an internal fight over protecting privacy in the digitised world; and 3) the texts are nowhere near agreed. But governments are still working behind-the-scenes, urged on by Team TiSA. There is a **serious risk that negotiations could start up again without warning at any time**.

The current paralysis provides a **vital window to educate and mobilise UNI affiliates and their members** on TiSA, and to challenge the participating governments and corporate lobbyists at national, regional and international levels to abandon the deal.

What TiSA means for UNI workers

TiSA would impact on UNI workers and unions at the systemic level through binding rules that:

- support the global reorganisation of capital through a digitally-enabled mode of production;
- facilitate globally integrated but highly fragmented logistics and supply chains;
- promote hyper-competitive service provision through outsourcing and contractualisation;
- remove barriers to cross-border services and offshoring;
- prohibit economic strategies and policies that support the domestic economy and jobs;
- remove employment-related obligations or local purchase requirements on foreign investors;
- ensure corporate élites have a right to enter and work in other TiSA countries;
- allow foreign firms to use cheaper foreign contract workers to deliver services in a TiSA country;
- enable employers to bypass collective agreements and deunionise the workforce;
- create new jobs in the global South that are even more precarious, with workers clustered at the bottom end of the global value and supply chains;
- require pro-business approaches to regulation of licensing, qualifications and technical standards, including those that directly affect labour; and
- weaken the role of specialist international standard-setting bodies, notably in telecommunications and postal services.

1. INTRODUCTION

The Trade in Services Agreement (TISA) could literally change the lives of UNI's affiliates and their members as unions, workers, consumers, citizens and human beings. Since 2013 a group of like-minded governments have been secretly negotiating a deal that would lock the world into the failed neoliberal model of the past four decades. They call themselves ***The Really Good Friends of Services***.

The Really Good Friends of Services
Australia, Canada, Chile, Colombia, Costa Rica, European Union, Hong Kong China, Iceland, Israel, Japan, Lichtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, South Korea, Sweden, Switzerland, Taiwan, Turkey, United States of America

They are working with, and largely for, a corporate lobby known as ***Team TiSA***. The six US co-chairs come from the world's most powerful major financial, tech, logistics and retail corporations: Citigroup, IBM, UPS, Walmart, MetLife and Liberty Mutual. Team TiSA wants the right to operate seamlessly across the world. Their vision for TiSA is a '21st century agreement' that removes all barriers to the global expansion and profitability of their services industries and puts handcuffs on national governments' right to regulate, even when new services and technologies pose unforeseen risks in the future.

Why TiSA is important

If their vision for TiSA succeeds, power would be redistributed from the contested zone of national politics to the private domain that an oligopoly of mega-corporations control. Their rights would trump the needs of real communities. Inequality within and between countries would deepen ever further. And democratically-elected governments would be told they cannot act in the public's interest because some earlier government tied their hands in a secretly negotiated agreement. Incredibly, the Really Good Friends group of governments are willing to negotiate such a deal.

The TiSA talks have been conducted in Geneva under a cloak of secrecy. Only a handful of governments have released even some of their own documents. Despite the secrecy, many leaked texts and statements from the corporate lobbyists have revealed what is on the table. TiSA is following the same failed model as other anti-democratic mega-agreements: the Trans-Pacific Partnership Agreement (TPP or TPPA) and the TransAtlantic Trade and Investment Partnership (TTIP). However, it goes further in an important way. TiSA's principal purpose is to clear the way for what some describe as the 4th Industrial revolution, driven by digital technology—and what others call the new wild west of capitalism. Under TiSA, a small group of powerful private corporations stand to gain largely unregulated dominance of the infrastructure of the global economy through their control of technology, digital platforms, search engines, and big data.

The implications are huge. Those who control the digital platforms and supply chains operate through layers of competitive contracts that allow them to minimise costs and wages, responsibilities to workers and consumers, tax obligations and regulatory constraints. Cross-border e-commerce and networked supply and value chains are already creating turmoil for businesses and jobs in both services and manufacturing. Logistics operators and e-retailers are tailoring individualised transactions in ways that bypass warehouses and retail stores. Faceless algorithms connect suppliers to consumers, organising delivery through 'self-employed' contractors whose terms they dictate.

Artificial intelligence, such as drones, robots and driverless vehicles, is replacing work performed by human labour. Offshore call centres in finance or support services for telecom firms dehumanise work and workers who become literally invisible. Services, products, knowledge and technology that are blended in the so-called 'Internet of things', and use technologies like 3-D printers, threaten to displace traditional production in brick-and-mortar factories.

As these mega-corporations celebrate the constant disruption and 'creative destruction' of the 4th industrial revolution, employment becomes ever-more precarious. The workers who operate the services economy are dispensable. Labour is simply a factor of production to be reorganised, relocated and replaced as corporate strategies, profit targets and technologies dictate. 'Flexibility' and 'efficiency' are code for a fundamental shift from permanent, full-time, unionised employment. As HR firm Digby Morgan advised its employer clients:

> *How can your organisation adjust to the opportunities of the growing on-demand economy? First, the answer begins with adaptability. Consider flexible workers for roles you traditionally fill with permanent employees. Freelancers are no longer viewed as supplemental talent only; they may be the best-quality workers for your roles. Second, it's also important to recognise that more companies are competing for their services. That means you will need to expand your employer brand strategies to directly target freelance workers.*[1]

Far from empowering workers, contracting, offshoring, and illusory self-employment create a dependent and largely de-unionised workforce. As consumers, workers are courted, their data captured and sold, and their choices manipulated, without effective protections or remedies. As citizens and voters, they are disenfranchised.

UNI's affiliates and their members are at the centre of this turmoil, because finance, telecoms, delivery and e-commerce are the engines of the global digital economy. If TiSA succeeds where TPP and TTIP failed, UNI-Global members can expect an endless cycle of job-destroying contractualisation, outsourcing, offshoring and automation.

Future-proofing global rules for capital

TiSA's rules are designed to serve the needs of these corporations twenty or thirty years from now, whatever new technologies may evolve, and irrespective of the economic, social, environmental or development impacts they may have.

Specifically, they are demanding unlimited rights under TiSA to supply financial, telecom, e-commerce and delivery services from outside the country. Those who do so can't be required to have any local presence inside the country, so there is no effective way to hold them to account for labour, consumer or ethical practices. Data can be transferred in and out of the country without restrictions and be held in any country, however weak its privacy or consumer protections or however intrusive its surveillance may be. Yet the corporations insist that their own source codes are kept secret to protect their market power. Banks can move their corporate employees, and probably their data, freely around the world. State-owned post offices, telcos and banks must operate on a corporate model, removing their reason to exist and readying them for sale. E-payments are expedited, with unfettered movement of money into and out of countries, depriving the domestic economy of the consumer dollar and facilitating tax evasion. That is just the start …

TiSA seeks to achieve these restrictions on what governments can do by combining a core text, a series of annexes, and country-specific schedules of commitments. It is no coincidence that TiSA's most powerful rules relate to financial services, electronic commerce, telecommunications and delivery.

1 https://www.digby-morgan.com/job-seeker/career-hub/archives/uberisation-of-the-workforce-accelerates-to-more-industries_63/

Empowering corporations, disempowering workers

Democratically-elected governments are creating unimaginable new risks by empowering private mega-corporations to control the platforms for global commerce, communications and even governance, and surrendering the right to try to control how they exercise that power. The lessons from the global financial crisis, and many others before it, have been ignored. So has the groundswell of opposition from unions, social movements, public intellectuals and voters around the world who have rejected these mega-deals, well before Brexit and Trump.[2] This critique has now become mainstream. Prominent Harvard University Professor Dani Rodrik warned that this economic model is politically unsustainable:[3]

> *The frustrations of the middle and lower classes today are rooted in the perception that political elites have placed the priorities of the global economy ahead of domestic needs. Addressing the discontent will require that this perception is reversed.*

The structure of this report

This report explains how TiSA could become a reality. Because the negotiations are secret it relies on leaked draft texts and analyses, statements from governments and corporate lobbies, historical material from earlier trade in services negotiations, and insights from unionists, academics and non-government organisations.

The report is organised in nine chapters plus a series of technical annexes. The next chapter explains who is rewriting the global rules and the state of the negotiations. Chapter 3 spells out the impact of TiSA on employment, workers and unions. Chapter 4 explains the context of the TiSA agenda on e-commerce. Chapter 5 provides an overview of TiSA itself. Chapters 6, 7 and 8 examine sectors of particular importance to UNI: telecommunications, financial services, and postal and delivery services. The final section calls on UNI to mobilise to stop TiSA.

2 In March 2017 more than 100 organisations sent an open letter to trade ministers from the TPP and other countries meeting in Chile warning them not to resurrect that deal in other forums, such as TiSA. Open Letter to Trade Ministers Meeting in Chile, 14-15 March 2017, http://www.citizen.org/documents/Chile-Ministerial-Letter.pdf

3 Dani Rodrik, 'There is no need to fret about deglobalisation', *Financial Times*, 4 October 2016

2.

WHO IS REWRITING THE RULES FOR GLOBAL COMMERCE

The 12-country Trans-Pacific Partnership Agreement (TPP)[1] and the TransAtlantic Trade and Investment Partnership (TTIP) between the United States of America (US) and European Union (EU) were derailed by a wave of resistance from people's movements, including international and local trade unions. The US has formally withdrawn from the TPP and informally abandoned TTIP for now. TiSA has become increasingly important as the 'last man standing' of the mega-regional deals, with various of TPP texts transferred across to TiSA in 2016.

But TiSA is in trouble too. In December 2016, the TiSA negotiations were unofficially suspended for two reasons: the EU had been unable to settle a proposal on the controversial issue of data privacy; and other countries did not know or trust what the Trump administration would do. Leaks also show that the negotiating texts were far from any possible conclusion. But there is no room for complacency, with a real risk that negotiations could suddenly starting up again- unless critics, including UNI Global, make that impossible. The current paralysis in the negotiations provides a vital window to educate and mobilise affiliates and their members on TiSA, and to challenge the participating governments and corporate lobbyists at national, regional and international levels to abandon the deal.

The 'Really Good Friends of Services'

Rich countries with large or sophisticated services firms and governments that are ideologically committed to neoliberalism have long pushed for 'gold standard' global rules to govern services. The plan dates back to the late 1970s when corporate lobbyists in the US, led by American Express, Citi and AIG, wanted to remove restrictions on their growing international operations, especially on foreign investment and flows of data and money. They rebranded regulation of their activities as 'barriers to trade' and convinced the US government to push for negotiations to liberalise 'trade in services' as part of the Uruguay round of trade talks from 1986 to 1994. The US got the other OECD countries on board, but they met strong resistance from the global South. The resulting General Agreement on Trade in Services (GATS), which forms part of the World Trade Organization (WTO) raft of agreements, fell short of their ambitions.

A new round of services negotiations was launched in 2000, as provided for in the GATS.[2] These talks were incorporated into the Doha round of WTO negotiations from 2001. A group of countries called the Friends of Services pushed hard for more deregulation and liberalisation. The talks became paralysed for several reasons: an international civil society campaign against the corporate takeover of services; continued resistance from countries of the global South to the expansion of the GATS, especially as richer countries refused to open their doors to temporary services workers; and the 'single undertaking' that involved trade-offs between agriculture, goods and services within the broader Doha mandate.

A frustrated subset of countries, now named the ***Really Good Friends of Services***, pursued a multi-pronged strategy to circumvent the stalemate. They organised plurilateral talks among themselves in the late stages of the WTO's Doha round. Outside the WTO, they pressured the global South to agree to stricter rules and much more extensive commitments on services in bilateral and regional free trade agreements (FTAs). The texts of new generation mega-agreements- the TPP, the TTIP, and the EU Canada agreement (CETA) – advanced their quest for new 'gold standard' rules, while reflecting the parties' particular sensitivities and interests. Such differences are also apparent in TiSA.

1 Australia, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore and US, who are all participants in TiSA, plus Brunei Darussalam, Malaysia and Vietnam.

2 GATS Article XIX.1

The TiSA negotiations were launched in 2013 on the physical margins of the WTO. Table 2.1 lists the 23 parties negotiating TiSA (counting the EU as one) as of December 2016 when negotiations were informally suspended. Several countries from the global South joined the talks (Colombia, Costa Rica, Mauritius, Panama, Pakistan). Singapore, Uruguay and Paraguay left, Uruguay after a strong union-led national campaign.[3] The US has blocked China from participating.[4]

Table 2.1 TiSA Negotiating Parties (* joined later; # withdrew)

Australia (AU)	Mexico (MX)
Canada (CA)	New Zealand (NZ)
Chile (CL)	Norway (NO)
Chinese Taipei (TW)	Pakistan (PK)
Colombia (CO)	Panama (PA)
Costa Rica (CR)	Paraguay * #
European Union (EU) (28 countries)	Peru (PE)
Hong Kong China (HK)	Singapore #
Iceland (IS)	South Korea (KR)
Israel (IL)	Switzerland (CH)
Japan (JP)	Turkey (TR)
Liechtenstein (LI) *	United States of America (US)
Mauritius (MA) *	Uruguay * #

The first round of negotiations was held in Geneva in March 2013. By December 2016 there had been 21 rounds, hosted by the US, the EU or Australia. The later rounds were held within the WTO buildings and serviced by the WTO secretariat, even though TiSA has no WTO mandate.

The negotiating texts and documents are secret. Most information that is publicly available is from leaks posted on Wikileaks,[5] Greenpeace,[6] Associated Whistleblowing Press,[7] and bilaterals.org,[8] which hosts the most recent documents from the November 2016 round. At the beginning of negotiations, the US asked other negotiating parties to agree to the same terms of secrecy as the TPP: not releasing any negotiating documents and related communications between the parties (aside from the final text) for four years after the agreement comes into force; each country could decide what information to share internally on a confidential basis.[9] Cover sheets of leaked TiSA documents show the US extended the four years' non-disclosure in TPP to five years for its own TiSA documents.[10] It is not known which, if any, TiSA parties responded to the US request. Norway, Switzerland and the EU have publicly released their own initial and revised offers of commitments along with some other documents they have tabled, and the EU has published edited summaries of each round.[11] The New Zealand government says it made no written commitment to secrecy, but still refuses to release any documents.[12]

3 Viviana Barreto and Daniel Chavez, 'TiSA and state-owned enterprises: Lessons from Uruguay's withdrawal for other countries in the South', Transnational Institute and Commercio Redes, 2017, https://www.tni.org/en/publication/tisa-and-state-owned-enterprises

4 *China's Economic Transformation: Lessons, impact and the path forward*, Peterson Institute for International Economics, October 2015, PIIE briefing 15-3, 15

5 https://wikileaks.org/tisa/

6 https://ttip-leaks.org/2016/09/20/greenpeace-netherlands-leaks-tisa-negotiation-texts-publishes-analysis-of-energy-annex-during-geneva-negotiations-2/

7 https://data.awp.is/filtrala/2014/12/17/19.html

8 http://www.bilaterals.org/tisa

9 https://ttip-leaks.org/favez/letter-by-the-us-ambassador-seeking-written-confirmation-by-participation-of-three-rules-of-confidentiality/

10 eg. https://wikileaks.org/tisa/document/20151006_Annex-on-State-Owned-Enterprises/

11 http://ec.europa.eu/trade/policy/in-focus/tisa/

12 New Zealand Secretary of Foreign Affairs and Trade to Jane Kelsey, 26 October 2016.

Exclusion of the Global South

While TiSA's negotiating parties claim common cause and point to the participation of several countries from the global South, the Really Good Friends are predominantly wealthy countries. This is significant for at least three reasons.

First, there is a lot of rhetoric that the expansion of e-commerce and global value chains will create opportunities and help close the gap for the global South, especially for small and medium enterprises.[13] But TiSA would prohibit policies that are traditionally used to promote development and benefit local businesses and local jobs. These include subsidies and protections for infant industry from competition; establishing a local presence, with flow-on economic benefits to employment, input suppliers, domestic spending and tax revenue; requirements that foreign investors transfer technology and use local content; and use of local computing facilities that can justify building capacity and infrastructure. TiSA's emphasis on cross-border services and data storage encourages provision from offshore hubs that are unlikely to be located in most developing countries, and where they are they can easily be relocated. Already there is a trend to 're-shore' production to home countries once automation becomes cheaper than offshore labour.[14]

Second, the GATS[15] and the Doha negotiating mandates[16] say that developing countries are entitled to special and differential treatment when making trade in services commitments and developed countries must make commitments that will genuinely deliver economic benefits to the South. Least-developed countries (LDCs) are entitled to even greater flexibility. The GATS rules governing other free trade agreements say special flexibilities are *mandatory* when those agreements are between developing and developed countries.[17] Yet TiSA has no special and differential treatment or development flexibility. As with the WTO, any developing countries acceding later could be asked to make even higher commitments than the originating TiSA parties.[18]

Third, TiSA is a blatant power play by rich countries to design a 'gold standard' deal that works for them and their corporations, then export it back to the WTO, and by-pass resistance from the global South to expanding the GATS.[19] The leaked core text says parties must consider ways to incorporate rights and obligations under TiSA into the WTO 'as soon as possible'. Any TiSA party can raise such a proposal and the joint committee of the parties would take a decision 'as necessary'.[20]

This 'multilateralisation' process might occur in several ways. The EU initially proposed a modular approach. TiSA has been structured to mirror the core GATS text, with the new rules and obligations contained in a series of annexes and countries' schedules of commitments. When enough WTO members were recruited to TiSA to reach a critical mass, the EU said they should propose the adoption of TiSA as a plurilateral WTO agreement.[21] A plurilateral agreement would not bind all WTO members, but over time the text would become the new norm, and developing countries would be pressured to comply with rules they had no role in negotiating. Meanwhile, individual WTO members could unilaterally add more liberalised TiSA commitments to their GATS schedules at any time.

The US (at least pre-Trump) preferred to cherry pick specific parts of TiSA and push them into the WTO. By 2016 the EU seemed to have adopted the same strategy, leading moves in the WTO to launch negotiations on e-commerce at the Buenos Aires ministerial in December 2017.[22] Adopting

13 World Bank, *World Development Report 2016: Digital Dividends*, Washington DC, 2016

14 Michael Belfiore, 'Automation brings manufacturing back home', *AutomationWorld*,13 April 2016, https://www.automationworld.com/article/technologies/robotics/automation-brings-manufacturing-back-home

15 GATS 1994, Article 4.3 says: 'Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial need'. That is reiterated in GATS 1994 Article 19 relating to further negotiations under the GATS.

16 Paragraph 26 of the WTO Hong Kong Ministerial Conference Declaration 2005 recognised that LDCs should not have to make any new commitments beyond those already made in the GATS.

17 GATS 1994, Article 5

18 TiSA, Article IV:9 and IV:10, Core text, dated November 2016.

19 The historical transition from GATS to TiSA is examined in Jane Kelsey, 'From GATS to TiSA: Pushing the trade in services regime beyond the limits', *European Yearbook of International Economic Law*, 7, 2016, 119-152.

20 TiSA, Article IV.11 and IV.12, Core text, dated November 2016.

21 European Commission, 'Negotiations for a Plurilateral Agreement on Trade in Services', Memorandum, 15 February 2013, http://europa.eu/rapid/press-release_MEMO-13-107_en.htm?locale=FR

22 'WTO's Discussions on Electronic Commerce', Analytical Note, SC/AN/TDP/2017/2, January 2017, South Centre, Geneva

the ‘21st century’ rules of the Really Good Friends and Team TiSA could have massive and potentially irreversible negative impacts on the global South, their workers and their communities, and is being strongly contested by the Africa group and the Least Developed Countries in the WTO.[23]

The corporate lobby

Team TiSA

TiSA’s official corporate cheerleaders call themselves ***Team TiSA.*** According to its website, Team TiSA is ‘dedicated to promoting and advocating for an ambitious agreement which eliminates barriers to global services trade, to the benefit of services providers, manufacturers and farmers, and consumers globally’.[24] Workers don’t rate a mention. The full membership is set out, by sector, in Table 2.2. The tech sector, telecoms and finance are the driving forces, along with logistics and e-retail. That is consistent with the sectoral base of the six co-chairs: Citigroup (finance), MetLife and Liberty Mutual (insurance), IBM (tech), UPS (express delivery, logistics), Walmart (retail, e-commerce),

Table 2.2 Team TiSA by sector

IT and telecoms	Finance	Retail & Logistics	Others
AT&T	Ace Group	Amway	*Media/entertainment*
BSA/ The Software Alliance	Aflac	EBay Inc	21st Century Fox
Cisco Systems Ltd	AIG	Express Association of America	Motion Picture Association of America
Computer & Communications Industry Association	American Council of Life Insurers	Fedex	The Walt Disney Company
Consumers Electronic Association	American Insurance Association	National Retail Federation	
Computer & Communications Industry Association	Citigroup	Retail Industry Leaders Association	***Professions & consultants***
Express Association of America	Council of Insurance Agents and Brokers	UPS	C&M International
Google	JPMorgan Chase	Walmart	Cassidy, Levy & Kent
HP	Liberty Mutual		Council for Global Immigration
IBM	Mastercard	***General Corporate Lobby Groups***	Deloitte
Information Technology Industry Council	Metlife Inc	Coalition of Services Industries	King & Spalding
Intel	Property Casual Insurers Association of America	Council for Global Immigration	Kyle House Group
Microsoft	Prudential	Emergency Committee for American Trade	Manchester Trade
Oracle Corporation	Visa International	National Foreign Trade Council	Sandler Travis & Rosenberg
Software and Information Industry Association		United States Council for International Business	White & Case
TechAmerica		US Chamber of Commerce	
Verizon			***Healthcare***
Western Digital			Alliance for Healthcare Competitiveness
			Agri and manufacturing
			American Farm Bureau Federation
			Security
			Chubb Corporation
			Tyco

These lobbyists enjoy privileged access to governments, negotiators and the WTO, giving credence to the view that TiSA is not just being written for the corporations, but indirectly by them. The US has a system of advisory committees whose members have access to draft texts as cleared advisers. For example, the US Chamber of Commerce, Express Association of America, UPS, Fedex and DHL Global Mail all sit at the table of the US Department of State in its Advisory Committee on International Postal and Delivery Services. As of March 2014 (during the TPP, TiSA and TTIP negotiations) the 41 members of the Advisory Committee on International Communications and Information Policy included representatives from Oracle, Boeing, Google, Facebook, AT&T, Yahoo,

23 Ravi Kanth, ‘Africa Group’s Deadly Blow to E-com Thematic or Negotiating Issues talks’, TWN Info Service, 25 October 2016, http://www.twn.my/title2/wto.info/2016/ti161021.htm

24 www.teamtisa.org

Microsoft, Cisco, Verizon, Consumer Electronics Association, Lockheed Martin, Telecommunications Industry Associations and the Satellite Industry Association.[25] Legislators have no equivalent access or influence. Beyond a token presence,[26] critics of the TiSA agenda, including global, regional and national unions, are excluded (and ignored).

Cross-country coalitions

Various coalitions of corporate interests are also key players, giving the same corporations multiple voices and forums. The US ***Coalition of Services Industries (CSI)*** includes most of the individual members of Team TiSA. It is part of the ***Global Services Coalition (GSC)*** whose Vice-President for Global Trade Services is from Fedex. The GSC has been pushing the digital trade agenda and singled out ‘the new so-called “21st century issues” such as cross-border data flows, so-called forced localisation requirements, and competition from state-owned and state-sponsored enterprises (SOEs).’[27] It has supported the inclusion of China in the TiSA talks, but only if China commits to their required level of ambition.

The global coalition has issued a series of TiSA-specific statements urging a rapid and ambitious deal.[28] Two of these in mid-2016 targeted domestic regulation, transparency in licensing procedures, financial services, delivery services, telecommunications and e-commerce (particularly data flows and prohibitions on requirements to hold data locally). The GSC also sought coverage and commitments on ‘new services’ (those that do not yet exist), removal of all ‘barriers’ at subnational levels of government, and minimisation of reservations that maintain a country’s policy space.[29]

Other countries in the Global Services Coalition include ***national coalitions*** from nine other TiSA parties: Australia, Canada, Colombia, the EU, Hong Kong, Japan, Mexico, New Zealand, Taiwan, and the UK (the City). This spread gives the GSC access to many national governments, as well as international institutions, including the WTO.

The ***European Services Forum*** was first set up to influence the GATS 2000 negotiations. It bills itself as ‘a major voice of the European services industries’[30] whose main stake lies in the liberalisation of the services markets in connection to the WTO GATS negotiations and the EU bilateral trade negotiations.[31] The Forum was an early promoter of TiSA and plays an active lobbying role across the EU’s many negotiations. Members include British Telecom, DeutschePost DHL, Deutsche Telekom, Groupe La Poste, Inmarsat, Oracle, Tata Consultancy Services and Telenor. Major finance sector players include the CityUK and the European Banking Federation,[32] BusinessEurope and Digital Europe. There are also sectoral groups[33] such as finance, postal and express delivery,[34] distribution/retail services,[35] telecommunications,[36] and shipping[37].

In addition to collective lobbying, major corporations have pushed their own sectoral interests. Later chapters of this report look at the aggressive demands from the financial, telecoms and delivery lobbies.

25 http://www.state.gov/e/eb/rls/othr/2014/223376.htm

26 Jean-Baptiste Velut, ‘What Role for Civil Society in Cross-Regional Mega-Deals? A comparative analysis of US and EU trade policies’, Papers in Political Economy, no.55, 2016, paras 34-42, http://interventionseconomiques.revues.org/2839?lang=en#tocto3n1

27 http://www.servicescoalition.org/images/2013_GSC_Communique_Oct_31stcompressed.pdf

28 https://servicescoalition.org/about-csi/global-services-coalition

29 https://servicescoalition.org/images/2016_Global_Services_Summit/GSC_Statement_-_July_2016_-_Final_Draft.pdf

30 http://www.esf.be/new/who-we-are/

31 http://www.esf.be/new/tisa/; http://www.esf.be/new/wp-content/uploads/2012/03/Seminar-on-Plurilateral-Services.pdf

32 Deutsche Bank, HSBC, Standard Chartered Bank, Zurich Financial Services, European Banking Federation, European Savings Banks Group, the City UK.

33 http://www.esf.be/new/who-we-are/members/by-sector/

34 Deutsche Post DHL, European Express Association, Groupe Law Poste, PostEurop,

35 Ecommerce Europe, EuroCommerce, Foreign Trade Associations, Seldia European Direct Selling Association

36 British Telecommunications, Deutsche Telekom, Inmarsat, Orange, Telenor, European Public Telecommunications Network Operators’ Association, European Satellite Operators Association,

37 European Community Shipowners’ Association

The state of play

It became clear during 2016 that problems facing TPP would increase the importance of TiSA, symbolically and strategically. The TPP was concluded in February 2016, but the Obama administration never had the numbers to pass it in Congress. In October 2015, the US belatedly tabled a text on SOEs in TiSA that was drawn from the TPP. A TPP-style e-commerce text was already tabled. The Obama administration also announced plans to use TiSA to secure an additional obligation from the TPP parties to allow financial services data to be held offshore,[38] which some members of Congress had made a pre-condition for their support.

The TiSA parties set a target to conclude the agreement at a ministerial meeting in early December 2016. Presumably, they wanted to sign the deal before Obama left office. Leaked texts from November 2016 show a serious attempt to achieve this by dropping some extreme proposals and reaching compromises on others. However, many matters remained unresolved. There could be no TiSA unless the US and EU both agreed on the text, meaning they would have had to finesse their major points of dispute, notably on the maritime transport annex and sub-federal regulation of financial services on the US side, and the privacy protections for e-commerce and commitments never to regulate 'new services' for the EU. That didn't happen.

The EU's position was the most problematic for the other parties. Team TiSA insisted that any genuinely '21st century' deal would have to allow unfettered movement of data, including financial data across borders; have rules that protected digital platforms and internet-enabled commerce from future regulation; and enable delivery and logistics operators to reorganise their global supply chains freely through whatever new technologies emerge. The EU refused to sign away the right to regulate new services in the future. It also could not agree a position internally about privacy protections and would not commit to allow data to be held offshore without them. That made it impossible to meet the December deadline.[39] There were murmurings that TiSA could proceed without the EU, but this lacked credibility.[40]

Then Donald Trump was elected US President. Unlike the TPP, TiSA was under the radar throughout the presidential election campaign. However, TiSA parties were unwilling to negotiate with the US without knowing Trump's position. The December ministerial meeting was cancelled and officials conducted a 'stocktake' instead.[41]

In February 2017, President Trump effectively withdrew the US from the TPP.[42] Although TiSA was not mentioned, the executive order expressed a clear preference for bilateral rather than plurilateral deals, which would allow the US even more leverage.[43] The serious risks that cross-border digital trade poses to brick-and-mortar jobs in services and greater offshoring should have caused them to withdraw from TiSA as well, but there is no evidence they have made that connection. As of April 2017, the position on TiSA is still unclear. There have been mixed messages from Trump himself. He promised a summit of major tech companies in a post-election speech that his administration would make 'trade across borders' much easier.[44] Yet, *Bloomberg* notes that 'Trump has a prickly relationship with the industry. He differs with many tech CEOs on immigration, internet security and regulation and on government investment.'[45] Some 100 tech companies, including Google, Apple,

38 TPP parties not in TiSA would be pressured to sign side-letters to the same effect.

39 'Hazards ahead for TiSA talks', *Politico*, 24 October 2016

40 'EU ambassador skeptical of value, possibility of TiSA deal without the EU', *Inside US Trade*, 16 November 2016

41 'TiSA Ministerial Cancelled, Officials to Prepare for 2017', *ICTSD*, 24 November 2016, http://www.ictsd.org/bridges-news/bridges/news/tisa-ministerial-cancelled-officials-to-prepare-for-2017.

42 https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP

43 https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

44 'Trump promises tech companies he will "make it a lot easier for you to trade across borders", *Inside US Trade*, 14 December 2016, https://insidetrade.com/trade/trump-promises-tech-companies-he-will-make-it-lot-easier-you-trade-across-borders.

45 'Trump meets with tech chiefs among worries on trade', *Bloomberg*, 15 December 2016, https://www.bloomberg.com/politics/articles/2016-12-14/trump-tells-tech-titans-he-s-here-to-help-you-folks-do-well.

Microsoft and Facebook joined the legal challenge to Trump's ban on entry for people from seven Muslim-majority countries.[46]

The ongoing delay in announcing a position on TiSA suggests an internal battle inside the administration. Powerful members of the Trump Cabinet are from Wall Street and the energy industry, both major lobbyists for TiSA, and advisers are close to the tech industry.[47] The incoming US Trade Representative Robert Lighthizer dodged questions about TiSA while being questioned by Congress.[48]

If the Trump administration does re-engage with TiSA, it is likely to demand the substantial revision of texts agreed so far and the introduction of new controversial proposals. Some of the text that was dropped in 2016 could well resurface.

The US and other countries also seem likely to insist that the EU tables its position on data and privacy before negotiations resume. There are suggestions that the European Commission has developed language on cross-border data flows, but there is no political will to engage the issue until after the German elections in September 2017.[49]

What happens next is speculation. As of July 2017, the negotiations are effectively suspended and no new rounds have been scheduled. The longer this continues, the harder it will be to recapture the momentum. The corporate lobbies and many of the Really Good Friends are pushing for negotiations to resume as soon as possible. It is critical to keep the pressure on to ensure that does not happen. The current roadblocks provide important action points and potential alliances for the strategy to stop TiSA. The successful union-led campaign in Uruguay that saw that government withdraw from the TiSA negotiations provides a brilliant precedent.

Whatever happens to TiSA, there is still an urgent need to understand the underlying agenda because the TiSA texts, drawn largely from the TPP, are already being repackaged and appearing in new forums, including the EU Japan free trade agreement and the WTO.

Entry into force

Assuming that TiSA negotiations do resume and they reach an agreement, the text would then be signed, followed by ratification in each party. The leaked text from November 2016 shows they have not decided how many countries must ratify TiSA before it could come into force, but it proposes two-thirds of the original signatories.[50] Although the deal would lack political or commercial meaning without both the US and EU, the formula is not weighted to reflect that reality (by contrast, both the US and Japan had to be original parties to the TPP).

Each country has to satisfy its constitutional requirements for adopting the agreement. These vary. In some countries, the executive (governing party/ies) holds the final authority; others require approval by the legislature and possibly a referendum. Every stage of ratification matters politically, as the opposition from some European Member States showed with CETA.[51]

The US and EU processes are especially fraught. Because the US would not agree to anything in TiSA that requires changes to its domestic law, it is not clear whether the agreement would need Congressional approval. If it does, TiSA would benefit from the Fast Track authority granted to Obama that means Congress has to vote 'yes' or 'no' to trade agreements and cannot pick apart the text.[52] No-one knows yet how the current Republican-dominated Congress would view TiSA. Presumably they would be supportive, as many Team TiSA corporations are their political donors; they may still object that too many concessions were made during the negotiations. Other Republicans might

46 'Nearly 100 Tech Companies Join Forces in Court to Oppose Donald Trump's Immigration Ban', *Forbes*, 6 February 2017, http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/mattdrange/2017/02/06/nearly-100-tech-companies-join-forces-to-oppose-donald-trumps-immigration-ban/&refURL=https://www.google.com.au/&referrer=https://www.google.com.au/

47 'Peter Thiel, Trump's Tech Pal, Explains Himself', *New York Times*, 11 January 2017

48 'Lighthizer does not rule out resuming TTIP talks, non-committal on TiSA', *Inside US Trade*, 20 March 2017

49 'EU decision on data flow language in TiSA not expected until fall; U.S. position still unknown', *Inside US Trade*, 13 February 2017.

50 TiSA, Article IV:16, Section IV – Administrative and Institutional Provisions, Core text, dated November 2016.

51 Stewart True and Scott Sinclair, 'EU Parliament ratifies CETA (only three dozen more votes to go)', 15 February 2017, http://behindthenumbers.ca/2017/02/15/eu-parliament-ratifies-ceta-three-dozen-votes-go/

52 Ellen Brown, 'Fast-Tracking TiSA', *Counterpunch*, 12 June 2015, https://www.counterpunch.org/2015/06/12/fast-tracking-tisa/

oppose more offshoring and the loss of brick-and-mortar jobs, but the low profile of TiSA makes that less likely than for the TPP.

The domestic US process known as 'certification' would be equally important. Before the US notifies completion of its domestic processes and its agreement to ratify TiSA for a particular country it would require that country to implement the *US understanding* of its TiSA obligations. In the past, the US has required other countries to revise their proposed laws, and even written the laws for them, in ways that effectively change the 'final' text.[53] The Trump administration could be expected to exploit that leverage to the full for TiSA.

Ratification would also be problematic in Europe where TiSA has been more controversial. The European Parliament set several red lines when it granted the European Commission a negotiating mandate,[54] but the Commission dismissed them as unachievable.[55] Commission officials initially said that TiSA would be treated as a mixed agreement because it covers some matters that fall with Member States' responsibilities; that would mean the final text requires the consent of the European Parliament and ratification by Member States according to their national procedures.[56] Such consensus could prove difficult. However, the European Court of Justice ruled on the EU-Singapore free trade agreement in May 2017 that the EU had exclusive jurisdiction to enter agreements covering subject matter similar to TiSA,[57] aside perhaps from TiSA's more extensive e-commerce chapter. To date, Brexit appears not to have affected the progress of the negotiations, but it could also make the bargaining over schedules more complex.

Again, these political pressure points provide strategic opportunities for UNI Global and its allies.

53 see www.tppnocertification.org

54 'TiSA: EP toughens safeguards concerning services of general economic interest', *EU Trade Insights*, 4 February 2016, http://www.borderlex.eu/eutradeinsights/tisa-ep-toughens-safeguards-concerning-services-of-general-economic-interest/.

55 Daniela de Vincenti, 'Parliament sets red lines for TiSA negotiations', 4 February 2016 https://www.euractiv.com/section/trade-society/news/parliament-sets-red-lines-for-tisa-negotiations/; Christophe Kiener, EU Chief Negotiator for TiSA to International Trade Committee (INTA) of the European Parliament, 30 June 2016.

56 'Hazards ahead for TiSA talks', *Politico*, 24 October 2016, http://www.politico.com/tipsheets/morning-trade/2016/10/hazards-ahead-for-tisa-talks-217012

57 Opinion 2/15 of the European Court of Justice (Full Court), **Opinion pursuant to Article 218(11) TFEU,** 16 May 2017, ECLI:EU:C:2017:376

3.

WHAT TiSA MEANS FOR UNI WORKERS

A snapshot

Trade in services agreements are designed to serve capital. Labour is rarely visible, except as a commodity, a mode of delivery, or a 'barrier to trade' - even though it is workers who provide the services that are being 'traded'. On the rare occasions that the Really Good Friends of Services and Team TiSA talk positively about workers it is either to promise a fanciful increase in employment from TiSA or to extol the benefits for workers of greater flexibility from harnessing new technologies.

Their vision of a globally-integrated services market is devoid of politics or social responsibility, leaving them free to maximise their profits through constant reorganisation, relocation and technological innovation. Those with corporate wealth and power are concentrated at the top of the pyramid, operating through layers of highly competitive subcontractors who employ a fragmented, vulnerable and exploited workforce. The 21st century vision of constant disruption and creative destruction poses an existential threat to working people, their families and communities.

This trend is not new, but TiSA will intensify the international race to the bottom for labour in at least four ways:

- ***Internationally***, corporations play countries off against each other to secure the least burdensome regulations and taxes;
- ***Within nations***, a race to the bottom among layers of contracts, contract workers and the nominally 'self-employed' erodes hard-won protections, poses new barriers to the organisation of labour and undermines the bargaining position of those who are unionised;
- As new technologies enable ***cross-border*** supply of services that were once territorially bound, jobs are outsourced and offshored from one country to another, creating precarious new jobs that can easily be moved elsewhere or displaced by new technologies that encourage the 'reshoring' of operations to the home country; and
- In the guise of 'trade', ***foreign workers*** are imported for short periods to deliver services in another country under terms of employment that are often exploitative of the worker and exacerbate social dumping in the host country.

There is a common theme: workers are pitted against workers in a battle for survival that is not of their making.

This commercial model is not only unjust; it is socially and politically unsustainable. Rampant inequalities and the economic distress borne by families, communities and entire nations have provoked a mounting backlash against such agreements. While the turmoil in the US and Europe makes the headlines, this radical disruption will impact most severely on the global South. Those workers have fewer choices, as do their small and medium businesses, and even their national enterprises. The promise of new prosperity through the digital economy and global supply chains is a cruel illusion.[1] The more power is concentrated in those who control the global finance, logistics and digital platforms, the less power governments, workers and unions in the global South will have.

1 South Centre, 'The WTO's Discussion on Economic Commerce', Analytical note SC/AN/TDP/2017/2, January 2017

TiSA's systemic effects on labour

TiSA would impact on workers and unions at the systemic level, where the project aims to:

- support the global reorganisation of capitalism through a digitally-enabled mode of production;
- facilitate globally integrated, but highly fragmented, logistics and supply chains;
- promote hyper-competitive service provision through outsourcing and contractualisation;
- remove barriers to cross-border services and offshoring;
- prohibit economic strategies and policies that support the domestic economy and jobs;
- remove requirements on foreign investors to buy local and train local workers in new technologies;
- ensure the élite workforce has a right to enter and work in other TiSA countries;
- allow foreign firms to use cheaper foreign contract workers to deliver services in a TiSA country;
- enable employers to bypass collective agreements and deunionise the workforce;
- expand the feminised, vulnerable, lower paid services workforce and widen the gender gap with secure and high-paid élite services work;
- create new jobs in the global South that are even more precarious, with workers clustered at the bottom end of the global value and supply chains;
- require pro-business approaches to regulation of licensing, qualifications and technical standards that directly affect labour; and
- weaken the role of specialist international standard-setting organisations, notably in postal and telecommunication services.

The politics of labour in TiSA

The US and EU will determine the final shape of TiSA (if it is ever agreed). Both have political sensitivities that will frame their positions on matters that directly affect labour.

US constitutional limits: The US cannot make TiSA commitments on labour mobility, even for élite labour, because the Congress has said it will not allow its constitutional authority over immigration to be eroded any further through free trade deals.[2] It is likely that political objections to the inclusion of entry rights for non-corporate labour in TiSA would intensify under the Trump presidency. The other parties to the TPP allowed the US to avoid making any such commitments. Some similar dispensation would be required for temporary labour mobility (mode 4) in TiSA, but the current proposals do not guarantee that flexibility.

Social dumping: Social dumping has become recognised, at least in the EU, as the flipside of freedom of movement. When contract workers from cheap labour countries are used to supply cross-border services into countries that have higher labour standards, the rights of those workers are often violated and the minimum standards set by statute and/or collective agreements in the host country are undermined. Environmental dumping also occurs, as the dispute on cross-border trucking between the US and Mexico under the North American Free Trade Agreement (NAFTA) shows.[3]

Border security: Movement of people across borders has become hugely sensitive, especially in Europe, because of the refugee crisis and heightened border security. Yet governments are expected to guarantee increased access for services labour from other countries under TiSA. They may want to restrict that access for security reasons. However, a clampdown that prevents foreign firms from

2 This was made clear following US FTAs with Chile and Singapore that made commitments for entry of specific numbers under the H-1B visa programme. See Lori Wallach and Todd Tucker, 'Debunking the Myth of Mode 4 and the U.S. H-1B Visa Program', March 2006, https://www.citizen.org/documents/Mode_Four_H1B_Visa_Memo.pdf

3 'Teamsters Denounce DOT Decision to Open Borders to Mexican Trucks', 9 January 2015, https://teamster.org/news/2015/01/teamsters-denounce-dot-decision-open-border-mexican-trucks.

undertaking activities or delivering services, as they have done in the past, might well be challenged if the government has made a TiSA commitment in mode 4. They could invoke the national security exception (which the leaked core text showed is the same as in the GATS), but its scope is limited to action to protect the country's 'essential security interests … in time of war or other emergency in international relations'. That wording suggests an immediate and finite period, not precautionary or semi-permanent measures. Alternatively, the government could invoke the problematic general exception for measures 'necessary to protect public order'. These are discussed in more depth in chapter 5 and the accompanying appendix.

The EU's response to the social dumping and security issues in TiSA is to propose an EU-specific 'declaration' in the Annex on Movement of Natural Persons. This would require source countries in TiSA to accept the ***return and readmission of nationals*** who have contravened rules for entry and stay, consistent with customary international law.[4] When there is a bilateral agreement on return and readmission between the EU and another TiSA party, and the EU considers it is not being honoured, the EU could unilaterally suspend the operation of the TiSA annex for that country's service suppliers. There is no indication that any other country supports the EU on this. The EU is proposing a unilateral declaration, which has a dubious legal status in a multilateral agreement. It may be a bargaining chip to secure the right to subject contract service suppliers to an economic needs test, which it has proposed, or it might be intended for internal political consumption.

TiSA's impacts on services workers

Services are at the heart of the social, cultural, environmental, economic and political life of communities; they are also the major source of jobs. TiSA would directly impact on both:

- The market access rule in TiSA removes key tools of economic management and the ability of central, regional and local governments to shape the service economy;
- The non-discrimination rules remove the right to impose restrictions on foreign firms, and to support local businesses and their workers through 'buy local' campaigns and apprenticeship subsidies;
- More liberalisation and competitive pressures through contracting and sub-contracting drives down wages, unionisation, skills, safety and accountability;
- Governments can't require foreign services firms that set up inside the country to use local content that supports local businesses and jobs;
- A standstill on current supports for local firms and restrictions on foreign firms, coupled with a ratchet to lock in any erosion of those supports and restrictions, locks in anti-worker neoliberal policies for the long term;
- Expansion of anti-union tech companies like Uber and Amazon destabilises existing businesses, jobs and working conditions;
- The focus on cross-border services and e-commerce promotes further outsourcing and offshoring, and recruitment of platform workers euphemistically described as 'self-employed';
- Rights to deliver services across the border without a local presence, and to hold all data offshore, allows employment under offshore labour wages and conditions and restricts governments' ability to regulate the 'gig' economy;
- Growth in precarious labour and invisible online work intensifies the vulnerability of women workers and the gender divide in the services workforce nationally and globally;
- Guaranteed entry for lower-paid foreign employees of foreign contractors exploits those workers, and triggers a race to the bottom in wages and conditions that worsens social dumping;

4 TiSA, 'EU Declaration regarding cooperation on return and readmission' (unnumbered), Annex on Movement of Natural Persons, TISA/JUL.2015/negotiating text/MNP, dated 8 November 2016.

- Requiring state-owned banks, telcos and post offices to operate like private corporations under a corporatisation model promotes cost-cutting, redundancies and privatisation, and is especially targeted at the global South;
- Pro-business approaches to technical regulation, licensing and professional qualifications of services distorts the balance between economic, social and safety considerations, and undermine protections for workers and consumers, such as health and safety standards, staffing levels and operational requirements; and
- Bringing employment and other standards that are set by inter-governmental bodies like the International Labour Organisation and the International Maritime Union under a 'trade' agreement for services undermines the specialist role of those bodies and stakeholder participation in setting those standards.

TiSA's impact on services jobs

A number of TiSA rules impact directly on employment and labour standards. Some of the worst that were carried over from the failed Multilateral Agreement on Investment (MAI) have been deleted in the most recent leaked texts.[5] But the remaining provisions are problematic enough. Three **localisation** requirements would be prohibited:

- It has been agreed that a TiSA country cannot require an offshore supplier of a service to have a ***local presence*** in its territory.[6] This promotes offshoring of jobs. If there is not even a local agent it becomes very difficult to secure the information needed to monitor the qualifications, skills and training of offshore workers or compliance with standards and workplace conditions, or to take enforcement action.
- A government must not impose certain ***performance requirements on foreign firms*** as a condition of them establishing a business inside the country to supply a service or of receiving a subsidy or similar advantage. They cannot require the firm to achieve a certain amount of local content, including using local services,[7] to transfer or use local technology,[8] or train or employ local people where that would require transfer of proprietary knowledge[9] – all of which are ways to support the local economy and start-up industries and to maintain and expand future employment opportunities. Governments could still make access to subsidies or other supports conditional on an investor locating in a particular region or training or employing workers.[10]
- The parties have also agreed that no TiSA government can require any ***senior management positions*** to be filled by locals or people from any particular country, so those responsible for running a business do not need to have local knowledge.[11] There is disagreement over whether, and what, nationality rules might apply to the ***board of directors***. Experience shows it is much more difficult to hold foreign directors and executives legally accountable for an accident or disaster, pension fraud or malfeasance.

These rules prohibiting localisation requirements are subject to a standstill that allows countries to keep existing measures, but only if they are listed in a country's schedule, with any future liberalisation locked in; or if they are listed in the country's broader 'policy space' reservations. [12] Both lists of reservations require agreement by the other parties.

5 The EU wanted foreign investors protected from a number of performance requirements, including that they employ local workers. TiSA, Article X.3.1(h), Localization Provisions, dated June 2016. See the analysis by Sanya Reid Smith, 'Localisation provisions analysis – second update', 7 October 2016, https://wikileaks.org/tisa/document/201606_TiSA_Annex-on-Localisation/.

6 TiSA, Article X.1, 'Localization provisions', dated November 2016.

7 TiSA, Article X.3.1(a) and X.3.2(a), 'Localization provisions', dated November 2016.

8 TiSA, Article X.3.1(c) and (d) and X.3.2(c) and (d), 'Localization provisions', dated November 2016.

9 TiSA, Footnote 8, 'Localization provisions', dated November 2016.

10 TiSA, Article X.3.4, 'Localization provisions', dated November 2016.

11 TiSA, Article X.2, 'Localization provisions', dated November 2016.

12 TiSA, Article X.4, 'Localization provisions', dated November 2016

The proposed **Annex on Government Procurement**[13] would weaken the support that public purchasing can provide for local services firms and jobs, encourage short-term outsourcing contracts and promote offshoring. Unrestricted cross-border procurement of services would shift the employment and economic benefits of publicly-funded procurement contracts outside the country. It could become difficult to impose minimum labour standards in procurement contracts and be practically impossible to monitor or enforce them effectively if they were included. Because goods and services are deeply integrated in most procurement contracts, this annex would de facto apply to procurement of goods as well. If the good or service is defective, the terms of the contract could entitle the foreign employees of the contractor to enter the purchasing country to perform the remedial work under home country wages and conditions. As of December 2016, the government procurement annex had limited support. Although a number of TiSA parties have agreed to similar provisions in their FTAs, services are not covered by the WTO's plurilateral Government Procurement Agreement,[14] and negotiations on government procurement are part of the unfinished business of the GATS.[15]

However, the absence of a specific annex on procurement does not mean it is not subject to the TiSA rules. As in Article XIII of the GATS, the exclusion of government procurement in the core text is limited in scope to internal purchasing for the use of government agency and does not protect purchasing of services that are on-sold, or form part of a service that is on-sold (for example, services used in Public-Private Partnership toll roads). That limited definition also applies where three is an explicit exclusion of government procurement in other annexes, such as financial services.

The US-sponsored **Annex on State-owned Enterprises** would require enterprises owned by central government to operate on purely commercial terms when buying goods and services, and selling services (see Appendix 10). That corporatised model promotes the competitive supply of what are traditionally considered public services. The special nature of public sector employment, for example in post offices, banks or telecoms, is replaced by private sector terms and conditions, accompanied by restructuring and redundancies, and later partial or full privatisation. By preventing SOEs from giving preferences to local services and goods, the Annex would again favour large international competitors and remove another important support for local firms and employees.

Foreign services workers (Mode 4)

The cross-border movement of labour to deliver a service (known as 'Mode 4') has always been controversial in trade in services negotiations. Rich countries want to define the movement of élite personnel as a 'trade' issue but treat the international mobility of any other kinds of workers as an immigration issue. Many countries from the global South want to export skilled and unskilled labour to reduce unemployment and attract remittances. Neither position shows any concern for the rights or wellbeing of migrant workers themselves or the impacts on the workforce they displace.

Appendix 3 explains in more detail how the annex on labour mobility in TiSA singles out four priority categories of workers for commitments in countries' schedules, either horizontally across all services or for particular sectors:

i. employees of a corporation from another TiSA country being moved within the company, known as intra-corporate transferees;

ii. business visitors from another TiSA country, such as short stay visits to sell products or services;

iii. independent professionals from another TiSA country, such as lawyers or consultants; and

iv. contractual service suppliers, who are employed by a firm from a TiSA country that has a contract to deliver a service in another TiSA country and enter temporarily to perform that contract.

13 TiSA, Annex on Government Procurement, April 2015, proposed by EU, Norway, Lichtenstein and Iceland

14 However, countries are usually required to include services when they accede to the agreement.

15 GATS 1994, Article XIII

A commitment to one or more of these categories would oblige the receiving state to allow temporary entry for specified periods of time, and would restrict normal immigration criteria and vetting processes if they nullify or impair the expected benefits.[16]

This annex rests on a spurious distinction that excludes temporary migrants competing in the domestic employment market and covers the temporary entry of employees or independent workers from another country, even though their presence would displace local workers, especially if there was no right to apply an economic need or labour market test. With associated risks of exploitation and social dumping.

Workers in the global South

Precarious employment is an ever-present reality in the global South. TiSA will deepen that problem in multiple ways, from the corporatisation and consequent privatisation of government-owned businesses to the footloose networks and supply chains that relocate in a perpetual quest for cheap and compliant labour.

The World Bank's 2016 World Development Report entitled *Digital Dividends* talks up the potential benefits to the global South and its workforce from the '4th industrial revolution'.[17] In practice, producers and workers from the South are likely to be clustered at the bottom end of the global value and supply chains. Existing models of outsourcing by transnational corporations are driven by cost-cutting through subcontracting: 'unregulated markets have the tendency to push developing countries towards a socio-economic position that reproduces underdevelopment. The increasing integration of developing countries in [global value chains] has not changed this in any meaningful manner'.[18] E-commerce, enhanced by TiSA, will intensify those trends.

The World Bank acknowledges that skills and infrastructure deficits may undermine the potential benefits, and that risks increase when a small number of private corporations control the digital domain. But it offers either market solutions or casts responsibility onto states whose authority and resources it has systematically stripped away over several decades. The Bank is especially cavalier and contradictory when it comes to jobs. It recognises that technology augments higher skills and replaces routine jobs, forcing many workers to compete for low-paying jobs.[19] In typical World Bank style, the report says: 'Adjustment takes time and will be painful for many, but this is how economies progress'.[20] In addition to improving workforce skills, the Bank suggests removing worker protections, and by implication unionisation, in their own interests:

> *changes in the labor market also require rethinking social protection and tax systems. The on-demand economy leads to more informal employment, transferring insurance and occupational obligations to freelance workers. Strict labor regulations, common in developing countries, and overreliance on labor taxation encourage faster automation by making hiring more expensive. It would be better to strengthen workers' protection independently from work contracts by delinking social insurance from employment, offering independent social assistance, and helping workers retrain and find new employment quickly.*[21]

Workers' rights

There is no labour clause or annex in TiSA. Its inclusion would be anathema to many WTO members and therefore fatal to the goal of exporting TiSA back into the GATS. The labour chapters agreed in

16 TiSA, Article 1.3, Annex on Movement of Natural Persons, dated 8 November 2016

17 World Bank, *World Development Report 2016: Digital Dividends*, Washington DC, 2016

18 Bezhad Azarhoushang, et al, 'Value chains, underdevelopment and union strategy', 7(1-2) *International Journal of Labour Research*, 2015, 153-175, 154.

19 World Bank, *World Development Report 2016*, p.3.

20 World Bank, *World Development Report 2016*, 19.

21 World Bank, *World Development Report 2016*, 36.

mega-agreements like the TPP are weak anyway,[22] and would not address the systemic impacts of TiSA on employment and the labour market, the wellbeing of the workforce and unionisation.

The only indirect reference to unionisation allows governments to deviate from their commitments on Mode 4 where the presence of a foreign worker would adversely affect the settlement of a collective labour dispute at the relevant workplace or the employment of someone involved in the dispute.[23] However, this relies on the government to invoke that right and only applies to foreign workers inside the country, not when strike-breaking services are supplied across the border.

The only time that workers' rights appeared in TiSA was in an early draft of the maritime services annex,[24] but that did not survive. It also recognised the international standards on maritime transport from the International Maritime Organization and the International Labour Organization, which apply to labour, but would have allowed TiSA parties to adopt lower standards than set by those organisations.[25] Both provisions are absent from the November 2016 text.

22 ITUC, 'TransPacific Partnership Labour Chapter Scorecard. Fundamental Issues remain Unaddressed', December 2015, https://tpplegal.files.wordpress.com/2015/12/ituc-labour-chapter-analysis.pdf

23 TiSA, Article 3.4, Annex on Movement of Natural Persons, dated 8 November 2016

24 Jane Kelsey, *The Trouble with TiSA*, International Transport Workers' Federation, 2017, 52-53, http://admin.itfglobal.org/media/1635608/the-trouble-with-tisa-report.pdf

25 TiSA, Article 12, Annex on International Maritime Transport Services, dated 24 May 2016

4.

E-COMMERCE: TRANSFORMING GLOBAL CAPITALISM

E-commerce is the true centrepiece of TiSA. The technology industry calls it the trade highway of the 21st century, and likens its transformative potential to the printing press in the 16th century and electricity in the 19th century. There are currently very few restrictions that govern the Internet. The powerful élite of private software, Internet, hardware, financial, logistics and infrastructure companies that dominate the digital domain want that to continue. TiSA offers them the tantalising prospect of largely unfettered authority over the global network economy, with governments promising never to regulate new technologies, services and practices that emerge in the future. Most important for them is the guarantee of unrestricted information and finance flows across borders and the rights to hold data anywhere in the world (especially the US, with minimal privacy rules) and to keep secret their source codes, whether for smart products or search engines themselves. Before considering the TiSA texts, it is important to understand the big picture which it is designed to serve. Appendix 4 provides a more detailed analysis of the TiSA text, especially the proposed Annex on Electronic Commerce.

Empowering GAFA

The powerhouses of e-commerce are principally American. The world's five largest companies by market capitalisation ten years ago were Microsoft, Exxon Mobil, General Electric, Citigroup, and Shell Oil. Now they are Alphabet (parent company of Google), Apple, Facebook and Amazon, known colloquially as GAFA, plus Microsoft.[1] According to *Forbes* magazine, 14 of the world's 25 largest tech companies in 2015 were from the US, including 7 of the top 10: Apple, Microsoft, Alphabet (the holding company for Google), Intel, IBM, Cisco Systems and Oracle.[2] Only South Korea's Samsung made the top five. The world's top three Internet companies Amazon (e-commerce), Google (search engine), and Facebook (social media) were also American, although the next three largest were from China: Tencent (social media), Alibaba (e-commerce) and Baidu (search engine).

The industry is itself subject to 'creative destruction'. As digital platforms like Facebook and Twitter rose, other names like MySpace, Napster, AOL and most recently Yahoo[3] have disappeared. But the market remains highly oligopolistic in 2017: 'Google has an 88 percent market share in search advertising, Facebook (and its subsidiaries Instagram, WhatsApp and Messenger) owned 77 percent of mobile social traffic and Amazon has a 74 percent share in the e-book market'.[4]

Speaking to the pro-corporate Lisbon Council for Economic Competitiveness and Social Renewal in 2013, the CEO and President of IBM Ginni Rometty hailed the potential for the US and EU to 'lead the world' in making these new rules:

As the most advanced and information-intensive societies in the world, we are in the best position to define the rules of the road necessary to protect the world's vital governmental, environmental and societal interest, while unleashing maximum, long-lasting innovation and growth.[5]

While digital technology offers new opportunities and advances, the path of continuous disruption and 'creative destruction' which the tech industry celebrates means a heightened risk of economic and political instability, insecurity and dependency for others. Businesses, people, communities and

1 Jonathan Taplin, 'Is it time to break up Google?', *New York Times,* 22 April 2017

2 http://www.forbes.com/sites/samanthasharf/2016/05/26/the-worlds-largest-tech-companies-2016-apple-bests-samsung-microsoft-and-alphabet/#7a08462f89ee

3 'The identity crisis that led to Yahoo's demise', *Reuter,* 26 July 2016, http://www.reuters.com/article/us-yahoo-m-a-missteps-analysis-idUSKCN1060DN

4 Taplin, 'Is it time to break up Google?'

5 Ginni Rometty, 'Competitive Advantage in an Era of Innovation', Lisbon Council address, 12 July 2013,

governments are already hooked on Internet search engines, digital platforms, websites, apps and social media as the main channels for communication. As their dependency deepens, a single event - an Internet Service Provider (ISP) outage,[6] faulty software or technical maintenance,[7] hacking or installing malware - could bring banking and payment systems, an airline, large parts of the global supply chain, or a city's whole infrastructure to a halt.[8] There are ominous new safety and security risks already associated with drones and driverless vehicles. These risks can only intensify as new forms of artificial intelligence and as-yet-unimaginable technologies are developed.

The tech industry's demand for flexibility redefines protections for workers and unionisation as 'barriers to trade'. Precarious work becomes the norm. In the same speech, Rometty said:

> *It is clear that overly strict employment laws and labor market rigidities will inhibit businesses', governments' and cities' ability to remain at the forefront of learning and expertise. This is particularly true in the technology sector… The general principle should not be to protect incumbency … but to foster maximum opportunity.*[9]

Workers, as consumers and citizens, face added threats to human rights and democratic government. TiSA's rules would entrench the power of GAFA who control the platforms, search engines and supply chains that are driving 21st century capitalism. The Big Data they hold is immensely valuable, financially and strategically: it can earn them vast sums from advertising; be sold to private interests for commercial or personal purposes; used to analyse and influence social trends and shape public opinion by manipulating the information individuals see; and abused by the state to invade privacy, conduct surveillance or cause actual harm to individuals, businesses and other governments.

The tech industry's main priority for TiSA is to cement its power to control that data and prohibit what it cleverly brands as 'data protectionism'. IBM's Rometty cited the proposed European Data Protection Regulation on free movement and use of data (adopted in April 2016) as the kind of 'excessive restriction' that would stifle innovation and competitiveness and be 'counter-productive if protecting one group's privacy would end up making entire markets uncompetitive, unable to access and capture value from this vast new natural resource' [meaning data].

Paradoxically, the private tech-operators are happy to rely on the public telecommunications, finance and postal delivery infrastructure provided by the state in many countries. TiSA would guarantee their access to quality infrastructure at minimum cost, while restricting the state's regulatory interventions and squeezing the public sector, especially monopolies and state-owned enterprises.

The geo-politics of e-commerce

E-commerce will deliver benefits, especially to consumers who have come to expect instant gratification. But claims that it will increase participation of countries, small businesses and marginalised communities from the global South is an illusion. The World Bank's World Development Report for 2016 promised *Digital Dividends*.[10] But even that report recognised that few developing countries and communities currently have access to the necessary skills, infrastructure, technology and services to participate in cross-border, or even national, e-commerce. Far from building a new inclusive global economy, countries and sectors of society on the wrong side of the digital divide risk becoming even more excluded once cross-border digital trading becomes the new norm, and confined to low value local trading.

As this chapter shows, US firms have dominated the tech industry and rule-making institutions for decades. But the geography of e-commerce is changing rapidly. The massive shift in economic power means Chinese corporations now rival or surpass the US in e-retailing and telecommunications. China is the invisible elephant in the room of the TiSA negotiations. The Anglo-American rhetoric treats trade

6 http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11811188

7 'British Airways counts cost of outage disruption,' *Financial Times,* 28m May 2017, https://www.ft.com/content/36f5f2dc-43af-11e7-8d27-59b4dd6296b8

8 Adrian Gonzalez, 'The Day a Cyber Attack Brings the World's Supply Chains to a Halt', 8 September 2016

9 Rometty, 'Competitive Advantage in an Era of Innovation'

10 World Bank, *World Development Report 2016: Digital Dividends,* World Bank Group, 2016

in services agreements as a means to force China to give other countries' firms non-discriminatory access to its markets and to change its domestic laws and practices. China was the real target of many rules in the TPP, especially the US-driven chapters on e-commerce and SOEs, which were both largely transposed to TiSA. The US has blocked China's participation in both negotiations.

China's approach to cross-border e-commerce reflects its priority to serve a growing middle class, so as to enhance its internal economic, social and political stability, and the 'digital Silk Road' component of its One Belt, One Road strategy to re-establish its historical trade routes.[11] China's ideal global rules for e-commerce are different from those proposed for TiSA. The best indication of China's position is a paper tabled in the WTO in late 2016 in response to proposals to negotiate e-commerce.[12] China argued for a gradual approach within the existing mandate of the working group set up in 1998 to discuss the issue. It cited the G20 Business (B20) proposals from 2016 for a World e-Trade Platform, sponsored by AliBaba's Jack Ma as a possible pathway that embodied 'the spirit of solidarity' that can benefit developing countries and their small and medium enterprises (SMEs). To avoid polarisation, WTO members should give priority to 'easy issues' of promotion and facilitation of cross-border trade in goods and support services like payment and logistics services.

China's position poses an interesting challenge if TiSA concludes with a chapter along the lines currently proposed. Chinese firms like AliBaba that operate in TiSA countries would be governed by and benefit from TiSA's rules. Should the plan to insert TiSA into the WTO succeed, China would be confronted with rules it had no part in negotiating and which do not reflect its commercial or regulatory practices. Because of this, some TiSA countries have rejected some extreme US demands in TiSA, especially on SOEs.

Who controls global e-commerce

There is no reliable data on the quantity and value of cross-border e-commerce. Transactions are often private in nature and fractured across a chain of services and suppliers. Services now form a major part of goods, including software, and maintenance contracts. Because definitions of e-commerce vary, it has become extremely difficult to identify the implications of services commitments in TiSA schedules: sometimes services are classified under communications, computer or information, or by the substantive content of the service or good.

There is some substantive information on *retail* e-commerce that clearly shows the dominance of companies from the US, China and EU, and of certain markets.[13] For example, a study of five large countries, commissioned from Neilson by online payment firm PayPal, estimated that US firms sold to 45% of the online shoppers in five countries surveyed in 2013.[14] However, the rapid pace of change means statistics can only be treated as indicative.

UNCTAD data for 2014 in Table 4.1 shows there is no uniform commercial model. E-commerce was the core business of three of the largest e-retailers: Amazon (US), AliBaba (China) and Cnova (Netherlands). Although e-retail was only a small part of Walmart's revenue, Walmart is so huge that it still ranked as the 3rd largest by revenue. The proportion of *cross-border* transactions of a firm's total e-retail sales also varied widely. Chinese firms had largely focused on their massive domestic market, with the world's 2nd largest retailer JD.com and 5th largest AliBaba in 2014 selling almost exclusively within the country. By 2016 AliBaba had taken over from Walmart as the world's largest retailer.[15]

11 'One Belt, One Road (OBOR): China's Regional Integration Initiative', Briefing to the European Parliament, July 2016

12 General Council, 'Work Programme on Electronic Commerce. Aiming at the 11th Ministerial Conference. Communication from the People's Republic of China and Pakistan', JOB/GC/110/Rev.1, 16 November 2016

13 UNCTAD, *In Search of Cross-Border E-commerce Trade Data*, Geneva, 2016, p.13

14 UNCTAD, 2016, p.16

15 'AliBaba passes Walmart as the world's largest retailer', *RT News*, 6 April 2016, https://www.rt.com/business/338621-alibaba-overtakes-walmart-volume/

Table 4.1 Top ten companies by retail e-commerce revenue, 2014[16]

			Total retail e-commerce revenue		International retail e-commerce revenue			
		Fiscal year end	US$m	% of total sales	US$m	% total e-commerce sales	Gross merchandise value (US$m)	
1	Amazon (US)	Dec. 2104	83,391	94%	33,307	40%	83,391	E-commerce revenue includes "media" & "electronics & other merchandise". International sales are from international websites. It includes export sales from these sites but not from North American sites.
2.	JD.com Inc (China)	Dec. 2014	18,535	100%	<1%	<1%	41,937	
3.	Walmart (US)	Jan. 2015	12,200	3%	3,440	28%	12,200	International estimated on basis of contribution to overall revenue.
4.	Apple (US)	Sep. 2014	10,200	6%	6,355	62%	10,200	iTunes Store only. International estimated on basis of contribution to overall revenue.
5.	AliBaba (China)	Mar. 2015	9,921	81%	285	3%	394,257	
6.	eBay (US)	Dec. 2014	8,817	49%	4,633	53%	82,954	E-commerce revenue refers to "Marketplaces". International estimated on basis of contribution to overall revenue.
7.	Otto Group (Germany)	Feb. 2015	8,622	54%	3,051	35%	8,622	
8.	Cnova (Neth.)	Dec. 2014	4,619	100%	2,499	54%	6,005	
9.	Best Buy (US)	Jan. 2015	3,533	9%	...	11%	3,533	International estimated on basis of contribution to overall revenue. Figure only provided for domestic online revenue.
10.	Rakuten (Japan)	Dec. 2014	3,431	61%	468	14%	22,141	E-commerce revenue refers to "Internet services".
	TOTAL		**163,269**	**19%**	**54,038**	**33%**	**665,240**	

Note: Excluding companies principally involved in the food industry. Source: Adapted from company reports. Source: UNCTAD, 2016, Table 3.2, pp.12-13

Predictions for growth in cross-border e-retail also vary. The Nielson research study for PayPal projected a 100% growth in the value of cross-border products bought by US customers between 2013 and 2018, 546% in Brazil and 547% in China.[17] However, the UNCTAD questioned whether *cross-border* e-commerce will grow at projected rates. It noted that many firms are setting up online subsidiaries inside countries because transactions tend to be easier and cheaper, and local firms are likely to go online to compete with foreign suppliers. UNCTAD concluded that cross-border demand is unlikely to grow significantly outside niche products, and in mainly developing countries that lack a well-developed domestic online market, although those countries also lack purchasing power, Internet penetration and sophisticated logistics. [18]

16 UNCTAD, 2016, Table 3.2, p.12

17 PayPal, 'Modern Spice Routes. The cultural impact and economic opportunity of cross-border shopping', https://www.paypalobjects.com/webstatic/en_TW/mktg/pdf/PayPal-ModernSpiceRoutes_6markets_Eng.pdf

18 UNCTAD, 2016, p. 23

The new 'Wild West'

TiSA is being designed to meet the needs of the industry for decades ahead. Digital technology has already transformed the logistics, supply chains and distribution industries, allowing tech firms that deliver a service in-country to run their platforms and algorithms from anywhere in the world. TiSA's emphasis on *cross-border* supply of services, prohibiting requirements for local presence and data storage, protecting source codes, recognising electronic payment services and electronic signatures, and applying scheduled commitments whatever technology is used to deliver them are all designed to facilitate this. The following snapshot of three dominant models shows what is at stake for UNI.

The Uber model

Uber, Lyft, Airbnb, Deliveroo and TaskRabbit, all created over the past decade, are tech companies that run electronic marketplaces. They manage algorithms that connect multiple participants in individualised transactions. Their expansion has been breathtaking: by the end of 2016 Deliveroo operated in 84 cities in 12 countries; Uber in over 60 countries and 400 cities; Airbnb had listings in 190 countries. They may or may not have a local commercial presence, and are structured to avoid tax through complex corporate arrangements.[19]

Historically, foreign investment by transnational corporations attracts opposition as a threat to local businesses and jobs. By contrast, digital services platforms have been hugely popular with consumers attracted by choice, cost, speed and convenience. For a while, this excitement drowned out a growing raft of concerns, but the downsides are now becoming more widely recognised:

- These companies are nominally worth billions of dollars and seen as attractive investments. In May 2016, Saudi Arabia's sovereign wealth fund invested $3.5 billion in Uber.[20] But their assets are largely intangible and their value is speculative. There are risks of implosion, similar to the bursting of the dotcom bubble in 2001, which impacted directly on firms and workers and had a broader recessionary effect on economies.
- Cut-throat competition using temporarily low charges (loss leading) is used to kill off local competitors, after which the prices rise.[21]
- Uber's massive revenue is matched by massive losses, with predictions it will need to greatly increase charges and cut costs, especially for labour, to become a profitable business.[22]
- Consumer complaints of price surges, safety risks and lack of quality assurance are met by a lack of accountability.[23]

There is no question that digital marketplaces like Uber have fundamentally changed consumer expectations and commercial practices in business to consumer (B-2-C) services. Their strategy does not always succeed. The model assumes that consumers are driven by price and convenience. In countries like China, large incumbents enjoy cultural, language and nationalistic advantages, assisted directly or indirectly by government policy and regulation.[24] Uber retains an army of lawyers and lobbyists to develop legal strategies and operational tactics to avoid regulation; it even installed fake apps to detect and thwart undercover regulators collecting evidence of unlawful activities.[25] Nevertheless, governments in various countries are clamping down on avoidance of payroll and income taxes and other fees, and other forms of unfair competition with the regulated providers of an equivalent service. Court challenges and tighter regulation in numerous countries have forced Uber to shut down, remove non-compliant vehicles (eg self-driving cars in San Francisco[26]) or comply with local requirements.[27]

The Amazon model

Amazon is a more orthodox on-line retailer whose competitive advantage is delivery time. Its consumers are prepared to pay a premium for an individualised service that provides near-instant gratification. A broad range of services use the same template: Amazon Prime Now (special fast delivery for members), Amazon Prime Fresh (grocery delivery), Amazon Restaurants (home restaurant delivery), Amazon Prime Pantry (selected packaged goods), Amazon Dash Button (replenish frequently ordered items), Amazon Flex (crowd sourcing last mile delivery), to name a few. As a cross-border supplier of products, it stands to benefit from the expanded privileges and protections from regulation in the TiSA core text and country schedules, and the annexes ranging from finance and e-commerce to delivery and transportation.

Amazon exercises different levels of direct control over the main segments of its operations: the procurement of the products, the on-line purchasing process, and fulfilment once the order is placed. The last is especially important for UNI.[28] Distribution and last mile delivery use a mix of logistics arrangements, ranging from long-standing relationships and in-house operations to outsourcing and experiments with new technology, such as drones and driverless vehicles. Like Uber, the Amazon model is software dependent. Algorithms work out the availability of the product from the inventory, service requirements, and the transport cost of each individual order. Cloud-based software coordinates the orders and schedules the trucks and deliveries. Technology enables Amazon to cut transaction costs massively through reduced inventory, sharing storage with manufacturers, and above all lower labour costs.

Recently, Amazon has been seeking to reduce logistics costs while enhancing speed and reliability. That means taking greater control of the supply chain itself, rather than trying to negotiate lower rates with big carriers. In a major development, Amazon opted to buy aircraft and lease crew to airfreight in the US, while chartering aircraft for its Europe operations. In the US, Amazon also bought thousands of uniform trailers to give it more control over delivery from hubs to spokes, although it still contracted out its road haulage.

Direct shipping from suppliers is now bypassing brick-and-mortar stores and warehouses. For example, Amazon operates out of Proctor and Gamble warehouse and distribution centres, which allows it to ship direct from the factory. It is also adding to its 173 logistics facilities worldwide, and growing the network of highly automated sorting centres by acquiring new ones closer to customers to facilitate last-mile delivery. Ironically, Amazon prefers the US Postal Service over Fedex for package delivery because it costs less and the postal service has obligations to provide delivery services everywhere. Otherwise, last mile delivery is subcontracted to small companies and owner-operators. Because notionally independent contractors depend on Amazon for repeat business, the company has greater bargaining power than in negotiating contracts with big operators like UPS and can arbitrarily pay lower rates.

Despite ranking as the world's largest e-retailer back in 2014,[29] Amazon had difficulties gaining much market share in large countries outside the US and Europe. Other large markets like China were dominated by AliBaba and JD.com. More recently, Amazon reportedly spent USD5 billion to capture market share in India, which still strongly regulates its distribution services and proposes new data regulation.[30] Amazon's planned expansion of membership-based services in Australia in late

19 Brian O'Keefe, 'How Uber plays the tax shell game', *Fortune Magazine,* 22 October 2015, http://fortune.com/2015/10/22/uber-tax-shell/

20 Heather Somerville, 'Uber raises $3.5 billion from Saudi Arabia's sovereign wealth fund, *Reuters,* 2 June 2016, http://www.reuters.com/article/us-uber-saudi-idUSKCN0YN5UY

21 Brian Solomon, 'Uber sued for predatory pricing by San Francisco taxi company', *Forbes Magazine,* 2 November 2016, https://www.forbes.com/sites/briansolomon/2016/11/02/uber-sued-flywheel-predatory-pricing-by-san-francisco-taxi-antitrust/#3e3956cf4fca

22 'Uber's 2016 losses to top $3bn according to leaked financials', *Wired,* 20 December 2016, http://www.wired.co.uk/article/uber-finances-losses-driverless-cars; 'Uber would need to quadruple fares to become profitable, expert claims', *NZ Herald,* 3 December 2016, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11759318

23 'Uber is trying to make you forget that surge pricing exists', *The Verge,* 23 June 2016, http://www.theverge.com/2016/6/23/12017002/uber-surge-pricing-upfront-fare-app-update-announcement

24 http://www.businessinsider.com.au/why-uber-failed-in-china-2016-8?r=US&IR=T

25 'Uber uses secret tool to deceive authorities', *NZ Herald,* 6 March 2017

26 'Uber CEO seen on video arguing with driver over fares', *NZ Herald,* 1 March 2017

27 http://www.ft.com/fastft/2016/07/13/tough-new-laws-force-uber-out-of-hungary/; http://www.wsj.com/articles/french-court-convicts-uber-of-violating-transport-privacy-laws-1465477861); http://www.stuff.co.nz/business/industries/82971276/uber-could-be-banned-if-it-doesnt-comply-with-the-law-transport-minister; http://www.whosdrivingyou.org/blog/us-cities-stood-up-regulate-uber

28 Kathrin Birner, 'One click to empowerment? Opportunities and challenges for labour in the global value chain of e-commerce', 7(1-2), *International Journal of Labour Research*, 2015, 55-74.

29 UNCTAD, *In Search of Cross-Border E-commerce Trade Data*, Table 3.2, p.12

30 'Amazon invests USD 5 bln to be top ecommerce provider in India', *Wall Street Journal*, 7 June 2016, https://www.wsj.com/articles/amazon-plans-3-billion-india-investment-1465355857; 'Will have regulatory regime on data protection: Government to Supreme Court', *The Economic Times,*27 April 2017, http://economictimes.indiatimes.com/news/politics-and-nation/will-have-regulatory-regime-on-data-protection-government-to-supreme-court/printarticle/58401023.cms

2017 (which will also service New Zealand) sparked predictions of massive disruption to the retail sector, including loss of jobs through automated filling and delivery systems.[31] The boss of major retailer Harvey Norman called Amazon a 'parasite' that 'just want to pay everyone minimum wages', 'contributes virtually nothing to society', and engages in predatory pricing to 'send everyone broke, then put up the price'.[32]

AliBaba

The Uber and Amazon models of e-commerce are transactional, relying on aggressive cost-cutting and ease of operation, rather than building long-term business relationships. They face a growing challenge from the China's AliBaba, which takes a more relational approach.

AliBaba was founded in 1999 by Chinese national Jack Ma. In September 2014, an initial share float of the company brought in USD27 billion. As with the other 'gig' companies, there were suggestions the revenue growth was unsustainable.[33] But its model is very different. The company's initial focus was to provide Chinese consumers with access to foreign brands as the country transitions to a domestic consumption economy. It rolled out its operations across China, especially into rural areas, while also serving the Chinese diaspora. Support from the Chinese government makes it difficult for foreign firms to compete in the domestic market; Uber sold its business in 2016 to a company part-owned by AliBaba.[34]

The international operations have also expanded through strategic relationships. AliBaba has a joint venture with German payment processing company Wirecard. Other offshore partnerships include with Spanish Postal Service and NZ Post, a Memorandum of Understanding with the US Postal Service, and 14.4% shareholding in Singapore Post. In 2016, it bought Southeast Asia's largest online shopping platform Lazada, based in Singapore.[35]

More recent developments reflect Ma's vision for a World e-Trade Platform or eWTP that would 'formulate international rules to eliminate barriers to eCommerce and help small businesses and consumers everywhere participate in cross-border trade'.[36] Ma promotes his online platform as being open to a wide range of stakeholders, including SMEs, and not dominated by governments and multinational corporations. China incorporated Ma's concept of of the eWTP into the G20 Business (B20) statement when it hosted the G20 in 2016.

AliBaba's recent expansion is framed by China's One Belt, One Road strategy.[37] Working together, the government and AliBaba set up the China (Hangzhou) Cross-Border E-Commerce Comprehensive Pilot Free Trade Area in March 2015. Certain goods ordered by Chinese consumers from overseas companies are subject to lower tariffs and receive expedited customs processing.[38] AliBaba's first offshore venture is a Digital Free Trade Zone in Malaysia in collaboration with the state-owned Malaysia Digital Economy Corporation, announced in March 2017. Built on land owned by the state-owned airport company, the e-commerce hub would have logistics, cloud computing and e-finance capabilities that could provide warehousing and centralised customs clearance for Malaysia and the region.[39] In 2016 Ma floated the idea for a similar free trade zone near the airport in Auckland, New Zealand, with whom China has a free trade agreement.[40]

Ma described his strategy to shareholders in 2016 as creating an 'ecosystem', building 'the fundamental digital and physical infrastructure for the future of commerce, which includes marketplaces, payments,

31 'Amazon launches hiring spree as it prepared for Australian launch', news.com.au, 23 January 2017 http://www.news.com.au/finance/business/retail/amazon-launches-hiring-spree-as-it-prepares-for-australian-launch/news-story/b375c39bf9f08653d17a577d97e9d15b

32 'Harvey Norman boss' dire warning about Amazon', *NZ Herald,* 28 February 2017; 'Warehouse prepared for Amazon juggernaut', *New Zealand Herald,* 9 March 2017

33 'China's Alibaba files in U.S. for what may be biggest tech IPO', *Reuters,* 14 July 2014, http://www.reuters.com/article/us-alibaba-ipo-us-idUSKBN0FJ0BV20140714

34 http://variety.com/2016/biz/asia/uber-china-selling-to-didi-chunxing-1201827433/

35 'Alibaba plans regional hub in Malaysia', *Bangkok Post,* 18 March 2017

36 'Jack Ma's Grand E-Commerce Plan', *Vietnam News,* 25 March 2016, http://wji.at/Vietnam-News/jack-mas-grand-ecommerce-plan/

37 'Ali Baba bringing Belt, Road benefits to SMEs', *China Daily,* 24 April 2017, http://www.chinadaily.com.cn/business/2017-04/24/content_29051117.htm

38 'China to Establish New Cross-border E-commerce Pilot Zones in 12 Cities', EUSME Centre, 10 January 2016.

39 http://www.alibabagroup.com/en/news/article?news=p170322

40 Fran O'Sullivan, 'Alibaba floats airport free-trade zone', *NZ Herald,* 1 August 2016, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11684839

logistics, cloud computing, big data and a host of other fields'. He contrasts this to 'pure-commerce players' whom he predicts will face tremendous challenges.[41] But AliBaba has created its own controversies, including for marketing counterfeit goods.[42] In 2015 half of AliBaba's employees worked on software[43] and were paid partly in stock, raising questions about its financial reporting.[44] As with Uber it does not employ many distributors directly, but uses suppliers and subcontractors in a state-regulated market where independent union organisation is, at best, embryonic.

Ma talks of facilitating small businesses and there is some evidence of that. But AliBaba retains strategic control of the platform and data, which is where the real value lies.[45] It currently hosts 35 percent of total websites in China, making it one of the world's top three cloud computing companies.[46] The Taobao online commerce platform holds more than 90 percent of the consumer-to-consumer (C-2-C) market, and the Tmall platform over half of business-to-consumer (B-2-C) transactions. By holding a 48% share in Zhejiang Cainiao Supply Chain, a joint venture of five major express delivery companies in China, AliBaba controls the logistics information system while avoiding requirements of financial disclosure. Its commercial partnerships with domestic providers include the logistics and distribution arms of Haier Electronics, consumer electronics retailer Suning Commerce, FamilyMart convenience stores, China Post and China Shipping. Its online payment processor, unlisted company Ant Financial (formerly Alipay), processes nearly half of China's online payments.

While the strategy is different, AliBaba's goal is no less grandiose than GAFA: to dominate the rapidly changing landscape of retail, financial services, manufacturing and entertainment over the next 30 years through the key pillars of cloud computing and big data.

E-finance

E-commerce requires payments. Traditional banking transactions are too cumbersome and costly. Most e-commerce uses electronic payment systems that are dominated by the major international credit cards, Visa and MasterCard, and specialist on-line exchanges such as PayPal and Poli. PayPal operates in 26 currencies across 200 countries. Payment services are increasingly integrated with platforms: eBay bought PayPal in 2002, but spun it off in 2015. AliBaba's banking and finance arm Ant Financial provides a broad range of financial services to more than 450 million customers. It operates the Alipay mobile payment platform at home and markets it to offshore retailers with a large Chinese customer base.[47] Alipay and other payments platforms are integral to Ma's e-commerce 'ecosystem.'

In addition to being the medium of payment, e-finance is itself a form of e-commerce that involves sale and purchase of a service. The finance industry as a whole has embraced electronic technologies. Over several decades, automatic teller machines (ATMs), Electronic Fund Transfer (EFTPOS) and credit card purchases have reduced face-to-face transactions. Online operations range from insurance and retail banking to derivatives traders, credit raters and financial media. The share of banking, insurance and advisory services delivered online or through call centres has grown rapidly. In the US, online-only banks were reportedly attracting approximately 12% of all new primary banking relationships by 2016, compared with only 4% a decade ago.[48]

Legacy banks are also encouraging customers to use online banking, meaning branch office closures, cuts to the front-line workforce, and employment of cheaper, often offshore, online workers. When

41 AliBaba, Letter to Shareholders from Executive Chairman Jack Ma, 13 October 2016, http://www.alizila.com/letter-to-shareholders-from-executive-chairman-jack-ma/

42 Scott Cendrowski, 'Why AliBaba can't complain about its return to the "Notorious" Counterfeit Market List', *Fortune,* 22 December 2016, http://fortune.com/2016/12/22/alibaba-taobao-counterfeit-goods-platform/

43 AliBaba, Letter to shareholders from Jack Ma, 2015, http://ar.alibabagroup.com/2015/letter.html

44 'Alibaba is paying its workforce an outrageous amount', *Fortune,* 6 February 2016, http://fortune.com/2016/02/05/alibaba-stock-pay-disturbing/

45 Transport Intelligence, 'Global e-commerce Logistics: e-commerce Supply Chain Profiles - Alibaba – Fulfilment', www.ti-insight.com/product/global-e-commerce-logistics-2016

46 AliBaba turns E-WTP into Reality with Creation of First Overseas E-hub, 22 March 2017, http://www.alibabagroup.com/en/news/article?news=p170322

47 'Auckland Airport's Alipay milestone', *NZ Herald,* 17 April 2017, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11837242

48 Jessica Dickler, 'Online banks are hot, just ask Goldman Sachs', *CNBC,* 22 April 2016 http://www.cnbc.com/2016/04/22/online-banks-are-hot-just-ask-goldman-sachs.html

street-front operations are wound back, e-banking becomes the only option for many people in rural areas, small towns and poor suburbs, who may not have the necessary skills, or access to computers and reliable Internet. Problems of fraud and unethical practices also increase. Loan sharks and other predatory lenders who operate online become invisible and often untraceable. As e-purchases displace cash payments, retailers have also become proxy bankers, paying out cash alongside purchases. Boundaries between different services increasingly blur as retailers offer credit cards with loyalty points to pay for on-line shopping and remote delivery.

A report for Citi in 2016 suggested European and US banks may be on the brink of an 'Uber moment' as the explosion of fintech disrupts the industry and predicted massive job cuts over the next decade.[49] Technological investment in the financial sector was focused on 'last mile' payments, with those that facilitate cross-border transactions like PayPal and Poli gaining ground alongside more traditional credit cards like Visa and Mastercard.

Cross-border financial services present a potential regulatory nightmare as the finance industry finds ever-more creative ways to circumvent national regulation. For example, qualification standards, employment practices and ethics becomes almost impossible to monitor effectively when an insurance company conducts its call centre operations from multiple sites around the world. Domestic consumer protections and privacy laws may become impotent if offshore financial firms are not required to have any local presence. When financial data is held 'in the cloud', people's personal and commercial information is subject to the privacy and consumer protection regime of the country that hosts the server – especially problematic when the host is the US.

The finance industry has always demanded that trade in services agreements guarantee free movement of data, alongside deregulation and unrestricted foreign investment. As online transactions have grown, the removal of restrictions on cross-border transactions and data have become their principal demand. Once they can operate globally from a single centralised platform, they can use new technologies to exploit economies of scale and deepen their dominance of global financial markets. The 'auxiliary' services of processing, call centres and other back office operations can operate seamlessly on a global scale. Local competitors, including state-owned banks and insurers, will struggle to survive, except in parts of the market of little interest to the big players. While some countries will continue to restrict cross-border banking and insurance transactions, and insist on maximising their regulatory capacity, that autonomy will be seriously eroded by TiSA.

The tech industry demands for TiSA

As IBM President Ginni Rometty said, the US and EU still see themselves as the rule makers. In the tech giants and their industry lobbies have privileged access to the government, for example through the US State Department's Advisory Committee on International Communications and Information Policy (see Chapter 2).[50] As the US election and de facto TiSA deadline approached in October 2016, seven internet and tech trade groups representing all the major players, several times over, published an open letter urging an outcome on TiSA.[51] They targeted 5 demands:

i. unrestricted data flows;

ii. a ban on data localisation requirements;

iii. reject the EU proposal to exempt itself from not regulating 'new services';

iv. ensuring that internet platforms are not liable for user-generated content; and

49 *Digital Disruption. How Fintech is Forcing Banking to a Tipping Point,* Citi GPS, March 2016, p.12

50 http://www.state.gov/e/eb/rls/othr/2014/223376.htm

51 *Internet Association*, including Airbnb, Amazon, Dropbox, eBay, Expedia, Facebook, Google, Intuit, LinkedIn, Netflix, Pandora, PayPal, Pinterest, Reddit, Spotify, Uber, Twitter, yahoo, TripAdvisor. *Computer and Communications Industry Association*, including Amazon, AOL, BT, Cloudfare, Data Foundry, Dish, eBay, Facebook, Dish, Google, Microsoft, Intuit, Netflix, Pinterest, PayPal, Tivo, Taxslayer, Yahoo, XO Communications, Samsung, redhat, Rabuten, Nvidea, Foursquare, Endurance International, OpenConnect, Pandoro, Netaccesssystem technologies. *Information Technology Industry Council,* including Accenture, Adobe, Amazon, Apple, Brother, Canon, Dell, Dropbox, Facebook, Google, Hewlett Packard, IBM, Intuit, Intel, Linkedin, Microsoft, Nokia, Oracle, Samsung, Sony, Tata, Visa, Twitter, Yahoo. *BSA/ Software Alliance*, including Adobe, Apple, Dell, IBM, Intuit, Microsoft, Oracle, Siemens, Symantec, Trimble. *ACT/The App Association*, an organisation for small tech companies. *Consumer Technology Association*, whose list of 2200 members is not available, but most of the big players belong. Internet Infrastructure Coalition, including Amazon and Google.

v. restricting countries' limitations on market access.

Post-election, in May 2017, the US Internet Association made a pitch to the new administration, without referring to any specific agreement.[52] The open letter was on behalf of almost all the behemoths: Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo,Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga. The pitched their appeal to the Trump rhetoric of jobs and protectionism:

> *new opportunities for U.S. workers, farmers and businesses by facilitating millions of transactions around the world through e-commerce, cloud computing, online advertising, communications, and content-delivery platforms. … Unfortunately, governments around the world - from China to Brazil to the European Union – are enacting anti-internet laws and policies that restrict or block the ability of U.S. exporters from realizing the potential benefits of digital trade. In order to maintain U.S. leadership in the digital economy, the United States must push back on these policies and pursue rules that enable the free and open internet to thrive worldwide.*

The letter built on their 2016 demands for:

- no restriction on c**ross-border data flows**;
- **no localisation requirements** for data and computers;
- protecting copyright, but to **ensure safe harbours and exceptions** (fair use is critical for search, machine learning, computational analysis, text/data mining, and cloud-based technologies)
- **no ISP liability** for content posted by third parties;
- make the WTO **customs moratorium** on e-commerce permanent;
- **non-discriminatory market access** for digital services, including 'new services';
- **eliminate 'forced technology transfer'** requirements (includes source codes); and
- appoint a chief digital trade negotiator in Office of USTR and expand USTR's Digital Trade Working Group established in 2016[53] and which made recommendations on TiSA, among other negotiations, in the dying stages of the Obama administration in January 2017.[54]

If the French digital industry is afraid …[55]

Not all the digital industry believes such rules will create a vibrant competitive global trading market or digital domain. France's e-commerce market is the 6th largest in the world.[56] Despite this, the French Digital Council warned France's Ministry of Trade: 'There is reason to fear that TTIP [TiSA] will become an impediment to a flourishing global market transformed by digital technology, and that it will hinder the development of a sustainable digital economy and society',[57] because 'the power relationship is unfavourable to the European Union'.[58] The US enjoys a large business and intellectual lead because its long-term vision was developed and backed by military spending. The EU has no equivalent vision. Complete elimination of trade barriers between the EU and US could lead to a

52 Internet Association to Hon Robert Lighthizer, 16 May 2017, https://cdn1.internetassociation.org/wp-content/uploads/2017/05/Lighthizer-Letter-5.16.pdf

53 'Ambassador Froman Announced New Digital Trade Working Group', July 2016, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/july/ambassador-froman-announces-new

54 Robert Holleyman, Deputy USTR to Robert Froman, USTR, 13 July 2017, p.5, https://ustr.gov/sites/default/files/ARH-AMF-DTWG-Letter-1-13-17-FINAL.pdf

55 Conseil National du Numérique, 'Strengthening EU's negotiation strategy to make TTIP a sustainable blueprint for the digital economy and society, Opinion of the French Digital Council', April 2014

56 Conseil National du Numérique, p.37

57 Conseil National du Numérique, p.13

58 Conseil National du Numérique, p.6

strengthening of the American e-commerce players that already dominate the European market, and in which France wants to compete.[59]

Choices regarding data processing rules in TTIP/TiSA would be critically important. The Council warned that liberalising data flows by lifting regulatory barriers would have a lasting impact on the digital industry and European economies. Data are not ordinary commodities, and the distinction between personal and commercial data is not clear-cut. Data-intensive services have become 'a permanent feature of areas where full respect for sovereignty and fundamental freedoms is required'.[60] Healthcare, financial services, energy and security are particularly sensitive. The 1995 EU Directive on personal data[61] said data cannot be transferred to a third country unless it provides an 'adequate level of protection' for the data. The US operates on private sector self-regulation. That was allowed by the Safe Harbour arrangement between the US and EU in 2000. The EC reform proposal from 2012 [since adopted in 2016 to come into effect in 2018[62]] would better protect individuals' privacy rights and control over their data. The Council pointed to Edward Snowden's revelations as evidence that the protection of European data had to be strengthened.[63]

On Internet governance, the Council noted that standards and technical specifications were set in forums, consortiums and private sector regulatory bodies that were mostly incorporated under US law.[64] The Americans have a dominant position and exercise strong influence over the standards that are applied. Europe was more influential in regional and international standard bodies, such as the International Organization for Standardisation (ISO). Although they are still linked to private sector standard setting bodies, the Council considered them to be more transparent and consensus based.[65] It warned that: 'The weak position of the European Union in the digital market means that its interests would best be served by the adoption of international standards through international bodies, even if that involves adopting the standards produced by consortiums' and that 'relying on mutual recognition would consolidate the dominant position of American players to the detriment of European innovation and know-how.'[66]

The Council advised the European Commission to base its negotiating strategy for the digital economy in TTIP on European Union values and safeguards: the right to regulate, the ability to regulate in the future, respect for the EU's sovereignty and freedom of competition. Although the paper was written in 2014 about TTIP, French pessimism about the impact of new e-commerce rules would apply equally to TiSA.

Even an industry think-tank thinks twice

The corporate lobby tends to think only in terms of rules that can provide direct advantages. However, even some of its allies are skeptical about moves to adapt the current GATS framework to the digital domain, and see the need for a careful, and somewhat more balanced, rethink of global regulation. In 2013, the Internet Digital Economy Alliance (IDEA), an industry sponsored think tank, proposed a quite different approach that distinguished rules for the networks from substantive commercial activities. It also recognised that the technology raises new sensitivities that are not adequately addressed in the GATS. IDEA proposed four foundational principles:

i. legal regimes must not restrict the operations of networks;

59 Conseil National du Numérique, p.37

60 Conseil National du Numérique, p.8

61 Data Protection Directive of the European Parliament and of the Council of 24 October 1995, 95/46/EC

62 Regulation (EU) 2016/679 and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016

63 Conseil National du Numérique, p.31

64 Such as the Institute of Electrical and Electronic Engineers (IEEE), headquartered in New York, US, and The Internet Corporation for Assigned Names and Numbers (ICANN)

65 The French Digital Council was especially concerned that regulatory convergence in TTIP would allow the US to impose technical standards promoted by American manufacturers rather than harmonising, saying the market already applies US standards. Relying on mutual recognition or regulatory convergence would consolidate the dominant position of American players to the detriment of European innovation and knowhow.

66 Conseil National du Numérique, p.33

ii. unencumbered movements of information and data;

iii. more flexible rules than for bricks and mortar sectors; and

iv. recognise that network-based activity does not fit within the traditional modes of supplying services under the GATS (across the border, commercial establishment in the country, temporary presence of services personnel).[67]

Significantly, IDEA acknowledged that the protections for governments' right to regulate in the GATS are likely to prove inadequate to address policy priorities, especially privacy, because the context differs from the offline world that existed when GATS was negotiated in the early 1990s. Information associated with individuals is often the subject of movement across borders as an integral part of services. Conversely, measures adopted to protect national security can create significant barriers and introduce legal uncertainty, causing unnecessary damage to commerce; for example, countries became reluctant to let information be held in US in the wake of the Snowden disclosures. This favours a more protective approach to regulating for human rights and a more restrictive approach to regulation for security purposes – the converse of what the US proposes in the TiSA e-commerce annex.

IDEA predicted that trade negotiators would be wary of agreeing on constraints until national level discussions had matured, and suggested a framework convention that could be modified over time as national consensuses evolved. The framework would have minimum obligations to permit the free flow of information, subject to specific provisions limiting the use of data related to natural persons.[68] That prediction has proved true in relation to the European Union. However, the legislators, consumer and human rights activists, and unions, in most other TiSA countries seem oblivious to the threats that the e-commerce agenda in TiSA would pose.

A precarious future for UNI workers

The terrible track records of Uber, Amazon and AliBaba, as well as the banks, foreshadow what the future under TiSA would look like.

The Uber model threatens to fundamentally alter the nature of work and terms of employment. A *Financial Times* story in 2016, headlined 'When the boss is an algorithm', documented a lack of basic employment rights and protections, constant surveillance, and anti-union attitudes.[69] Insecure work is disguised as flexibility. The notionally 'self-employed' receive instructions through a faceless 'algorithm manager' that dictates their terms of engagement, including price and location, and changes them unilaterally without notice. Workers carry the legal risk of non-compliance with local regulations and the financial risk of misfortune. Stories of workers living in dehumanising conditions are now legion.[70] In 2017, Uber settled with the US Federal Trade Commission over misleading drivers about how much they could earn.[71] In a case brought on behalf of drivers by the International Union of Foodworkers, the London Employment Tribunal ruled in October 2016 that Uber drivers are working in an employment relationship and have enforceable rights, including a guaranteed minimum wage, paid breaks and holiday pay.[72] Uber's anti-worker, anti-union attitude was epitomised in February 2017 by Chief Executive's verbal abuse of a driver, on top of its failure to act on sexual harassment complaints within the management team.[73]

Amazon's fulltime and part-time workforce in 2016 had expanded to 341,000, almost 100,000 more than in 2015.[74] The company is infamous for highly exploitive labour conditions, invasions of privacy

67 International Digital Economy Alliance (IDEA), 'The Trillion Dollar Question. How trade agreements can maximise the economic potential of data in the networked economy and support the Internet as the world's trading platform', 2013, pp.2-3

68 IDEA, The Trillion Dollar Question, pp. 7-8

69 Sarah O'Connor, 'When the boss is an algorithm', *Financial Times,* 11 September 2016

70 'When their shifts end, Uber drivers set up camp in parking lots', *NZ Herald,* 24 January 2017

71 'When their shifts end', *NZ Herald,* 24 January 2017

72 Uber loses right to classify UK drivers as self-employed', *The Guardian,* 28 October 2016, https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status

73 'Uber CEO seen on video arguing with driver over fares', *NZ Herald,* 1 March 2017

74 https://www.statista.com/statistics/234488/number-of-amazon-employees/

of employees, using electronic devices to track workers, bullying of temporary foreign workers and resistance to unionisation.[75] By maintaining multiple fulfilment centres, Amazon can substitute labour if industrial action is taken. Work in its fulfilment centres is increasingly automated. Tasks are divided across receivers, stowers, pickers and packers, all monitored by electronic devices (including absences on bathroom breaks[76]). Stories of drivers sleeping in cars and tents mirror those working for Uber.

Amazon's workforce costs are expected to fall further as artificial intelligence is used to replace human labour. The company acquired robotics manufacturer Kiva Systems in 2012. As of 2015 there were 15,000 robots operating in ten US fulfilment centres controlled by a central computer. The centres provided services like 'pick and pack', labelling, shipping, inventory, and returns management for small and medium enterprises (SMEs) and individual sellers. Drones have been tested for last-minute delivery, with greatest potential for delivering light packages of high value in urban areas, where individual deliveries of low volume can be costly and inefficient. Alternative delivery options include crowd sourcing, networks of automated lockers, and Pick Up and Drop-Off points. In 2016, Amazon sought to patent the use of blimps as delivery hubs from which drones could operate a delivery service,[77] potentially across the border, and to print 3-D products from trucks *en route* to deliver.[78]

The Amazon model is shared by other large distributors. Britain's second largest parcel delivery firm Hermes had 10,500 couriers working for it in 2016; all are 'self-employed' and deemed not entitled to the national living wage, pension contributions, or holiday or sick pay.[79]

There is little information on AliBaba's labour practices in China or in the offshore joint ventures with public and private post and courier companies. Its formal workforce is largely technical specialists, who are well rewarded, although one posted a complaint of unpaid overtime and the intense pressure of constant change.[80] It is more difficult to find much detail about treatment of its contract workers. The choice of Malaysia for the first free trade hub promises poor labour standards and struggles to unionise. There are also long-standing complaints that the well-connected AliBaba has secured contracts reserved for bumiputra.[81]

This report does not suggest that TiSA is responsible for these underlying trends or corporate practices. But conclusion of the deal would consolidate the power of the mega-tech players and disempower governments, voters, workers and unions in seeking to make the technology work for people.

75 Birner, *One click to empowerment?*, 2015.

76 'Amazon workers sleep in tents near site', *NZ Herald,* 11 December 2016

77 'Amazon's latest idea – a flying factory', *NZ Herald,* 30 December 2016

78 'Patent filing reveals Amazon's idea to 3D-print products on delivery trucks', *Geekwire,* 25 February 2015, http://www.geekwire.com/2015/patent-filing-reveals-amazons-idea-to-3d-print-products-on-delivery-trucks/

79 'Revealed: delivery giant Hermes pays some couriers less than a living wage', *The Guardian,* 18 July 2016, https://www.theguardian.com/society/2016/jul/18/hermes-couriers-paying-staff-less-than-living-wage

80 https://www.glassdoor.com/Reviews/Employee-Review-Alibaba-com-RVW754825.htm

81 Joseph Tawie, 'AliBaba contractors 'killing-off' Dayak business', *The Nation,* 16 October 2012, http://www.freemalaysiatoday.com/category/nation/2012/10/16/ali-baba-contractors-killing-off-dayak-business/

5.

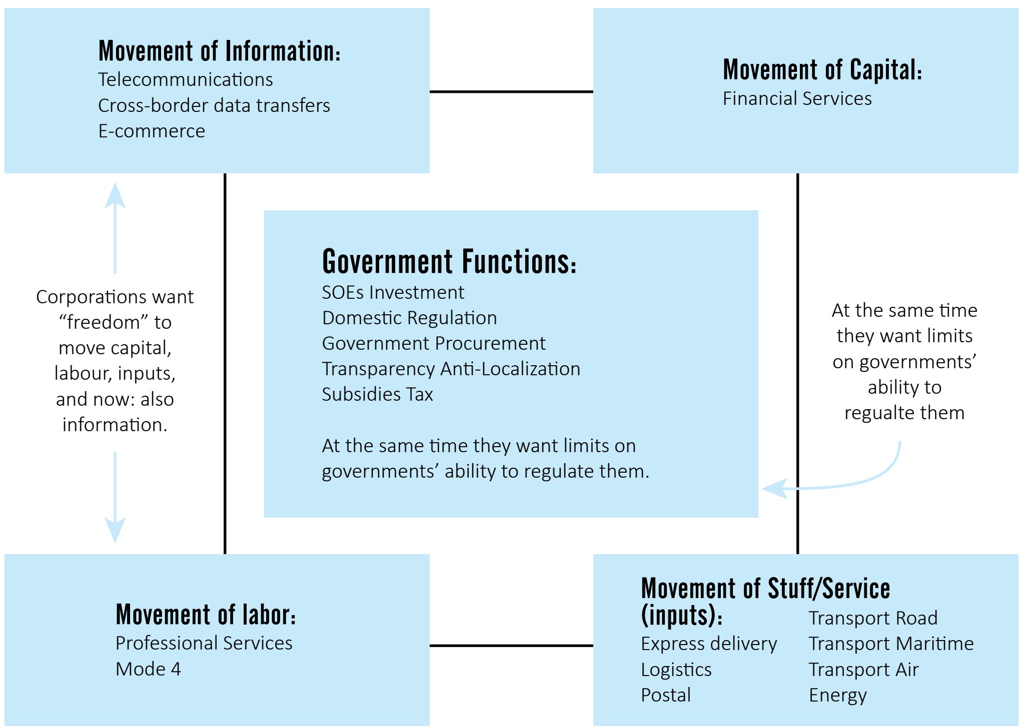
AN OVERVIEW OF TISA

The GATS was a product of the 1980s and 1990s. It was designed to open countries' doors for corporations as they transnationalised and to lock in the emerging neoliberal regime of liberalisation and business-friendly regulation. In the 2000s free trade agreements expanded the GATS rules outside the WTO. New restrictions on regulating services cross-fertilised with other chapters that guaranteed corporate rights in investment, intellectual property and government procurement. TiSA's role is take these rules further again, acting as the midwife and protector of the transformation to a digitally-enabled form of global capitalism in which services are pivotal. The combination of a core text modelled on the GATS with new schedules and numerous annexes reflects the underlying objective to transport TiSA back into the WTO and effectively supersede the decades-old GATS. Appendix 5 provides a more technical account of the core text.

How TiSA liberates global capitalism

There are several ways to explain how TiSA would advance this goal. Figure 5.1 identifies the 'freedoms' from government functions that corporations are seeking through different elements of TiSA, organised by four categories: movement of money, movement of information, movement of people and movement of things.

Figure 5.1: Corporate Demands for TiSA: To Limit Functions of Government and to Ensure Complete Freedom of Movement across Borders[1]

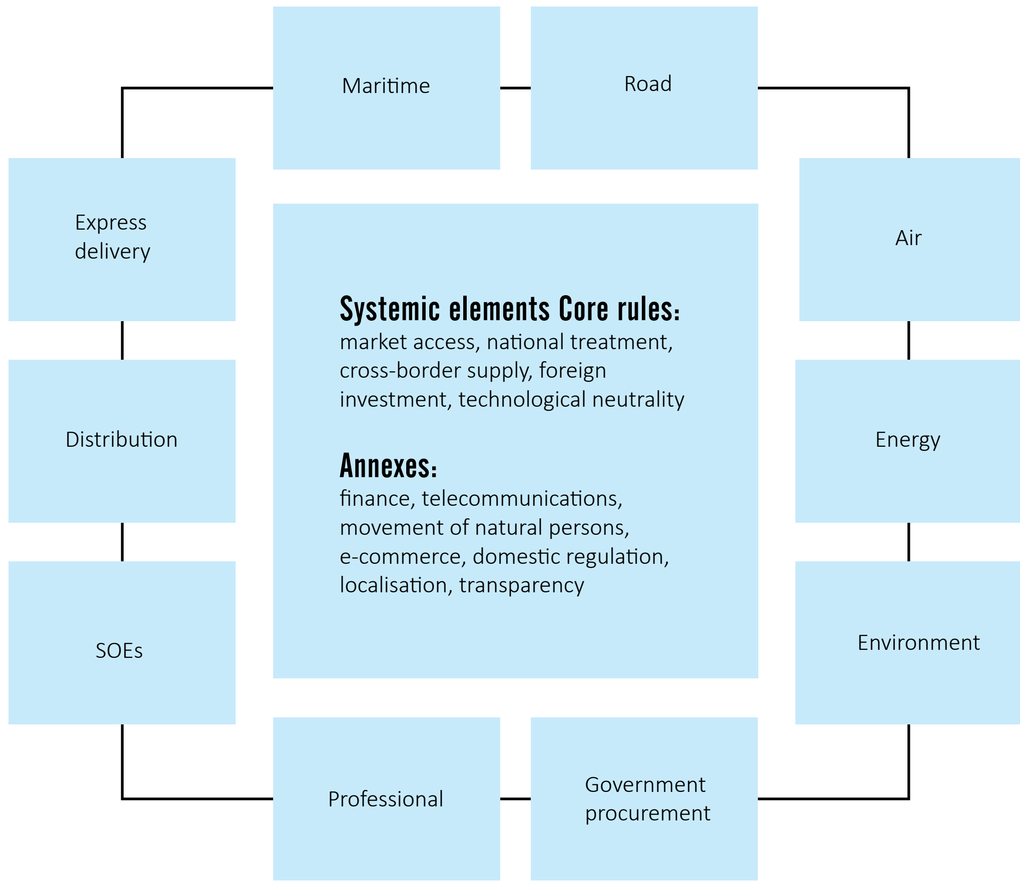


1 Figure is adapted from a version by Deborah James, Director of International Programmes, Centre for Economic Policy Research, Washington DC

Figure 5.2 offers another way of looking at TiSA. It distinguishes between the systemic elements set out in the core rules and the most important annexes that would be pre-requisites to any final TiSA (in the centre), and a periphery of other sector-specific annexes that are the pet projects of some TiSA countries and face resistance from others. The systemic annexes that the EU identifies as 'key' are telecommunications, e-commerce, localisation, financial services, transparency, and Mode 4 (movement of people). Domestic regulation has also been included in Figure 5.2, although not favoured by the EU. The remaining sector-specific annexes have varying degrees of support across the TiSA parties.

Just as the annexes cannot be understand separately from the core text, they also can't be read in isolation. Some annexes overlap because they approach similar services activities from different perspectives – for example, annexes on road, air and maritime transport, delivery and distribution are all integral to the global supply chain; the financial services, telecommunications and delivery annexes are all fundamental to e-commerce. The specific titles of annexes can be misleading – 'maritime services' potentially includes multi-modal transport through road and rail. Others propose clusters of services around a shared activity, such as air transportation.

Figure 5.2: How TiSA Rules and Annexes Serve the Global Digital Economy



Handcuffs on future regulation

Team TiSA's goal of a 21st century agreement means the new rules and commitments must be flexible and extensive enough to accommodate the changing structures of capitalism and the *modus operandi* of powerful corporations for decades ahead. They complain that the GATS is rigid and its schedules and classifications are obsolete. To some extent that is true. When the GATS was drafted, the Worldwide Web was in its infancy. No-one could have predicted the way the Internet has developed and how it would change international commerce - or the concerns that has generated over information flows, privacy, financial stability, and national security. It is equally impossible to predict now what technologies might emerge in the future, for example by harnessing artificial intelligence in currently unimaginable ways. Yet Team TiSA and the most aggressive of the TiSA parties want governments to promise *never* to regulate services that do not yet exist or new technologies that change the way the services they have committed to TiSA's rules are delivered.

The following summary tries to capture the essence of TiSA's rules. For a more technical account see Appendices 3 to 10 on the Core text and the annexes.

Defining trade in services

The reach of these agreements is incredibly broad. The rules apply to any **measures** a government adopts, which range from laws to administrative decisions, at central, regional or local government level or by bodies that exercise a delegated authority. Moreover, the measures only need to 'affect' the supply of a particular service; they don't even need to directly target the service (so they could include new labour laws, especially if they negative affect a particular service).

The service is traded when it is supplied by a foreign firm or individual from another TiSA country to a user of another TiSA country through one of four ways or **modes of supply**: across the border (eg buying a book from Amazon), using the service in another country (an offshore bank account), a commercial presence inside the country (a foreign-owned telco) or personnel coming to the country temporarily to deliver the service (an IT specialist).

Core rules

The two core rules of TiSA are the same as the GATS:

Market access targets six kinds of measures that governments use to control the size and growth of markets in a service, nationally or in a region of the country. It extends to indirect impacts, where a measure *affects* the *supply* of a service in any of the modes of delivering it (from offshore, by foreign investment, or a temporary presence in the country). There is a closed list of the kinds of restrictions on services markets that are prohibited; examples include a monopoly (eg. of telecoms or disaster insurance); an economic need tests (eg. showing an unmet need for a health insurer, bank, or pension fund operator); a cap on the number of suppliers (eg. licences for couriers or liquor outlets); a ban on certain services (eg. advertising high-risk financial products); entry only through a legal form (eg. insurers by a subsidiary rather than a branch or agency) or joint ventures (eg. public telecom providers).

In the GATS, the market access rule only applies to services that are listed in the country's schedule for each mode of supplying it, which makes it more possible to predict the impact. TiSA takes the same approach, although some annexes propose a more restrictive 'negative list' approach to services like express delivery and many financial services, especially insurance. These are discussed below.

Non-discrimination (national treatment). Foreign services firms that supply a service physically or from offshore also want to be treated at least as well as locals (although they are happy to receive better treatment, such as in free trade zones or through special incentives like tax holidays). The national treatment rule (think of it as 'treating them like nationals') would, for example, stop a government from subjecting foreign investors to special vetting or from restricting how much of a firm or asset they can own; paying subsidies only to locals; requiring chief executives and directors to be citizens; or reserving certain activities for local firms. In the GATS, governments made their commitments to this rule the same way as for market access – it only applied to services listed in the schedule for each mode. TiSA takes a negative list approach – the rule applies unless the service or measure is explicitly protected in the country's schedule of commitments.

Texts from 2016 show the same scheduling requirements will apply to other TiSA rules that prevent 'discriminatory' measures that require a cross-border service supplier to have a ***local presence*** inside the country,[2] set nationality requirements for ***senior managers and boards of directors***,[3] and impose

2 TiSA, Localization Provisions, November 2016, Art X.1

3 TiSA, Localization Provisions, November 2016, Art X.2

local content and performance requirements on foreign firms operating in the country (such as requirements to transfer technology)[4].

Schedules of countries' commitments

It would have been impossible to get governments to agree to apply these and other rules in the GATS if they applied across the board to all services. So they were allowed to control their exposure through country-specific schedules. To do so they needed a common way of describing which services were covered (or not). They used a document known as ***W/120***, which is based on a ***classification system*** developed in the UN in the early 1990s (see Appendix 2). The classifications are often surprising, because the services are viewed from a commercial perspective (for example, midwives are categorised as supplying a professional business service).

The W/120 classifications are outdated and overlap, which creates uncertainties and risks for governments when drafting these schedules and policy makers are trying to interpret them. Is Google an advertising service or a computer service? Is Amazon a retail distribution, courier or computer service? Is warehousing run by robots a distribution service, a computer service or not covered? Would films and music be an entertainment, audio-visual, computer or telecom service?

The ***negative list*** approach to scheduling commitments on the non-discrimination (national treatment) rule in TiSA starts from the presumption that a government cannot give preferential treatment to local services or suppliers, at any level of government, in any mode of delivering the service, forever - unless the government has explicitly stated otherwise in its schedule. The goal is to maximise the coverage of the non-discrimination rule and restrict the legal space for new regulation. It puts a country's future regulatory capacity at risk of errors and omissions, unforeseen or unforeseeable situations- or a highly liberalising government that is intent on binding the hands of its successors.

Negative lists are high risk even for governments with a lot of experience of liberalisation, privatisation, de-regulation and market-based regulation, and who have well-resourced bureaucracies and experienced negotiators. Particular services may play a quite different economic and social role in the future economy, raise new environmental and cultural concerns, or have a much greater negative impact on the workforce or vulnerable communities, which require governments to regulate. The negative list prevents that, unless the government can justify using one of the very limited exceptions discussed below.

Because of these risks, TiSA would allow a country to carve out a service or measure altogether from the national treatment rule, referred to as a ***'policy space' protection*** (in Section A of the schedule). However, it is subject to negotiation and agreement by all the other TiSA parties. It is unclear whether this option would be available for annexes that require commitments on market access to take a negative list approach. The cumulative effect of the rest of TiSA could still hog-tie a government in regulating a new service or a new way of delivering it.[5]

Where a country does not propose a 'policy space' protection or the other parties won't agree, the fall-back position is to keep existing measures that would breach the non-discrimination rule, basically freezing the status quo in the particular subsector. This is called a ***standstill*** (in Section B of the schedule): the government cannot adopt more restrictive policies or regulations, for example by new limits on foreign investors or reversing a privatisation. A standstill vastly increases the risks from policy, regulatory, social or political failure, and can leave a government impotent to respond to new circumstances, including the unforeseen impacts of technologies. Again, the right to keep those existing measures has to be negotiated and agreed to.

4 TiSA, Localization Provisions, November 2016, Art X.3

5 Through the combination of the market access rule, the definition of 'supply' of a service and a 'measure' 'affecting' a service, the broad scope of some sectoral commitments (eg. computer services or data services) interpreted using the concept of 'technological neutrality'. See also Appendix 5.

On top of the standstill a ***ratchet*** would apply: if a government adopts a more-liberalised measure, it is automatically locked in for as long as TiSA remains in force. It is irrelevant if the government has been poorly advised, reckless, ideologically-driven, corrupt, or captive of corporate élites. The ratchet would also allow a political party in power to adopt an extreme agenda of liberalisation, deregulation and privatisation knowing its opponents would be unable to implement an alternative political manifesto. A future government that is more prudent, seeks to rebalance social and commercial interests, or to close the opportunities for profiteering or corruption, could face legal action under TiSA if it tried to undo a liberalising law that the previous government had introduced.

When a government schedules a commitment in TiSA it is taking a gamble about what regulatory space it needs to preserve, and does so within a negotiating context that is anti-development and aims for maximum liberalisation. This is profoundly anti-democratic: it forecloses the right of elected governments to change their policy settings in the future on pain of economic sanctions. Those risks are heightened for the global South, which is why most have resisted the use of negative lists to date. Its adoption in TiSA is another breach of the mandatory development flexibilities in GATS.

As with the GATS, it would be extremely difficult and potentially very costly for a country to ***remove a commitment*** from its TiSA schedule. If another party objects, the government would have to negotiate additional liberalisation to compensate for the (speculative) future impact on the other country's commercial interests; that means the price of change would fall on other services sectors.

There are only a couple of examples where this has been attempted under the GATS. In 2008 the EU agreed to allow the US to withdraw commitments on Internet gambling in return for additional concessions on postal and courier services and storage and warehouse sectors.[6] In the most notorious example, the US has blocked progressive health reforms in Bolivia, one of the world's poorest countries. The Bolivian government notified the WTO in 2008 that it wanted to change the GATS schedule, which was drawn up by its neoliberal predecessor, and take hospital services back under public control in line with its new constitution. The US objected at the last minute. That was almost a decade ago. Presumably the US is waiting for a less progressive Bolivian government to withdraw the request. Meanwhile, its stance sends a clear message to any other country seeking to change its schedule.

Domestic regulation disciplines

Neoliberalism assumes a light-handed and market-based approach to regulation.[7] The market access and national treatment rules already limit governments' regulatory options. In the Uruguay round some activist governments and corporations wanted additional restrictions on three other ways of regulating services: technical standards, qualification requirements and procedures, and licensing requirements and procedures. They proposed a multi-layered test that would require governments to take the most light-handed approach reasonably available to achieve the objective of the regulation, and narrows the scope of those objectives to marginalise non-commercial social, cultural, environmental or other discretionary considerations.

WTO members agreed that interim restrictions along these lines could apply only to the subsectors listed in a country's GATS schedule *and* only if the way the government implemented that regulation nullified its national treatment or market access commitment *and* if the regulation could not have been foreseen at the time the GATS commitment was made. Most recent FTAs have used the same approach. Very little use has been made of these rules.

Negotiations have continued in the WTO, but remain stalled – although there is another attempt to push them in advance of the WTO Ministerial in Buenos Aires in December 2017. The main

6 The US has still not complied with the gambling obligation after a successful challenge by Antigua and Barbuda: Panel Report, United States — *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004.

7 As reflected in the EU's Better Regulation Package (http://www.betterregwatch.eu/) and the Regulatory Coherence chapter of the TPP, see Jane Kelsey, 'Preliminary analysis of the draft TPP chapter on regulatory coherence', https://itsourfuture.org.nz/wp-content/uploads/2013/09/JK-Memo-on-Reg-Coh.pdf

proponents[8] are now trying to advance their demands through TiSA, in both the core text and an Annex on Domestic Regulation. The US, Canada and the EU oppose some of their worst aspects, but not all. These proposals are detailed in Appendix 9. These rules could have significant impacts on all services of importance to UNI, and need to be read alongside the annexes that impose further restrictions on specific sectors, such as financial services, telecoms and e-commerce.

It may also be difficult to decide whether a measure, such as restricting is a ban on delivery by drones or driverless vehicles, would fall under the market access rule as a measure affecting the supply of a service by imposing a ban or a technical standard subject to the proposed restrictions on domestic regulation. Such uncertainty would put policy makers and regulators in an impossible position.

E-commerce, technology and data

Some of the TiSA parties want a country's commitments to apply whatever technology is used to deliver the service, including technologies that were not invented when the schedule was drafted. The status of the principle of ***technological neutrality*** is unsettled in the GATS.[9] The idea that commitments apply through any means of delivery was argued in the dispute brought against the US over a ban on Internet gambling; the dispute panel said the principle 'seems to be largely shared among WTO members',[10] but it was not material to the outcome. In a dispute brought by the US involving audio-visual services, China insisted that the principle has never been accepted by WTO members. The panel found it was not necessary to decide that question, but it did not reject the possibility.[11] China has consistently taken that position at the WTO.

Given the focus in TiSA on cross-border services and the rapid developments in technology, applying technological neutrality would massively expand the impact of commitments on substantive services, such as education, health, audio-visual or delivery, and on services involving computers, other technologies and infrastructure. If the concept was accepted, it also would vastly magnify the problems of foresight- it is impossible to predict what issues or risks a new technology might create that would require regulation in the future.

Prohibiting localisation requirements

The cross-border service supplier is usually governed by the law of the country they are operating from, including labour standards. Making commitments on cross-border services, and agreeing to apply technological neutrality, become even more dangerous if a government cannot insist that the entity supplying a service from outside the country has a presence inside the country. Prohibiting ***requirements for local presence*** is one of Team TiSA's principal demands. Accepting that ban would pose major obstacles to effective legal liability, the vetting of qualifications and assessing compliance with technical and professional standards, consumer protections and the ability to tax, as well as monitoring the labour standards of workers who are delivering the service. Effective oversight and enforcement would depend on those countries' laws, the cooperation of their regulators, affordable access to their legal systems and their courts' willingness to accept jurisdiction.

A second rule, on ***data localisation***, would prohibit requirements to hold or process data inside the country of origin, and allow suppliers of a service to store and process data relating to a service anywhere in the world. What rules apply to that data would then depend on where the server was located. The 'cloud' usually means the US, whose laws on privacy are lax and laws on surveillance are intrusive, and where commercial sale of data is rife. It could also become practically impossible for

8 Principally New Zealand, Australia, Hong Kong and Switzerland

9 Jia-Xiang Hu, 'When Trade Encounters Technology: The role of the technological neutrality principle in the development of WTO rules' in Bryan Mercurio and Kuei-Jung Ni, *Science and Technology in International Economic Law: Balancing Competing*. Routledge, 2013, 75- 89, at 86

10 *US – Gambling*, para 6.285

11 Panel Report, *China – Publications and Audiovisual Products*, WT/DS363/R, 12 August 2009, para 7.1257

authorities to access the data necessary to monitor company's compliance with its safety standards or labour laws effectively. The data itself might be held by third party contractors in another non-TiSA country. Governments would effectively surrender their sovereignty to the lawmakers of another country.

Empowering corporations to lobby

Under the ***Annex on Transparency***, TiSA governments and their corporations would have the right to be informed of proposed new regulations in advance so they can lobby to protect their interests.[12] The wording of the annex appears neutral, as it refers to informing 'interested persons'. But in an earlier version, New Zealand explicitly described the purpose as to enable those persons to assess whether and how their 'trade interests' were affected.[13] Many countries already provide similar access through so-called 'better regulation' processes, but that is domestic policy that can be changed; TiSA would impose a binding obligation in a pro-corporate agreement. Locking the transparency obligation in through TiSA would permanently skew the balance of interests in the lawmaking process, given the massive resources these foreign companies have available.

Public services

No public services carve out

What GATS proponents misleadingly describe as the **'public services' carve out'**[14] applies only where services that are supplied under governmental authority are non-commercial *and* have no competitor – a public monopoly that provides services for free.[15] Very few public services meet those criteria today. All other public services would be subject to TiSA's rules.

Subsidies

Subsidies are a crucial public policy tool to ensure affordable access to services. In some FTAs subsidies and grants have been excluded altogether. The position on subsidies has not yet been decided in TiSA. This is extremely important because subsidies are defined as a 'measure' and are subject to the non-discrimination rule. Under the GATS, if a government made a commitment to apply the national treatment rule to a particular service, it would have to provide subsidies to the foreign provider unless it had excluded them from its commitment. In TiSA, the negative list approach to national treatment commitments means foreign firms would have rights to subsidies for services unless the schedule provides otherwise.

Universal service obligations (USO)

Another tool that governments use to ensure that services in regulated industries, such as telecommunications and postal services, are generally available are universal service obligations. They are often mandated through inter-governmental organisations like the International Telecommunications Union and the Universal Postal Union. USOs have traditionally been provided through state enterprises with funding from government or pooling any losses among the industry operators. Private and foreign firms object that USOs give state providers an unfair competitive advantage. The TiSA annexes on telecommunications and delivery services seek to limit the scope of the USO, require competition for the right to deliver it, and/or protect private operators from contributing to the cost.

12 TiSA, Article 3, Transparency Annex, dated 6 November 2016.

13 TiSA, Footnote to Article I-2, Annex on Transparency, dated January 2015

14 TiSA, Article I-1.3(b) and (c), Core text, dated 14 July 2016

15 'Services supplied in the exercise of governmental authority' are defined as a service supplied neither on a commercial basis nor in competition with one or more service suppliers.

State-owned Enterprises (SOEs)

Additional restrictions may apply to SOEs. According to an OECD study in 2014 there are still SOEs in many sectors.[16] The network industries (utilities and post) made up about half the total value of the SOE sector in OECD countries and 60% of employment; next came finance, at about a quarter of total SOEs by value, followed by transportation and the primary sector, including mining. In mid-2016 the US belatedly tabled an Annex on State-owned Enterprises that draws on the chapter it made a red line in the TPP, but omits is most onerous obligation.[17] This annex is especially important for UNI, with the potential impact on post and telecoms, banks, insurers and pension funds that are majority-owned or controlled by central government. The OECD study also shows that some TiSA countries, including a number of EU member states, would have quite extensive exposure to the Annex- and might therefore be expected to resist.[18] Others, including the US, have very few SOEs that would be affected.[19]

The US's strategic goal is to improve the ability of US companies to compete with SOEs in the US, the SOE's home country and third countries. In the process, it would:

- require countries to adopt a commercialised and ***corporatised*** model of state-run activities and ***lock the in*** for the long term;
- create conditions that foster ***privatisation***;
- have a ***chilling effect*** on the exercise of public good functions by governments and SOEs;
- ***undermine state-managed economies***, especially China, where state-owned and state-supported enterprises play a dominant role.
- establish ***a precedent-setting 'norm'*** as a precursor for negotiations in the WTO, whereby rich countries design 'disciplines' that force radical restructuring of developing countries in which SOEs play a major role.
- ***use TiSA as a backstop*** for the TPP, even though the TiSA version does not go as far.

What qualifies as an SOE: The annex only applies to central government, because the US cannot bind its states. To qualify, the enterprise must be 'principally' engaged in 'commercial activities', which are defined vaguely as activities undertaken 'with an orientation towards profit-making'[20] and produce a good or service in quantities and at a price that the SOE determines. Banks, postal services and telcos owned by central government could all be caught.

To be *state* owned the central government must hold more than 50% voting rights or power to appoint 50% of the board of directors. Whether a golden share that gives the state voting rights on strategic matters would be covered is unclear. The status of PPPs in which the state has a majority stake is also uncertain as they are structured in various legal forms. The TPPA had a threshold of annual revenue below which most SOE rules would not apply.[21] There is no threshold in the leaked TiSA annex, although that may be added.

The SOE disciplines: SOEs that are majority-owned by central government would have to apply purely commercial considerations, as if they were a private sector business, when selling or buying services and not favour domestic consumers or businesses. TiSA parties could also demand information on each other's SOEs. It is unclear how far each country would be allowed to protect its sensitive SOEs,

16 OECD, *The Size and Sectoral Distribution of SOEs in OECD* and Partner Countries, 2014, page 15, Table 2.

17 For an early analysis of the thinking behind the TPP SOE chapter see: Jane Kelsey, 'The Risks of Disciplines on State-owned Enterprises in the Proposed Trans-Pacific Partnership Agreement', 4 March 2012, http://www.itsourfuture.org.nz/wp-content/uploads/2013/09/Kelsey-TPP-SOE-paper.pdf

18 Canada, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Mexico, Norway, Poland, Portugal, South Korea, Spain, Sweden and Turkey all have around 50 or more.

19 Australia, Austria, Belgium, Denmark, Italy, New Zealand, Switzerland, UK and US.

20 Footnote 1 says this does not include an enterprise that operates on not-for-profit or cost-recovery basis.

21 The threshold was set at 200 million IMF special drawing rights (about US376 million) from the date the agreement comes into force and adjusted 3 yearly.

but all the other parties would have to agree. This annex needs to be read alongside others that affect specific public services, such as competitive delivery services, telecommunications and financial services, as well as government procurement.

Preparing for privatisation: Since the 1970s, governments have used the corporatisation model of state enterprises to shed their social, employment, and economic development responsibilities; drastically cut the public-sector workforce and shift workers onto private sector employment conditions; reduce government subsidies and other supports; create lucrative markets for private businesses; and prepare SOEs for full or partial privatisation.

The TiSA annex does not require privatisation of SOEs and that is not the inevitable outcome. But once a public entity is corporatised and required to be fully commercial, the rationale for it remaining public is undermined, aside from the revenue stream it provides for the government. Partial privatisation is often presented as a benign way to bring in new equity or pay down corporate or public debt, while maintaining public control. But selling a minority stake creates investor demand and dilutes political resistance to full privatisation down the track.

Experience shows that governments may need to rescue systemically important former SOEs (such as banks, airlines, railways, water and other utilities) when the privatised businesses fail, often through profiteering or asset stripping, or when market or social failures create unacceptable costs. TiSA's national treatment rule and SOE Annex would close the escape route from failed privatisations. The annex also makes it hard to create new SOEs (although not as difficult as the TPP).

Once an enterprise meets the definition of an SOE that is 'principally engaged in commercial activities' the Annex would make it impossible to adopt a model that rebalances the market and social pillars in favour of a less commercial model of public enterprise, even in the face of policy or social failure.[22]

Mandated public services: The SOE annex would allow limited protection for public services. The US would allow an SOE to apply non-commercial considerations (such as the need to ensure public access, affordability, or cultural sensitivities) where it is fulfilling a 'public service mandate'. A 'public service mandate' is defined as a government mandate under which an SOE makes a service available to the public directly or indirectly, and includes the distribution of goods and the supply of general infrastructure services.[23] The EU has an alternative proposal based on 'a legitimate public service obligation'.[24] But even where that mandate exists the SOE must not discriminate against services and service suppliers from other TISA countries. It also assumes, often unrealistically, that an SOE has a distinct firewall between its publicly mandated and other services, domestic and international services, and operations that relate to goods, services and IT.

Social rights and privacy

Defenders of trade in services agreements constantly assert that governments retain the right to regulate for the public good. That misrepresents the legal position. A WTO dispute panel famously said in a GATS dispute that the US lost on Internet gambling:

> *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.*[25]

When apologists refer to the right to regulate for the environment and public health they are usually meaning the ***general exception***, which is a defence that governments can raise when accused of

22 TiSA, Footnote 1, Core text, dated 14 July 2016

23 TiSA, Footnote 4, Core text, dated 14 July 2016

24 TiSA, Article X.2.1 and X.4, Annex on State-Owned Enterprises, dated September 2016, With EU Comments October 2016.

25 *US – Internet Gambling*, para 6.316

breaching the rules. It has been carried over from the GATS into TiSA, and applies to measures ***necessary to protect human life or health***, ***public morals or public order***.[26] Its scope is limited. For example, it does not cover human rights, including labour rights set out in the core ILO Conventions or sectoral instruments, unless they are accepted as matters of public morals or public order. Even if the scope was broader, the defence would have to satisfy a multi-layered test that is so hard to satisfy it has succeeded fully only once in the 44 times it has been relied on in the WTO.[27]

First, there must be no less restrictive and reasonably available alternative measure to achieve the policy goal- the introduction of stricter safety laws for delivery services in response to new technologies, such as the successor to drones, could be challenged for exceeding the 'norm' that other countries consider adequate to address similar situations.

Second, the approach taken must not amount to 'arbitrary' or 'unjustifiable' discrimination or a disguised way of getting around the TiSA obligations – again, vague terms that can have a chilling effect on regulators.

The general exception provision on ***privacy***[28] is even more problematic. The exception only applies to measures designed to achieve compliance with the country's laws or regulations that are (a) not inconsistent with TiSA, *and* (b) are 'necessary', meaning there is not a less onerous reasonably available option to achieve that protection! In other words, TiSA put an additional constraint of 'necessity' on what TiSA would allow governments to do. That is not an exception! Privacy protections are especially important if allows data to be stored anywhere in the world, including the US with its weak privacy laws.

National security

Security is crucial for the express delivery, telecoms and finance sectors. However, excluding or restricting foreign suppliers from providing certain services would be discriminatory and violate national treatment. Other security-related technical standards could breach the domestic regulation disciplines.

The national security exception in TiSA would not help. It was taken from the GATS,[29] presumably to ensure consistency. That exception was itself adapted from the GATT 1947 and reflects perceptions of national security from the World War Two era. Governments are allowed to take action to protect their 'essential security interests', which they can judge for themselves. But the defence only applies in a time of war or 'other emergency in international relations', or for action pursuant to a United Nations mandate. It would not cover general national security precautions- unless all the TiSA parties accept that 'anti-terrorism' measures are responding to an 'emergency in international relations'. Alternatively, the government could invoke the general exception and claim that the measure was 'necessary to maintain public order'. However, that would be subject to the problematic multi-layered test described above.

26 TiSA, Article I-9, Core text, dated 14 July 2016

27 'Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide an Effective TPP General Exception', Public Citizen, August 2015

28 Article 4.2 in the Annex on Electronic Commerce, undated (November 2016), recognises countries can adopt their own privacy regimes, but that does not *require* any protections, let alone set minimum standards.

29 TiSA, Article I-10, Core text, dated 14 July 2016

6.

TiSA AND TELECOMMU-NICATIONS

TiSA is not about creating a level playing field: it is about allowing the transnational corporations from the affluent North (and in particular the dominant Internet players such as Google) to have access on favourable conditions to publicly-funded telecommunications infrastructure, especially in the global South. The telecom and Internet giants will continue to dominate their home markets even if TiSA rules force them to grant access and interconnection to potential competitors. They will be the major beneficiaries of rules that promise unfettered rights of cross-border supply and foreign investment and access to essential infrastructure, including connecting to undersea and terrestrial cables. They have the resources and technology to dominate markets, such as resale of services, the market allocation of spectrum and transfer of numbers, and the use of technologies of choice.

Box 6.1 Objectives for TiSA on Telecoms

The main proposals affecting telecoms would ensure:

- separate regimes for regulating telecommunications and not regulating the Internet;
- offshore provision of telecom services is unrestricted;
- requirements for an offshore supplier to have a local presence are prohibited;
- no restriction on transferring or holding data offshore;
- unlimited foreign investment in telecoms;
- access for all firms (not just telcos) to networks and services;
- access for all firms to essential public telecom infrastructure, while minimising the price they pay;
- major public telcos, primarily in the global South, must give competitors access to attach terminals and connect leased circuits;
- unrestricted rights to resell services;
- unbundling the network so competitors only pay major telcos for the parts they want to use;
- major, usually state-owned, suppliers and taxpayers carry the cost of maintaining whole networks;
- state-owned telcos must act like private businesses, beyond a limited public mandate;
- the universal service obligation is limited, firms can compete to supply it, and all get the benefits;
- terms like ‘reasonable’, ‘impartial’, ‘objective’ provide grounds to challenge regulatory decisions;
- regulatory bodies must enforce the annex as part of domestic law;
- foreign firms have rights to comment in advance on proposed laws, regulations and decisions;
- the International Telecommunications Union is marginalised as the standard-setter for telecoms.

Industry demands

The top telecommunications firms are dominated by the US, but China is now contesting that position. One website listed the top 10 in 2016 as [1]: 1. China Mobile (China); 2. Verizon (US); 3. AT&T (US); 4. Vodafone (US); 5. Nippon Telegraph and Telephone Corp (Japan); 6. Softback Group (Japan); 7. Deutsche Telecom (Germany); 8. Telefonica (Spain); 9. America Movil (Mexico); 10 China Telecom.

Most have large home markets which they dominate. The US Telecommunications Industry Association (TIA) put the value of the global telecoms market in 2012 at USD4.9 trillion, about a quarter of which was located inside the US.[2] The growth areas for industry investment were wireless and fixed broadband networks, driven by the need to create greater capacity to accommodate growing digital data transmission demands.

The TIA treats the Internet and telecommunications and an integrated whole. As Box 5.2 shows, its objectives for the digital economy include standard demands for liberalisation and expansion of telecoms markets, non-discriminatory and market-based regulation, regulators that are independent of domestic telcos (especially public telcos), and the technological neutrality of scheduled commitments so they apply to all new technologies. It also wants any localisation requirements removed and prohibited, in particular for cross-border operators to establish a local presence or manufacture technology locally, and to transfer technology.

Box 6.2 US Telecommunications Industry Association (TIA) demands

In setting its trade priorities for the digital economy the TIA proposed three principles:[3]

1. Enhancing trade liberalisation and expanding markets:

- trade liberalisation of tariffs and non-tariff barriers;
- market-based approaches to regulation;
- technological neutrality so commitments continue to apply to all new technologies;
- regulatory authorities should be transparent and independent;
- foreign suppliers must be protected against discrimination.

2. Combating protectionism and localization barriers:

- enforce existing WTO and FTA commitments;
- prohibit requirements to manufacture locally as a condition of accessing markets;
- remove and prevent localisation barriers that limit access to best technologies and products available in the global supply chain.

3. Ensure free flow of cross-border data:

- encourage common approaches to data privacy to allow interoperability;
- preserve the current multi-stakeholder approach to Internet governance;
- oppose efforts to put Internet governance under the control of a multi-national body.

Other voices from the digital industry want to ensure that telecom rules meet the infrastructural and commercial needs. The industry-sponsored International Digital Economy Alliance (IDEA) stressed the

1 Melissa Parrieti, 'The World's top 10 Telecommunications Companies', Investopedia, 2 March 2016, http://www.investopedia.com/articles/markets/030216/worlds-top-10-telecommunications-companies.asp

2 Telecommunications Industry Association, 'Trade Priorities to Advance the Global Digital Economy', 2013

3 Ibid, 2013

need for trade agreements to cover privately managed networks as well as the publically accessible Internet, and ensure that ISPs that serve the private market can resell their excess bandwidth on new physical infrastructure for the provision of public Internet connectivity.[4]

TiSA on telecommunications services

As with finance and delivery services, TiSA impacts on telecommunications in numerous ways. Government will be asked to schedule commitments not to restrict market access (how many? how big? through joint ventures? is there an unmet need?) or discriminate (in favour of locals and between different countries) on telecom services provided across the border or through foreign investments. 'Transparency' would give TiSA states and telcos the right to comment on proposed regulations. Other annexes on domestic regulation, state-owned enterprises, e-commerce, professional services, and labour mobility would impose new rules.

Unlimited foreign investment and cross-border supply of telecoms

A number of TiSA countries say all parties should be *required* to make commitments on foreign investment and cross-border provision of telecom services.[5] That would deny governments the ability to protect their telecoms from the core rules on market access and national treatment in their schedules of commitments.

Foreign investment: A number of countries[6] want no restrictions on participation of foreign capital in a country's telecom sector or requirements to enter through a joint venture. The US opposes this, as it restricts foreign investment in telecommunications!

Cross-border*:* A group of countries[7] also want no limits on the ability of firms from other TiSA countries to supply telecom services from across the border, either by

- limiting access to the country's market (restricting the number of providers, requiring them to show an unmet need (an economic need test, etc) or
- discriminating in favour of locals (eg subsidies only to local firms, excluding foreigners from supplying certain services, preferential access for locals to the spectrum, etc).

They also want to prohibit a requirement that cross-border telecom suppliers have a local presence in the country where they deliver the service, although the EU dilutes this to 'endeavour not to require' a local presence. There is a further proposal from the EU, Switzerland, Norway and others that governments cannot limit the number of available licenses, except for assigning frequencies and other scarce resources.

These restrictions on regulating cross-border telecom services are opposed by a significant number of countries. The US has not stated a position.

4 International Digital Economy Alliance, 'The Trillion Dollar Question. How trade agreements can maximise the economic potential of data in the networked economy and support the Internet as the world's trading platform', 2013, fn 2.

5 TiSA, untitled proposal, Annex on Telecommunications, dated November 2016, p.34

6 EU, Iceland, Mauritius, Norway and Switzerland

7 EU, Iceland, Japan and Norway

The Annex on Telecommunications Services

The most significant part of TiSA is the proposed Annex on Telecommunications Services, which aims to impose additional limits on government regulation, building on the GATS Annex on Telecommunications and the voluntary Reference Paper on Basic Telecommunications, the Trans-Pacific Partnership Agreement (TPP), as well as US FTAs.

Consistent with Team TiSA's objectives, the telecom annex places obligations on *major suppliers of public telecommunications services*, while it guarantees entitlements to *telecommunications services suppliers* and sometimes firms in other sectors. A 'major supplier' is defined as one that can materially affect the terms of participation in the relevant market for public telecoms through its control over essential facilities or the use of its position in the market – a definition targeted at developing countries, as the giant telcos will argue that they do not control essential facilities and they can't materially affect participation in the market because anti-trust laws ensure competition.[8]

The rules in the annex serve five functions:

i. Deregulation and access to services and networks for telecom suppliers;
ii. Requiring that major telcos facilitate competition;
iii. Undermining telecoms as a public service;
iv. Providing minimal consumer rights and protections;
v. Securing compliance through institutional regulatory frameworks.

Appendix 6 provides a detailed analysis of the TiSA telecoms rules.

What this means for UNI's affiliates and workers

- Increased offshore supply of public telecoms kills local jobs.
- Exposing public sector telcos to increased competition from private and foreign firms, inside and outside the country, means pressures on labour costs, workload, safety standards and social rights, such as pensions and healthcare.
- New technologies, including satellites and mobile networks, shrink the traditional land-line market and associated jobs.
- Allowing private suppliers of telecom services to cherry-pick the lucrative parts of the market increase pressure on the major, especially public, operators to minimise costs while maintaining networks.
- Fracturing of state-owned monopolies, especially through unbundling, promotes privatisation and contracting out.
- Requiring state-owned telcos to run like private businesses, often followed by privatisation, means redundancies, private sector conditions, contracting and outsourcing.
- When professional telecom workers and technicians become competitive short-term contractors, the work is deprofessionalised and the public telecom network loses essential institutional knowledge and expertise.
- The transfer of servicing roles to call centres and online chats, often offshore, undermines local jobs, pay and conditions, and fosters exploitation of a feminised workforce.
- Fracturing of the domestic telecom market and corporatisation and privatisation of state-owned telcos, makes it hard to organise, maintain unionisation, bargain collectively, and take industrial action.
- Jobs move to un-unionised contractors and offshore labour on inferior conditions.

8 TiSA, Article 23 Definitions, Annex on Telecommunications Services, dated November 2016.

7. TiSA AND FINANCIAL SERVICES

TISA's rules on financial services are designed to advance the interests of the same global finance industry players whose greed and recklessness was responsible for the global financial crisis (GFC) and others before it. They want guaranteed rights to supply banking, insurance, investment and other financial services across the border and to prevent or restrict regulations that make those operations more difficult or less profitable. Governments signing on to TISA would be expected to lock in their current levels of financial deregulation and liberalisation, promise never to regulate new and potentially toxic financial products and services, and disable themselves from taking precautionary measures to prevent another crisis.

Future growth of on-line and cross-border trade in financial products and services, especially through self-regulated and privately owned exchanges or in the shadow banking system, poses increased systemic risks of financial stability, regulatory avoidance, money laundering and tax evasion. Their workforce becomes utterly dispensable through a dynamic cycle of offshoring, automation and centralisation. As de-territorialised banks, credit cards and payment platforms like PayPal and Poli arrange settlements between each other they have the potential to form a proxy central banking system beyond the control of state regulators.

Nothing has been learned from successive crises. Leaked documents show the EU has made requests for more liberalisation of financial services to twelve countries, including most of TiSA's developing country participants.[1] The potential economic, social and political risks extend beyond the parties negotiating TiSA. As with the GFC,[2] a disproportionate burden of another financial crisis would fall on developing countries, even when they had no role in making the rules that heightened those risks. Additionally, those countries face the prospect that TiSA's new financial services rules could be exported back to the WTO.

Box 7.1 Objectives for financial services in TISA

TISA's rules aim to require governments to take a minimalist approach to regulating the finance industry and remove obstacles to its seamless global operations to guarantee:

- no limits on the size of financial institutions (too big to fail);
- unrestricted rights to supply services from outside the country (offshore call centres and tax havens);
- institutions can't be stopped from performing multiple activities (eg banks that take deposits from retail customers can also trade on their own account);
- foreign investment can be made through branches (that are regulated from their parent state) rather than subsidiaries (regulated by the host country);
- financial data can be held offshore (making them subject to foreign privacy and consumer protection laws, and inaccessible to financial regulators in an emergency);
- unrestricted rights to transfer funds electronically across the border (increasing risks of hot money flows or a run on a currency);

1 TiSA, Bilateral market access request by the European Union, June 2016, to Chile, Costa Rica, Hong Kong, Mauritius, Mexico, Pakistan, Peru, South Korea, Switzerland, Taiwan, Turkey, the US. https://wikileaks.org/tisa/document/20160701_TiSA_Bilateral-Market-Access-Request/

2 *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, 21 September 2009 (Stiglitz Commission), p.12

- electronic payment operators can transfer money in and out of countries to pay for services (as cross-border e-commerce grows, so will the dominance of PayPal, Visa and Poli);
- state monopolies can't use that status to support their non-monopoly activities (eg a state monopoly on disaster insurance must ensure its other insurance activities don't benefit from that);
- state-owned banks, insurers and fund managers must operate on a purely commercial basis;
- financial traders can't be required to conducted their business visibly, through public exchanges, rather than invisibly by over-the counter operations (using the shadow banking system that allows them to evade public scrutiny);
- new 'innovative' financial products and services can't be regulated if they can be sold inside the country (but innovative products are *designed* to avoid the existing regulations);
- credit rating agencies or financial advisers can't be regulated (even though they failed monumentally during the global financial crisis);
- unrestricted inflows and outflows of capital (even the IMF now recognises that precautionary capital controls and emergencies measures are legitimate ways to stabilise currencies and economies);
- managers or senior officers, or a majority of directors, can come from any country (requiring them to be nationals helps to ensure local knowledge and effective legal accountability); and
- the activities of hedge funds can't be regulated (speculation in food, energy, currency); etc.

The financial industry lobby

Architects of the GATS

The US financial services industry were the original architects of trade in services agreements. In the 1970s, they developed a plan to rebrand the expansion of transnational financial services as 'trade'. According to the former director of the WTO's services division: *'Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement'.*[3] While the lobby was led from Wall Street, it encompassed the major insurance and banking institutions, investment banks, and providers of financial services like funds managers, credit-rating agencies and even the news agency Reuters. They were later joined by the e-finance and electronic payments industry, which includes credit, stored value and loyalty cards, ATM management, and payment systems operators like PayPal.

When the GATS was being concluded in 194s the US insisted that negotiations on financial services were extended until countries had agreed to a raft of rules, schedules, annexes, known collectively as the Financial Services Agreement.[4] The most far-reaching was part was the voluntary Understanding on Financial Services which many, but not all, the TiSA parties have adopted.[5]

Attempts by the financial services lobby to push the boundaries of the Financial Services Agreement during the GATS 2000 negotiations and the Doha round failed. The US and EU developed new templates for more extensive obligations through their free trade agreements (FTAs). The TPP and

3 David Hartridge, 'What the General Agreement on Trade in Services (GATS) Can Do', speech to the Clifford Chance Conference on 'Opening Markets for Banking Worldwide: The WTO General Agreement on Trade in Services', London, January 1997

4 What is commonly called the Financial Services Agreement is a composite of texts: the GATS sets the framework for rules that govern services transactions between a consumer of one country and a supplier of another; the Annex on Financial Services applies to all WTO Members; schedules of commitments specify which financial services each country has committed to the key rules in (i) and (ii), and any limitations on those commitments; and a voluntary Understanding on Commitments in Financial Services sets more extensive rules and has an ambivalent legal status in the WTO.

5 Current TiSA negotiating parties who are not parties to the Understanding are: Chile, Costa Rica, Hong Kong, Israel, Korea, Mauritius, Pakistan, Panama, Peru, Taiwan. Those who are also not parties to US or EU FTAs that contain some such rules are Hong Kong, Mauritius, Pakistan and Taiwan.

TiSA became the vehicles to consolidate those gains, and bind governments to maintain a highly liberalised, deregulated, self-regulated (or at best lightly-regulated) financial regime. US Treasury Secretary Jack Lew said: 'We bargained very hard in TPP to get terms that are very favorable generally to U.S. financial institutions on a global basis'.[6] A comparison of TiSA with the TPP shows the US has made new demands, for example holding financial data offshore, while the EU has surrendered new protections for regulators it had included in its agreements with Canada, Vietnam and Cariforum countries, notably abandoning the stronger defence for prudential measures.

Team TiSA's finance arm

Team TiSA has become the new flagbearer. Its members include the first and third largest US banks (JP Morgan Chase and Citigroup),[7] most of the largest US insurance firms and numerous industry lobbies, plus both Visa and Mastercard. TiSA's Annex on Financial Services reflects the wish list of US industry demands, conveyed publicly through a consultation on TISA that the US Trade Representative (USTR) conducted in 2012 and the US International Trade Commission inquiry into the role of digital trade in the US and global economies in 2013.

The insurance industry lobby has been especially aggressive in its demands for TiSA. The **US Chamber of Commerce** pushed for the right to transfer policy holder and employee data across the border, non-discriminatory access to countries' markets for all forms of insurance, and 'level playing field' for government-affiliated and private insurers.[8] The **American Insurance Association** was even more aggressive, wanting TiSA to guarantee:

> *100 percent market access for the insurance suppliers of signatories in the markets of other signatories, including freedom from discriminatory treatment, the absence of quantitative restraints and investment restrictions, the freedom to choose the form of legal entity through which they operate in a given jurisdiction, and the ability to provide insurance on a cross-border basis. The [T]ISA should include strong disciplines on behind-the-border measures that indirectly restrict or limit market access, including state-owned enterprises, and discriminatory measures and regulatory schemes that operate as disguised trade restrictions. The [T]ISA should clarify that prudential measures must be nondiscriminatory and no more restrictive than necessary to achieve prudential objectives.*[9]

The **US Securities Industry and Financial Markets Association** urged the USTR to ensure there was prior consultation on draft regulation and a strong investment chapter with investor-state enforcement.[10]

The finance industry's digital agenda

The core demand in the 2013 US inquiry into digital trade was to 'free' the industry from localisation rules for data, local presence, and regulation of new products, subject to 'appropriate' prudential supervision.

According to **Citigroup,** an initiator of the original GATS and one of the six co-chairs of Team TiSA, the 'primary goal of any regulatory scheme concerning cross border data processing should be the establishment of global interoperability of national legal and regulatory requirements applicable to cross border data transfers and data processing.'[11] In other words, a uniform regime that is designed to serve the needs of the major financial institutions.

Citigroup's submission described data processing as the foundation of global operations of the finance sector, covering 'a wide array of activities and operations on the digital continuum including collection, access, use, transfer, disclosure, storage, retention and back up operations, such as disaster recovery.' Having to comply with the laws and requirements of different jurisdictions prevented it from centralising its operations in large global mainframes.

6 'Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue', *Inside US Trade,* 11 February 2016

7 http://www.bankrate.com/banking/americas-top-10-biggest-banks/#slide=1

8 https://www.regulations.gov/document?D=USTR-2013-0001-0018

9 https://www.regulations.gov/document?D=USTR-2013-0001-0013

10 https://www.regulations.gov/document?D=USTR-2013-0001-0032

11 https://www.uscib.org/docs/Citi_TC_030713.pdf, p.6

In particular, requirements for domestic processing of personal information denied customers, especially multinationals and businesses, the benefits of improved service quality. Costs of infrastructure, staffing and legal advice diverted funds from innovation and new initiatives, and could cause financial institutions to exit a country. Some countries took a different approach, dictating the content of contracts for outsourced activities or requiring approval from a banking regulator for outsourcing arrangements. That, according to Citigroup, showed there was no need for local data requirements – an early indicator of what the industry may argue are less burdensome ways for a government to achieve a 'legitimate policy objective'.

Citigroup objected, in particular, that the EU's Draft General Data Protection Regulation imposed restrictions on conduct outside the EU. It was concerned that other countries might follow suit, creating uncertainty for the industry and imposing costly and inefficient obligations to comply with different local rules on financial reporting requirements, anti-money laundering etc.

Another member of Team TiSA and the Coalition of Services Industries, **CIGNA insurance**, wanted to replace national regulation with global rules that are designed for globalised financial institutions:

> *as the world's economies become more interdependent, and as businesses and individuals become more globally mobile, it becomes essential that local regulations not impede the development of the global health policies required by these individuals and the businesses they support to promote global business and trade*. [12]

CIGNA attacked a broad range of localisation requirements as impeding its ability to provide efficient, personalised health insurance and cover for a multinational's employees anywhere in the world: local data processing, local authorisation of firms and health insurance plans, restrictions on data transfers, caps on foreign investment, and requirements to have a local presence. Most important was the free movement of data across borders. At a minimum, Cigna wanted TiSA to facilitate the supply of health insurance by guaranteeing the right of financial institutions to transfer data into and out of the territory for processing, and to process claims offshore.

In addition, parties should schedule commitments on health insurance in all four modes of supplying services, and clarify whether it is classified as life or non-life insurance. Cross-border market access commitments should cover, at least: supply to foreigners residing in a TiSA country; non-discriminatory laws, licensing, procedures and tax treatment; no restrictions on ownership and the legal form in which they invest; equal access to provider networks; and similar tax treatment. Visas for corporate personnel should not be linked to them taking local health insurance cover.

In an attack on the EU's privacy rules, CIGNA made the quite remarkable claim that the U.S. Health Insurance Portability and Accountability Act ("HPIAA") is 'arguably more robust in protecting an individual's personal health data' than EU law: 'It is, therefore, of great concern to Cigna that the EU has yet to recognize the robust nature of U.S. privacy legislation and its enforcement regime'.[13]

Freedom of Information documents show Cigna followed a similar submission to the USTR in 2013 with a personal meeting to press its cause.

The European finance lobby

The EU finance industry has made equally aggressive demands. ***Insurance Europe,*** which accounts for 95 percent of insurance premium income, wanted a standstill on existing market access and local preferences, with minimum standards for new commitments to apply across the board for all sectors of financial services.[14] These standards included no localisation requirements, no caps on foreign equity and full access to public and private distribution networks. It argued for a 'level playing field' with state-owned entities including postal financial services, even when they were fulfilling their universal service requirements. All restrictions on insurance activities and local requirements should be removed. In addition, all TiSA parties should sign up to the Understanding on Financial Services

12 CIGNA Insurance submission to US ITC Inquiry into the role of digital trade in the US and Global Economies, 2013

13 CIGNA Insurance submission to US ITC Inquiry into the role of digital trade in the US and Global Economies, 2013

14 Insurance Europe position on the Trade in Services Agreement, position paper, Brussels, 10 June 2013, https://www.insuranceeurope.eu/sites/default/files/attachments/Position%20on%20the%20Trade%20in%20International%20Services%20Agreement%20(TiSA).pdf

and guarantee the industry's right to comment on any new regulatory policies, supported by access to investor-state dispute settlement. As with their American counterparts, they wanted to narrow significantly the scope of the (already ineffectual) prudential exception.

TiSA Rules on Financial Services

TiSA's Annex on Financial Services builds on the Understanding on Financial Services, adding a variety of innovations that reflect the industry's demands.[15] The annex has an extensive definition of financial services, similar to the GATS, which does not rely on the standard W/120 classification document. The long and non-exhaustive list of 'financial services' ranges from insurance and reinsurance to commercial banking, derivatives trading and pension fund management to credit rating agencies and financial advisers.

The proposed rules would increase obligations to schedule commitments on the core market access and non-discrimination rules, and impose far-reaching restrictions on financial regulation, especially for insurance services. There are some exclusions for central banks' non-commercial activities and for a statutory system of social security or public requirement plans or other government-guaranteed entities where there are no competitors.[16] There is also a highly problematic protection for the right of governments to take prudential measures. Appendix 7 provides more technical detail.

Financial stability

A report written for the European Parliament in 2016 on financial services liberalisation under TiSA (the Lang Report) warned of a 'lost opportunity' to address problems with existing rules.[17] Yet successive leaked versions of the financial services annex show TiSA would go further than the GATS and the TPP. If the current texts were adopted, TiSA would set a new base that requires more liberalisation commitments, imposes new restrictions on requirements to transfer or store financial data locally and to disclose source code, tightens domestic regulation, and provides more opportunities for the finance industry to lobby against new regulations.

Before and after the global financial crisis there have been many calls to revisit the model of deregulation and liberalisation of global financial markets embodied in the GATS Financial Services Agreement. Countries like Ecuador and Barbados tried unsuccessfully to tighten the WTO's rules on financial services and suppliers in the late 2000s.[18] The US Congress managed to introduce some degree of re-regulation through what was known as the Dodd-Frank law in 2010[19] (which the Trump administration is now winding back). Prominent member of the US Senate Banking Committee Senator Elizabeth Warren warned the USTR in December 2014 that

> *the Trans Pacific Partnership (TPP) could make it harder for Congress and regulatory agencies to prevent future financial crises. With millions of families still struggling to recover from the last financial crisis and the Great Recession that followed, we cannot afford a trade deal that undermines the government's ability to protect the American economy.*

The Lang report prepared for the European Parliament observed that in the absence of TPP and TTIP, *'TiSA remains the only avenue outside the WTO in which new generation rules for transatlantic financial services are being developed'*.[20] Instead, the opportunity to fix problems that were exposed by the global financial crisis has been squandered.

15 TiSA, Annex on Financial Services, dated November 2016

16 TiSA, Article X.1.2(b) and (c), and 1.3, Annex on Financial Services, dated November 2016

17 Andrew Lang and Leonie Amarasekera, *Financial services liberalisation and TiSA: implications for EU Free Trade Agreements,* 26 July 2016 (Lang Report)

18 eg. *Unintended Consequences of Remedial Measures taken to correct the Global Financial Crisis: Possible Implications for WTO Compliance* WTO DOC JOB/SERV/38 (2011) (Communication from Barbados).

19 Formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, 124 Stat. 1376–2223

20 Lang Report, p.8

Capital controls

Even the IMF and its research economists now recognise that capital controls can be legitimate tools of financial stabilisation.[21] Numerous countries have successfully adopted them as pre-emptive measures. Yet nothing has been done in TiSA to amend the GATS provisions that prevent the adoption of capital controls as a precautionary measure and impose narrow conditions on their use even in emergencies.[22]

Prudential measures

When financial markets or major institutions collapse, economies are plunged into crisis and people's lives are shattered. Financial regulators use prudential measures to safeguard their financial system and financial institutions. The GATS contained a circular and potentially self-cancelling defence for prudential provisions: measures taken for prudential reasons must not be used as a means of avoiding the country's commitments or obligations under the GATS![23]

TiSA has imported that wording unchanged, even though the EU has adopted a new approach that partly addresses the deficiencies. The Lang report diplomatically observed that some safeguards and exceptions positions in TiSA *'may not reflect current best practice (compared, for example, to the prudential carveout in CETA). Where that is the case, TiSA may have an impact on the effective legal protection provided by enhanced exceptions contained in FTAs to which TiSA members are parties.'*[24] The European Parliament was more forthright, expressing a strong view that no new commitment [should] be made in TiSA *'that could jeopardise EU financial regulation by forcing the EU to turn back on its enhanced regulatory framework for the financial sector or by preventing the EU from using the law to tackle excessive risk-taking by financial institutions'.*[25] Despite that, the leaked financial services annex from November 2016 shows the European Commission has agreed to the flawed and potentially useless GATS provision in TiSA.[26]

Financial data

Who controls financial data, where and under what conditions is extremely sensitive. As the Peterson Institute explains, the authority of financial regulators is still essentially territorial, and

> *they want to be able to seize data and resources quickly to address abuse or to contain a financial crisis. Each government might therefore rather have global conglomerates keep a minimum amount of capital and certain essential information in its jurisdiction. When an international financial conglomerate fails, each government might rush to seize what it can to make sure that its constituents get paid. Under the circumstances, it is not surprising to see governments worry about their ability to prevent or resolve crises, react to abuses in finance or data privacy—or, on a more sinister note, police their people—when firms can instantly whisk assets and data out of their reach.*[27]

The TPP did not apply the prohibition on requiring data to be held locally to financial data.[28] The US Treasury had insisted on that approach,[29] apparently at the request of the Securities and Exchange Commission.[30] According to US Treasury Secretary Jack Lew 'we can't give away something that our

21 Most recently Jonathan Ostry, Prakash Loungani and Davide Furceri, 'Neoliberalism: Oversold?', 53(2) *Finance and Development,* June 2016, http://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm

22 TiSA, Article I-8, Core Text, dated 14 July 2016

23 GATS, Article 2(a), Annex on Financial Services

24 Lang Report, p.8

25 Resolution A8-0009/2016, para 1(e)(iv) cited in Lang Report, p.13

26 TiSA, Article X.16, Annex on Financial Services, dated November 2016

27 Anna Gelpern, 'Financial Services' in Peterson Institute for International Economics, *Assessing the Trans-Pacific Partnership*, PIIE Briefing 16-1, February 2016, 99

28 TPP, Annex 11-B, Section B of the financial services chapter said a financial institution must be allowed to *transfer* information in electronic form for the purpose of data processing where that processing is required in its ordinary course of business. But TPP countries could still require that financial data was *stored* locally.

29 Article 14.13.2 of the TPP says no 'covered person' shall be required to locate or use local computing facilities in the territory as a condition for conducting business in that territory. But 'covered person' does not include a 'financial institution' or a 'cross-border financial service supplier of a Party'.

30 'Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue', *Inside US Trade,* 11 February 2016

financial regulators need here in the US [because] prudential regulators need access to information in a timely way, particularly in a crisis. … Prudential regulators need to be guaranteed access to "timely and appropriate" information and there were times during the financial crisis they "were cut off".[31]

Wall Street lobbyists condemned this as 'data protectionism' and 'forced data localisation' and demanded it was covered by the TPP, even after the agreement was signed.[32] Their supporters in the US Congress demanded the ban on data localisation be extended to financial data as a condition of their much-needed support for the deal.[33] The USTR insisted the TPP text could not be reopened, but said the ban would be inserted into TiSA, which would bind eight TPP countries and many others.[34]

The US proposed a TiSA provision in July 2016 that would prohibit countries from restricting cross-border data flows.[35] The wording was subject to extreme secrecy and did not appear in the leaked financial services text dated that month. The sensitivity went beyond the concerns of financial regulators; it also raised the spectre of privacy and the potential for sale and misuse of personal financial information. By the November 2016 leaked text nothing had been agreed. This is discussed in more detail in Appendix 7.

What TiSA means for UNI's finance sector workers

- TiSA aims to lock the door against future regulation of the financial sector, despite repeated financial crises that have devastated economies, jobs and households, especially in the global South – some governments might even have to roll back the regulations they adopted following the global financial crisis.
- The finance sector would become even more high-risk, high-profit, globally mobile and unstable, as it maximises returns for shareholders and executives and minimises the costs of its workforce by cutting wages, de-unionising, contracting out and offshoring work.
- State-owned banks and insurers, especially in the global South, would face intense pressure to privatise or compete on private sector terms, with massive impacts on the public-sector workforce.
- Facilitating online technologies would shift work to back offices that foster short-term contracting and casualisation, and intense work pressures.
- Offshoring would increase, with call centres, online chat rooms and web-based transactions forcing workers to compete under labour conditions of the country in which they work, and eroding unionisation and collective bargaining.
- Gender impacts would intensify as women are clustered in low paid, insecure contract work.
- As workplaces become automated and anonymous, working conditions would deteriorate and electronic surveillance of performance would increase.
- Competition among workers and pay based on performance targets and financial incentives would intensify stress and increase pressure to take short cuts on ethical and regulatory requirements.

31 House Appropriations Subcommittee on Treasury Budget with Secretary Lew, 16 March 2016, http://www.sifma.org/members/hearings.aspx?id=8589959275; and House Financial Services Committee on International Financial System with Sec. Lew, 22 March 2016, http://www.sifma.org/members/hearings.aspx?id=8589959428.

32 'Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue', *Inside US Trade,* 11 February 2016

33 For the standard argument see Nigel Cory and Robert Atkinson, 'Financial Data does not Need or Deserve Special Treatment in Trade Agreements', Information Technology and Innovation Foundation, April 2016, www2.itif.org/2016-financial-data-trade-deals.pdf

34 The non-TiSA countries would be asked to agree in a side-letter.

35 Rachel Fefer, 'Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress', Congressional Research Service, 3 January 2017, p.13

8.

TiSA AND POSTAL SERVICES

The TiSA agenda for postal, courier and express delivery services is set by the Big Four members of the Global Express Association, aka the Express Association of America: DHL, Fedex, TNT and UPS, as they position themselves to capitalise on the 4th industrial revolution. Globally integrated supply chains that operate through multiple channels and are organised through digital platforms. Require seamless cross border flows of transport, goods, data, money and people. At the same time their dominance has been challenged by more flexible and dynamic operators like Amazon, who have gone from customers to aggressive competitors.

The changes they are demanding to postal and delivery systems through TiSA holds one of the keys to their survival. Public postal systems restrict their expansion, while differences in national regulations impede the efficient use of their global networks. The GATS had little effect on either, so they are both targets in TiSA. Their home countries, the US and EU are driving the TiSA negotiations on this sector, including a sectoral Annex on Delivery Services that would lock open new doors and close governments' regulatory space. Other proposed annexes are also important. The Annex on Electronic Commerce would guarantee their ability to operate globally from a centralised home base. The Annex on State-owned Enterprises would require the public Post Office to operate as a private business when selling most of its services, with limited scope for its traditional public service functions. The Annex on Domestic Regulation would affect the terms and administration of licensing and technical standards for delivery services.

Box 8.1 TiSA Objectives for Postal Services

If the US, EU and Big Four succeed TiSA would

- break down remaining postal monopolies;
- lock in existing and future postal liberalisation and deregulation;
- prevent cross-subsidisation from postal monopoly services to other delivery services;
- impose private sector practices on state-owned Post Offices, which is a common first step to full deregulation and/or privatisation;
- minimise the universal postal service obligation (UPSO) and shield private firms from related costs and responsibilities;
- subject regulatory bodies to greater scrutiny, especially when they operate the public postal service;
- erode the role and leadership of the Universal Postal Union (UPU) as the specialist international agency for postal services by adopting binding and enforceable rules on delivery services in a 'trade' agreement; and
- create conditions for the rapid expansion of global e-commerce, which could see digital platform operators like Amazon displace both the public postal system and the Big Four.

The corporate demands

Trade liberalisation is a priority for the Big Four delivery firms. As multimodal operators, they have developed interests in all modes of transport, as well as port and ground services, warehousing, government procurement of delivery services, and insurance. These are covered by the general

rules TiSA and proposed annexes on international maritime, air and/or road freight transportation annexes. But the main focus is on express delivery. Their common demands for TPP, TTIP and TiSA on delivery services include:[1]

- *Removing market access barriers to trade in services;*
- *Achieving a much higher level of regulatory convergence, and alignment of standards and practices;*
- *Removing barriers to investment;*
- *Eliminating restrictions on cross-border data flows (the free flow of data across borders is critical to the express industry);*
- *Prohibiting forced localization (including in-country requirements for servers and data storage);*
- *Developing disciplines on state-owned enterprises (SOEs) and state-supported enterprises (SSE) to ensure fair competition between these entities and the private sector.*

The corporate lobby made three specific demands for TiSA:

> ***Fair Competition/Level Playing Field.*** *The TISA should seek to liberalize trade in package delivery services further by ensuring a level playing field for all competitive services offered outside those supplied in the exercise of governmental authority,[2] particularly with respect to state-owned and state-supported enterprises (SOE/SSE). There is a need to secure more ambitious commitments and disciplines for domestic regulation and fair competition by allowing free market principles to govern the highly competitive express sector, or where necessary, independent regulation and a level playing field with competing services offered by Posts such as express mail services. Exclusions and non-conforming measures (NCMs) for postal services should be drawn as narrowly as possible, for example, by using a reasonable price/weight multiple.*
>
> ***Transparency, Regulatory Coherence, and Private Sector Consultation.*** *To encourage greater transparency, coordination, consultation, and partnership between express delivery services and regulators, the TISA should include the establishment by each party of a national coordinating body, process, or mechanism, to ensure a whole-of government approach, regulatory coherence, and institutionalized private sector input. Parties should also include mechanisms to review the impact of current or proposed measures and provide appeal opportunities should a measure not achieve desired results.*
>
> ***Integrated Approach, Particularly for Customs Processes.*** *The TISA should focus on removing barriers to express delivery services, recognizing that EDS faces antiquated policy environments in some countries, including onerous regulations on cross-border transport, inefficient border clearance procedures and domestic regulations that distort fair competition. To respond adequately to the nature and scope of the services this industry provides, the TISA must address the unique needs of express delivery service providers, including the need for an integrated approach for customs clearance, seamless regulation across multiple modes of transport, and commitments to immediate release, single-window, and electronic border clearance.*

Ironically, TiSA may prove more beneficial for their competitors. The Big Four are already struggling to survive the challenge from tech innovators like Amazon and Uber, at least in their current form. Because they have less sunk investment in infrastructure and long-term relationships, they can adapt their operations and move locations more easily. In a 2016 article that asked 'Will Amazon Kill Fedex?' *Bloomberg Businessweek* observed that 'Amazon is becoming a kind of e-commerce Walmart with a FedEx attached'.[3]

1 Testimony of the Express Association of America to the Committee on Ways and Means, United States House of Representatives hearing on U.S. Trade Policy Agenda, 3 April 2014, https://waysandmeans.house.gov/UploadedFiles/The_Express_Association_of_America_040314TR.pdf.

2 This language mirrors the restrictive 'governmental authority' exclusion in TiSA, which only applies where the service is non-commercial and there is no competing supplier, conditions which in this context render it meaningless.

3 Devin Leonard, 'Will Amazon Kill Fedex', *Bloomberg Businessweek*, 31 August 2016, https://www.bloomberg.com/features/2016-amazon-delivery/

TiSA would offer greater flexibility to Amazon and Uber through the annexes on e-commerce and air and road transport services, along with rights of entry for foreign workers employed by contractors to supply services across the border under the labour mobility annex. Likewise, they will benefit more from the future-proofing elements of TiSA: binding commitments on cross-border supply of services (mode 1), supported by the stand-still and ratchet that prevents stronger regulation; technological neutrality of commitments and no regulation of new services; and a ban on localisation requirements for data or that they have a local presence in the countries where they operate. The transparency annex would guarantee them rights of input into new regulatory decisions that affect their interests, which is especially important for those that push the legal boundaries and face pressures for re-regulation.

Activist states: the EU and US

Only three parties contributed to the text on Competitive Delivery Services in 2014:[4] the EU, the US and Turkey. This reflects a long-standing quest by the US and EU to open the postal sector to express delivery operators by rewriting the relevant parts of the GATS. However, they suggest different ways to do this, which reflect their particular regulatory approaches. The latest leaked text from November 2016 is described as a 'landing zone' and does not include country attributions, but comparisons with earlier texts show it is a middle ground between the US and EU positions. Other unnamed countries are trying to preserve more policy space. A more detailed analysis is provided in Appendix 8.

The EU approach

The EU takes a competition policy approach to the sector and seeks to restrict the scope of public postal services and the universal postal service obligation. It is historically more aggressive than the US.

In 2005, as part of the plurilateral services negotiations in the WTO, the EU proposed a reference paper on postal and courier services,[5] which built on an earlier one from 2001.[6] It complained that too few commitments were made in the postal/courier sector and that the current CPC classification that differentiated between public postal and private courier services no longer reflects the market reality.

The EU proposed a new classification and asked all WTO members, as a medium to long term goal, to adopt the maximum level of commitments for postal and courier services that was compatible with the Universal Postal Service Obligation (UPSO). In the short term, countries should make full commitments to open, and not discriminate on, express delivery services, handling of addressed parcels and packages, handling of addressed press products, handling of non-addressed items, and document exchange. The EU would accept a more gradual market opening, and national treatment, for handling addressed written communications and items as registered or insured mail.

The EU's position was expanded in its bilateral free trade agreements (FTAs). The agreement with the Cariforum states was the most extreme.[7] The section on 'courier services' focused on preventing anti-competitive practices, but 'courier service' was not defined. Licences could only be required for delivering the universal service. Regulatory bodies had to be independent of suppliers, which disqualified the public postal service from regulating. Countries could define their own universal service, but it could not be more burdensome than necessary for the extent and kind of service, and had to be administered in a transparent, non-discriminatory and 'competitively neutral' way.

The more recent EU Vietnam FTA refers to postal services and is less extensive- possibly to reflect Vietnam's development status and pervasive SOEs, although Cariforum states are also from the global South. The Vietnam FTA explicitly uses the old 1991 classifications that distinguish between public postal and private courier services. The provisions cover anti-competitive practices, transparency of

4 TISA, Annex on Competitive Delivery Services, dated April 2014

5 WTO, 'Communication from the European Communities and their Member States. Reference paper on postal and courier services', TN/S/W/26

6 WTO Council on Trade in Services, 'Communication from the European Communities and their Member States: GATS 2000: Postal/courier services', 23 March 2001, S/CSS/W/61.

7 Cariforum-EC Economic Partnership Agreement 2008, Section 3.

licence requirements, and an independent regulator.[8] Postal services are explicitly included in the most-favoured-nation (MFN) obligation, meaning agreements one party makes with a third country would have to be shared with the other party.[9] However, there is no reference to the universal service, in contrast to the telecommunications section where the wording is similar to the Cariforum agreement.

The Canada EU free trade agreement (CETA) has a short annex which confirms that courier services are subject to the investment and cross-border services chapters. Those commitments exclude air traffic rights for courier service suppliers,[10] which are subject to the Canada EU bilateral air transport agreement. The CETA annex on temporary entry and stay of natural persons makes it clear that commitments to allow entry for contractual services suppliers covers postal and courier services;[11] this means a firm from one Party could use foreign contract labour to deliver postal or courier services in the other (see Appendix 3).

The EU initially proposed the more extreme Cariforum position for TiSA, but that has been moderated in the November 2016 text (see Appendix 8).

The US approach

The US is more concerned to maximise the market available to its big operators and shield them from any public good obligations. The 2014 text seeks to draw a sharp line between the postal monopoly and express delivery services by defining the manner in which the monopoly must operate, including to ensure there is no cross-subsidisation to its other activities, and to protect express deliverers from any universal service obligations. It also seeks to protect its big express deliverers from any obligations related to universal services. The US position in the first leaked TiSA annex on competitive delivery services from 2014 is based on Annex 10-B on Express Delivery Services in the TPPA. That included an explicit expectation that market access commitments would guarantee, at a minimum, a standstill on current regulation.[12] That position is not in the November 2016 text.

What's new in TiSA for postal services

TiSA provides a number of inter-related tools to achieve the industry's goals: the core text, countries' schedules of commitments, the proposed Annex on Delivery Services,[13] and the Annex on Sate-owned Enterprises.

The first leaked text of the Annex, dated April 2014, promoted an integrated commercial delivery sector that blended public and private using new definitions of a postal monopoly and commercial or express delivery, with a minimal universal service monopoly. In the latest leaked text from November 2016[14] they are no longer trying to redefine postal and courier services, and instead apply the core rules to both. Those rules are designed to remove restrictions on markets, including postal monopolies, and remove measures that favour local suppliers, especially public postal operators. The scheduling mechanisms in TiSA aim to maximise those obligations.

The Annex on Delivery Services would narrow the space for the public monopoly and the universal service. The Annex on Domestic Regulation would impose constraints on licensing requirements and the technical standards for those services, and the Annex on State-owned Enterprises would require public Post Offices to operate as private businesses, except when delivering an explicit public service mandate.

8 EU-Vietnam Free Trade Agreement 2016, Section IV, fn 54.

9 EU-Vietnam Free Trade Agreement 2016, Chapter II: Article 4.3.

10 EU-Canada Comprehensive Economic and Trade Agreement (CETA) 2016, Annex 9-C Understanding on Courier Services.

11 CETA, Para 9, Annex 10-E Sectoral Commitments on Contractual Service Suppliers and Independent Professionals, relating to Chapter 10: Temporary Entry of Natural Persons for Business Purposes.

12 TPP, Annex 10-B, Express Delivery Services, Para 4.

13 TiSA, Annex on Competitive Delivery Services, dated 16 April 2014; Assessment by the International Transport Workers' Federation (ITF) on the TISA Annex on Competitive Delivery Services, June 2015. https://wikileaks.org/tisa/document/20140416_Annex-on-Competitive-Delivery/

14 TiSA, Annex on Delivery Services, dated 9 November 2016.

Public postal services

Governments know that attacks on core public services have helped sink trade in services negotiations in the past. All TiSA countries also have an obligation as members of the Universal Postal Union (UPU) to deliver a universal postal service.

Their approach in TiSA is to allow a very narrow space for a postal monopoly to deliver specified services and the universal service, within the broader competitive delivery market where the postal authority, express delivery firms, and other commercial delivery suppliers all operate. Depending on how the text is interpreted, foreign firms may be entitled to seek to deliver the universal service, and certainly to enjoy the same benefits it provides to locals. 'Non-discrimination' is important for e-commerce operators, who still use public postal services because the UPSO guarantees extensive geographical coverage and reliable networks.

Beyond that limited space, governments are being asked to lock open up their public postal services markets through their schedules and apply the same rules to all delivery services, public and private, foreign and local.

The State-owned Enterprises annex would also remove supports that help keep state-owned Post Offices commercially viable.

EU requests of Latin America on postal services

In June 2016, the EU made various requests to Latin American countries to make commitments on postal services. These requests have been leaked. They are part of a negotiating process of requests and offers that lead to the final TiSA schedules of each country. If TiSA is concluded, these schedules will supersede the GATS commitments between the TiSA parties. A country's initial and revised offers are secret unless the government chooses to release them (which only the EU and a handful of other European countries have done). That makes it impossible for unions and others to know what their governments are requesting or offering. This secrecy and lack of debate means that governments can commit to liberalise their postal services in response to pressure, or as a trade-off for some other service, without their publics or parliaments knowing.

The leaks reveal that the EU has asked Chile, Costa Rica, Mexico, Panama and Peru to make broad commitments on 'postal services', usually based on the old 1991 classification. In other words, the EU asked countries to commit services that are provided by their national postal administration to the TiSA rules. Sanya Reid Smith explains the implications of the EU's request that Costa Rica liberalises its postal services for foreign investors (technically 'establishing a commercial presence' or 'Mode 3'):

> *in addition to this meaning more competition for postal services in Costa Rica, if it is privatised and the privatisation turns out to be problematic, it cannot be renationalised back to a public monopoly. […] While the EU in other sectors seems to only want commitments in mode 3 for non-public services, the EU has no qualms asking for liberalisation of the postal sector including for public services. It may have done this since Costa Rica already opened the postal sector to US companies in its USFTA, so the EU is just asking to be given the same market access as US companies already have. Costa Rica did not liberalise postal services at the WTO or in its EU or EFTA FTAs, so agreeing to the EU requests in this sector would involve further liberalisation including to companies from additional TISA countries.*[15]

The target countries revised their offers after receiving these requests from the EU and others. Those second revised offers, dated August 2016, have also been leaked, and show varying responses to the EU requests: Chile made no changes; Peru added courier services in mode 3 (foreign investment), but not for cross-border postal or courier services, or any postal services, as the EU had asked. These requests and offers are an ongoing process that would begin again if the TiSA negotiations resume.

15 Sanya Reid Smith, 'Some of the implications of a few of the requests by the EU to these TiSA countries', 7 October 2016, https://wikileaks.org/tisa/analysis/20161007_TiSA_Analysis-on-Market-Access-Requests/20161007_TiSA_Analysis-on-Market-Access-Requests.pdf.

The Universal Postal Union

As with telecoms, TiSA would undermine the specialist international organisation that is responsible for postal services, the Universal Postal Union (UPU). The EU has previously tried to do this directly. In a 2005 paper during the GATS 2000 negotiations, the EU recognised that the Universal Postal Convention and its regulations are binding on all Member States of the UPU. It then proposed that:

> *These agreements should be transmitted, as far as it is necessary, into GATS schedules of commitments in order to ensure coherence between the two agreements and to provide a dispute settlement mechanism to the sector. Therefore, it is crucial that all WTO Members reflect their UPU obligations under their GATS schedules.*[16]

This indicates that the EU believes at least some UPU obligations are inconsistent with the market access and non-discrimination rules of the GATS. The EU also suggested the relationship between the UPU and the GATS might be clarified through a reference paper, similar to that for telecommunications, which would describe the scope of the universal service and areas that are reserved and not reserved for the public postal administration. The EU proposal would have made the WTO responsible for interpreting and enforcing *both* the UPU obligations and the GATS rules and commitments on postal and courier services. The EU makes no equivalent proposal in TiSA. But simply having more extensive, binding and enforceable rules on postal services in TISA would erode the UPU's leadership responsibilities, and circumscribe the future development of future policy and regulatory proposals in the UPU.

Impacts on UNI's postal unions and workers

Postal workers in the public sector have been under pressure from decades of deregulation, privatisation and globalisation, and competition from express delivery and courier firms that push down wages and conditions. Temporary and contract workers have minimal bargaining power over their income, lack basic conditions such as sick pay and holiday pay, and carry the burden of social insurance, healthcare and pensions. Unions struggle to find new ways to organise and bargain collectively.

TiSA would intensify these trends. For postal workers, this would mean …

- competition from contract workers from express delivery operators and courier firms, and from the bogus 'self-employed' workforce of AliBaba and Amazon, squeezes wages and conditions of postal workers in the public sector even further;
- postal labour is replaced by automation and by artificial intelligence, such as drones and unmanned vehicles, including for deliveries across the border;
- the scope of public postal services is reduced, meaning fewer jobs, lower union numbers and less bargaining power, and loss of public sector protections, as sick pay and holiday pay, the burden of social insurance, healthcare and pensions are shifted onto workers;
- public postal services are run like private businesses under private sector conditions, with constant churning, short-term contracts and casualisation; and
- entry of foreign delivery workers employed under inferior terms of employment create conditions for labour exploitation and social dumping.

16 WTO Council on Trade in Services, 'Communication from the European Communities and their Member States: GATS 2000 Postal/courier services', S/CSS/W/61, para 5 and page 4.

9.

CHALLENGING THE TiSA PROJECT

In the name of 'freedom' the Really Good Friends of Services and Team Tisa are deliberately seeking to disrupt and destabilise today's already turbulent world. Their vision for the 21st century offers a future where workers are vulnerable and expendable, and citizens and voters are disenfranchised. Their project is a fundamental assault on democracy, from its broad pro-corporate objectives and the secrecy of the negotiations, to the right of foreign states and companies to comment on a country's proposed laws and for tribunals of trade experts to pass judgment on a sovereign states policies and regulations.

Governments must be able regulate and respond to unanticipated problems as they see fit, and implement an alternative mandate they were elected to pursue, without the threat of a legal dispute or economic sanctions. The combination of TiSA's core text, annexes and schedules aim to fetter that sovereign authority *forever*, at a time when the legitimacy of the neoliberal model and these agreements are in crisis. If finalised, TiSA would foreclose the possibility of a progressive alternative vision for the 21st century that recognises and addresses the challenges ahead: to narrow the vast inequalities of wealth, gender and race within and between countries; ensure job security and social protections for workers and communities as they face the disruptive impacts of new technologies; radically rethink how we use natural resources, services, capital and technology in the face of climate change; rein in speculative and destabilising financial markets; and much more.

UNI's affiliates and their members are already confronting the challenges of e-commerce in multiple forms. Public telcos are struggling to survive privatisation and deregulation, the looming redundancy of land-lines, and competition from mobile and digital operators. Public postal services are increasingly automated, have been swamped by email, and face cutthroat competition from private express delivery services in deregulated markets. Online banking and call centres are becoming the main interface between banks and insurers and their customers, as e-finance accelerates the closure of high street branches and operations are consolidated offshore. The future of local businesses and jobs, the nature of work and where it is located, the ability to unionise and bargain collectively or take industrial action are all in jeopardy.

Many of novel e-services will not survive or will be quickly superseded. But there is no question that digital technology is transforming how capitalism functions, what workers do, where they are located, how they are employed, by whom and on what terms, and with it the ability of workers and unions to organise and bargain collectively. This transformation foreshadows decades of chronic instability, with the prospect of large scale unemployment and social disruption. The pace of change is unpredictable. Some technologies will replace labour, others will intensify the pace of work. Permanent employment will increasingly become precarious work, whether as contractors in call-centres or as nominally 'self-employed' whose terms are dictated by those who control the digital platform.

Defeating TiSA will not stop the '4th industrial revolution' nor the threats it poses to workers and unions. But it will help to keep open the spaces for global and national unions to work with others to develop a collective strategy to protect people's rights as workers and as citizens in the 21st century. The immediate task is to ensure that the TiSA negotiations are not resumed. That requires a concerted campaign by UNI affiliates and others at international, regional and national levels to expose and oppose what governments belonging to the 'Really Good Friends of Services' have secretly proposed on behalf of the Team TiSA corporations – and to ensure that the same agenda is not transplanted to other free trade agreements or the WTO.

APPENDICES

APPENDIX 1
The Contents of TiSA

(based on leaked documents from the November 2016 round. Text that is not finalised is in italics)

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[...] Economic Integration – GATS Article V]

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[...]. Transparency

[...] Disclosure of Confidential Information

[...] Domestic Regulation

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I-7. Payments and Transfers

I-8. Restrictions to Safeguards for Balance of Payments

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[...] Denial of Benefits

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Road Freight Transport and Related Logistics Services

State-owned Enterprises

Telecommunications Services

Transparency

Exception

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APPENDIX 2
W120

WORLD TRADE ORGANIZATION

RESTRICTED

MTN.GNS/W/120
10 July 1991

(98-0000)

Special Distribution

SERVICES SECTORAL CLASSIFICATION LIST

Note by the Secretariat

The secretariat indicated in its informal note containing the draft classification list (24 May 1991) that it would prepare a revised version based on comments from participants. The attached list incorporates, to the extent possible, such comments. It could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.

SERVICES SECTORAL CLASSIFICATION LIST

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
1.	BUSINESS SERVICES	Section B
A.	Professional Services	
a.	Legal Services	
b.	Accounting, auditing and bookkeeping services	862
c.	Taxation Services	863
d.	Architectural services	8671
e.	Engineering services	8672
f.	Integrated engineering services	8673
g.	Urban planning and landscape architectural services	8674
h.	Medical and dental services	9312
i.	Veterinary services	932
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k.	Other	
B.	Computer and Related Services	
a.	Consultancy services related to the installation of computer hardware	841
b.	Software implementation services	842
c.	Data processing services	843
d.	Data base services	844
e.	Other	845+849
C.	Research and Development Services	
a.	R&D services on natural sciences	851
b.	R&D services on social sciences and humanities	852
c.	Interdisciplinary R&D services	853
D.	Real Estate Services	
a.	Involving own or leased property	821
b.	On a fee or contract basis	822
E.	Rental/Leasing Services without Operators	
a.	Relating to ships	83103
b.	Relating to aircraft	83104
c.	Relating to other transport equipment	83101+83102+
d.	Relating to other machinery and equipment	83106-83109
e.	Other	832
F.	Other Business Services	
a.	Advertising services	871
b.	Market research and public opinion polling services	864
c.	Management consulting service	865
d.	Services related to management consulting	866
e.	Technical testing and analysis services	8676
f.	Services incidental to agriculture, hunting and forestry	881
g.	Services incidental to fishing	882

h.	Services incidental to mining	883+5115
i.	Services incidental to manufacturing	884+885 (except for 88442)
j.	Services incidental to energy distribution	887
k.	Placement and supply services of Personnel	872
l.	Investigation and security	873
m.	Related scientific and technical consulting services	8675
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633+ 8861-8866
o.	Building-cleaning services	874
p.	Photographic services	875
q.	Packaging services	876
r.	Printing, publishing	88442
s.	Convention services	87909*
t.	Other	8790
2.	COMMUNICATION SERVICES	
A.	Postal services	7511
B.	Courier services	7512
C.	Telecommunication services	
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**
k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl.transaction processing)	843**
o.	other	
D.	Audiovisual services	
a.	Motion picture and video tape production and	9611

*The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

	distribution services	
b.	Motion picture projection service	9612
c.	Radio and television services	9613
d.	Radio and television transmission services	7524
e.	Sound recording	n.a.
f.	Other	
E.	Other	
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICES	
A.	General construction work for buildings	512
B.	General construction work for civil engineering	513
C.	Installation and assembly work	514+516
D.	Building completion and finishing work	517
E.	Other	511+515+518
4.	DISTRIBUTION SERVICES	
A.	Commission agents' services	621
B.	Wholesale trade services	622
C.	Retailing services	631+632 6111+6113+6121
D.	Franchising	8929
E.	Other	
5.	EDUCATIONAL SERVICES	
A.	Primary education services	921
B.	Secondary education services	922
C.	Higher education services	923
D.	Adult education	924
E.	Other education services	929
6.	ENVIRONMENTAL SERVICES	
A.	Sewage services	9401

B.	Refuse disposal services	9402
C.	Sanitation and similar services	9403
D.	Other	
7.	FINANCIAL SERVICES	
A.	All insurance and insurance-related services	812**
a.	Life, accident and health insurance services	8121
b.	Non-life insurance services	8129
c.	Reinsurance and retrocession	81299*
d.	Services auxiliary to insurance (including broking and agency services)	8140
B.	Banking and other financial services (excl. insurance)	
a.	Acceptance of deposits and other repayable funds from the public	81115-81119
b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	8113
c.	Financial leasing	8112
d.	All payment and money transmission services	81339**
e.	Guarantees and commitments	81199**
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
	- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
	- foreign exchange	81333
	- derivative products incl., but not limited to, futures and options	81339**
	- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
	- transferable securities	81321*
	- other negotiable instruments and financial assets, incl. bullion	81339**
g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h.	Money broking	81339**
i.	Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services	8119+** 81323*
j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	81339** or 81319**
k.	Advisory and other auxiliary financial	8131

	services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	or	8133
l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services		8131
C.	Other		
8.	HEALTH RELATED AND SOCIAL SERVICES (other than those listed under 1.A.h-j.)		
A.	Hospital services		9311
B.	Other Human Health Services		9319 (other than 93191)
C.	Social Services		933
D.	Other		
9.	TOURISM AND TRAVEL RELATED SERVICES		
A.	Hotels and restaurants (incl. catering)		641-643
B.	Travel agencies and tour operators services		7471
C.	Tourist guides services		7472
D.	Other		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)		
A.	Entertainment services (including theatre, live bands and circus services)		9619
B.	News agency services		962
C.	Libraries, archives, museums and other cultural services		963
D.	Sporting and other recreational services		964
E.	Other		
11.	TRANSPORT SERVICES		
A.	Maritime Transport Services		

a.	Passenger transportation	7211
b.	Freight transportation	7212
c.	Rental of vessels with crew	7213
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7214
f.	Supporting services for maritime transport	745**
B.	Internal Waterways Transport	
a.	Passenger transportation	7221
b.	Freight transportation	7222
c.	Rental of vessels with crew	7223
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7224
f.	Supporting services for internal waterway transport	745**
C.	Air Transport Services	
a.	Passenger transportation	731
b.	Freight transportation	732
c.	Rental of aircraft with crew	734
d.	Maintenance and repair of aircraft	8868**
e.	Supporting services for air transport	746
D.	Space Transport	733
E.	Rail Transport Services	
a.	Passenger transportation	7111
b.	Freight transportation	7112
c.	Pushing and towing services	7113
d.	Maintenance and repair of rail transport equipment	8868**
e.	Supporting services for rail transport services	743
F.	Road Transport Services	
a.	Passenger transportation	7121+7122
b.	Freight transportation	7123
c.	Rental of commercial vehicles with operator	7124
d.	Maintenance and repair of road transport equipment	6112+8867
e.	Supporting services for road transport services	744
G.	Pipeline Transport	
a.	Transportation of fuels	7131
b.	Transportation of other goods	7139
H.	Services auxiliary to all modes of transport	
a.	Cargo-handling services	741
b.	Storage and warehouse services	742
c.	Freight transport agency services	748
d.	Other	749
I.	Other Transport Services	
12.	OTHER SERVICES NOT INCLUDED ELSEWHERE	95+97+98+99

APPENDIX 3

LABOUR MOBILITY UNDER TISA

The proposed Annex on Movement of Natural Persons in TiSA would give privileged access to four categories: foreign intra-corporate transferees, business visitors, independent professionals, and contractual service suppliers, which potentially opens the door to a large increase in foreign contractualised labour.

GATS 'Mode 4'

The temporary movement of natural persons to deliver a service in another country is recognised as one of four modes for 'trading' services internationally and is commonly known as 'Mode 4'. These categories were developed in the 1980s when the GATS was being negotiated. The focus was then on foreign investment, formally called establishing a commercial presence (Mode 3). The élite labour of executives, managers and professionals was treated as a valuable asset to the enterprise, and commodity labour as a cost to business that is readily substitutable by other workers or technology. Nothing has changed.

However, making that crude class distinction in the Uruguay round would have deepened the objections by developing countries that GATS was a deal for rich countries, their corporations and élites. As a result, 'Mode 4' in the GATS does not distinguish between classes of labour. Instead it distinguishes between the entry of someone who is *employed by a service supplier from another GATS country* to perform a service, which is considered 'trade', and those seeking *entry to the employment market*, which is treated as immigration for the purpose of employment.[1] This can be a spurious distinction as those engaged in 'trade' will often directly or indirectly displace locals in the host employment market.

Technically, GATS Mode 4 applies to all categories of workers who are employed by a service supplier from another GATS country and to independent professionals. Governments could have made commitments in their schedules for mode 4 to guarantee entry for commodity labour,[2] including care givers, construction workers and agricultural labourers employed by a service supplier from another country. That did not happen because the positive list approach allowed the likely destination countries not to list them in their schedules. Instead, they granted entry rights to intra-corporate transferees, managers and executives, specialists and some professionals in particular sub-sectors.

Since then, many FTAs have explicitly restricted chapters on 'temporary movement of natural persons' to élite corporate personnel and independent professionals. Because TiSA needs to be compatible with the GATS, it retains the original approach to Mode 4, but a separate annex requires or encourages parties to give priority to preferred categories.

The TiSA annex on labour mobility

The most recent leak of the TiSA Annex on Movement of Natural Persons from November 2016[3] continues the distinction between persons *employed* by a service supplier from another TiSA country and those seeking to access to the *employment market*. This distinction becomes even less credible

1 GATS 1994, Article 2, Annex on Movement of Natural Persons Supplying Services Under the Agreement

2 GATS 1994, Article 3, Annex on Movement of Natural Persons Supplying Services Under the Agreement

3 TiSA, Annex on Movement of Natural Persons, TISA/JUL.2015/negotiating text/MNP, dated 8 November 2016.

in TiSA because governments are encouraged to guarantee entry for foreign workers to deliver contracted services in highly contractualised economies. Four rules have been agreed in the annex:

- ***Scheduling***.[4] The standard rules for scheduling TiSA commitments would apply to Mode 4:
    - a positive list approach to market access commitments in Mode 4, promising not to restrict temporary access to the domestic market for a foreign person to deliver a service in a specific sector. Often that would be written as a horizontal entry that applies to all services sectors committed in the schedule, subject to any limitation the country wants to retain (such as a quota on numbers allowed entry or a time limit on stay);
    - once a market access commitment has been made there are no rights to restrict entry on the basis of foreign nationality, unless the schedule that has been agreed with the other TiSA parties allows:
        - → a standstill that preserves the status quo in a service, but prevents any new or stronger protections for locals, such as reserved occupations, with a ratchet that locks in all new liberalisation; or
        - → full policy space that allows existing or new rules to apply to foreign and domestic labour in that service
- ***Strike breaking***:[5] A country may suspend the Mode 4 obligations in its schedule where entry and temporary stay might adversely affect the settlement of a collective labour dispute at the relevant workplace or the employment of someone involved in the dispute. This is the only indirect reference to unions in the annex. However, the protection is weak, because it relies on the government to invoke it and would not apply where the strike-breakers are providing the service from offshore.
- ***Immigration and visa laws***:[6] States are assured that they can regulate entry and temporary stay, including to protect the integrity of their borders—but only where that does not nullify or impair the benefits another TiSA country expected from the annex or from a scheduled commitment. That proviso, derived from the GATS, would apply even if the measure did not directly breach a TiSA rule- for example, if a government adopted more complex, costly and lengthy immigration or visa procedures for approval that seriously impeded the ability of a foreign firm to conduct its business in the country, as it had expected TiSA would enable it to do.
- ***Information***[7] ***and entry***[8] ***procedures***: Certain information must be publicly available, and processing, fees, documentation requirements, multiple-entry visas and opportunities for review should facilitate entry under TiSA. That could make entry easier for all kinds of workers, but it is linked to commitments in schedules that will apply mainly to élite categories. A person granted entry would still have to comply with licensing requirements or mandatory vetting or codes of practice for their profession. Expediting access, as proposed here, carries risks of poor quality vetting and undetected fraud, especially where employers have incentives to abuse the looser arrangements.

Redefining 'Mode 4'

The most controversial parts of the annex have not been agreed. Canada, Colombia, the EU, Norway and Mauritius have a priority to secure Mode 4 commitments in four categories of persons employed by a service supplier of one TiSA party to supply a service in another TiSA country:[9]

i. intra-corporate transferees;

ii. business visitors;

iii. independent professionals;

4 TiSA, Article 3, Annex on Movement of Natural Persons, dated 8 November 2016

5 TiSA, Article 3.4, Annex on Movement of Natural Persons, dated 8 November 2016

6 TiSA, Article 1.3, Annex on Movement of Natural Persons, dated 8 November 2016

7 TiSA, Article 2, Annex on Movement of Natural Persons, dated 8 November 2016

8 TiSA, Article 5, Annex on Movement of Natural Persons, dated 8 November 2016

9 TiSA, Article X 'Specific Commitments', Annex on Movement of Natural Persons, dated 8 November 2016

iv. contractual service suppliers.

None of the categories are defined; the following discussion uses the definition from CETA, but the meaning in TiSA could be different. Each category would be afforded a different degree of entitlement. Each TiSA party would be required to make commitments at least for category (i) intra-corporate transferees. Three categories are especially relevant to UNI.

Intra-corporate transferees[10] is most important to the corporate lobby, as it allows them to move senior personnel around the world to run the business, provide a career path within the firm, and keep specialist and proprietary knowledge in-house. Those proposing this provision[11] want automatic entry for intra-corporate transferees (and business visitors) once a country makes commitments to allow commercial establishment (Mode 3) in a sector. This would entitle the banks and insurers or telcos to bring their management or technical personnel with them and operate colonial-style administrations in any TiSA country. Under the annex the personnel would have entry for at least one year or the duration of their contract if that is less.[12]

Contractual services suppliers is the most controversial category. In the absence of a definition, CETA is used here as a proxy, where 'contractual services suppliers' is defined as:

> *natural persons employed by an enterprise of one Party that have no establishment in the territory of the other Party and that have concluded a bona fide contract (other than through an agency as defined by CPC 872[13]) to supply a service to a consumer of the other Party that requires the presence on a temporary basis of its employees in the territory of the other Party in order to fulfil the contract to supply a service.[14]*

The basic intention is clear: if a firm in one TiSA country has a contract to supply services in another TiSA country, it must be allowed to use workers it has employed from its own or a third (even non-TiSA) country to deliver the service, where the contract requires the temporary presence of those workers. The contract referred to is between the contracting parties to supply and receive the service. There are no rules about the nationality of the employees of the contractor supplying the service. For example, a New Zealand company that has a consultancy contract to privatise a country's postal service could recruit personnel from New Zealand or any other country to deliver the service. A specialist call centre firm in Israel that wins a contract to deliver back office services in Canada could bring temporary employees from Israel, Pakistan or the Philippines. Express delivery firm from Turkey that competes successfully with the public postal service in Italy for delivery contracts could bring its own drivers temporarily from Turkey or Romania to supply the service.

The pay and conditions of those employees would be governed by their employment contract with the supplier of the service and the relevant law for that contract. It is possible that the original contract for the service requires the workers to be employed under the labour laws of the country in which they are supplying the service, but that is uncommon. It is also possible that the country where the service is supplied requires that local labour laws, such as the minimum wage, apply to foreign employees of foreign contractors, but that is not usually the case.

The requirement that the contract 'requires the presence' of the foreign employees in the country to deliver the service is also unclear. It does not mean there are no locals are available to do the work, because the EU has proposed adding that requirement (an 'economic needs test') to the provision. That suggests 'requires the presence' may depend on what is written in the contract, which will be a private matter between the contracting parties.

10 Under CETA Article 10.1 the term 'intra-corporate transferees' applies to senior personnel working in a senior position in an enterprise performing senior management roles or exercise significant autonomous authority or supervisory functions; specialists who have an advanced level of expertise or knowledge of the enterprises products or services in an international market or of the enterprises processes and procedures, and those are unusual skills that cannot be learned by others easily; or graduate trainees gaining experience.

11 As of November 2016, they were Canada, Chile, Colombia, the EU, Iceland, Japan, Mauritius, Norway

12 TiSA, Article X.2(a), Annex on Movement of Natural Persons, dated 8 November 2016

13 In the UNCPC classification list this covers: 87201 - Executive search services; 87202 - Placement services of office support personnel and other workers; 87203 - Supply services of office support personnel; 87204 - Supply services of domestic help personnel; 87205 - Supply services of other commercial or industrial workers; 87206 - Supply services of nursing personnel; 87209 - Supply services of other personnel – which is defined unhelpfully as 'Supply services of other personnel not elsewhere classified'

14 CETA, Article 10.1. This is badly drafted in relation to who holds the contract to supply the service.

The proposal allows governments more flexibility in making commitments for contractual service suppliers: they would 'endeavour to'[15] guarantee entry for up to 90 days cumulatively within a year or for the duration of the contract if shorter.[16] 'Endeavour' still requires TiSA countries to actively consider such commitments in good faith.

Such commitments would compound the problems of labour exploitation and social dumping that the European Parliament has resolved to end.[17] Yet the EU supports this proposal, provided there is a right to impose an economic needs test. Even when economic needs tests are effective and enforced (and they often are not) other parts of TiSA may make them difficult to implement in practice. For example, the domestic regulation annex requires administration of general regulations to be reasonable, objective and impartial. It would be easy to see an economic needs test being challenged for breaching those requirements.

Independent Professionals would have a right of temporary entry to deliver a service on the same terms as contractual service suppliers.[18] They would still be subject to licensing and qualification requirements and procedures, including codes of conduct,[19] and any technical standards that apply to the service, although those would subject to the light-handed approach required by the Annex on Domestic Regulation.

In addition, Australia, Norway and Iceland are pushing an **Annex on Professional Services**.[20] Almost none of it is agreed. The annex would apply to measures affecting 'trade' by listed professions[21] through any mode of delivery (note just Mode 4) and whatever technologies were used to deliver the service, under the principle of 'technological neutrality'. The list of professions includes engineering and finance-related services. Australia and Turkey want to prevent any TiSA country from applying a discriminatory economic needs test, including a labour market test to show there are no locals to do the work.[22] Once professional services have become contractualised, for example as a result of TiSA's Annex on Telecommunications, these rights of entry could have significant displacement effects. Increased cross-border provision of professional services would also make it more difficult for governments, and people using the services, to check the authenticity of qualifications and the quality and ethics of practitioners, apply consumer protection laws and enforce penalties.

While there was limited support for these proposals in November 2016, there was extensive support for applying the Domestic Regulation annex to 'measures affecting trade in professional services', whether or not the particular sector was committed in a country's schedule.[23] This would only apply to the professions listed in the professional services annex.

The parties have agreed to encourage professional bodies to enter dialogue on mutual recognition arrangements and set up a Working Party on Professional Services. Governments and professional bodies have traditionally been cautious about recognising foreign qualifications and usually prefer more restricted mutual recognition agreements. This is provided for in the core TiSA text on the same terms as in the GATS.[24] UNI would want to ensure a right to participate in discussions on relevant professions, especially if the categories of professionals were expanded.

15 Colombia and Mauritius oppose that qualification.

16 TiSA, Article X.2(c), Annex on Movement of Natural Persons, dated 8 November 2016

17 European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), Para I.1

18 Article X.2(c): Specific Commitments, Annex on Movement of Natural Persons, dated 8 November 2016

19 TiSA, Article 3.3, Annex on Movement of Natural Persons, dated 8 November 2016

20 TiSA, Annex on Professional Services, dated 10 November 2016

21 The services proposed are: legal; accounting, auditing and bookkeeping; taxation; architecture; engineering, integrated engineering and engineering related scientific and consulting; urban planning and landscape architecture.

22 TiSA, Article 8, Annex on Professional Services, dated 10 November 2016. Canada, Chile, Colombia, Iceland, Japan, Norway, Mauritius, New Zealand and US are considering.

23 This article is not numbered. The EU has not stated a position.

24 TiSA, Article I.6, Core text, dated 14 July 2016

APPENDIX 4
THE E-COMMERCE ANNEX

Chapter 3 explained the context of the push in TiSA and other mega-agreements to secure globally binding rules on electronic commerce. That is a theme that runs throughout the TiSA text, from the core rules to the countries' schedules of commitments and the annexes, in particular the Annex on Electronic Commerce.

What is e-commerce?

Electronic commerce is not defined in TiSA. The WTO defined it simplistically as 'the production, distribution, marketing, sale or delivery of goods and services by electronic means', although that was solely for the purpose of discussions within the WTO working group on electronic commerce (established in 1998).[1] The OECD uses a more detailed definition:

> *An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations.*

Whether a transaction is e-commerce would be defined by the method of placing the order. Orders made over the web, extranet or electronic data interchange are included; those made by telephone calls, facsimile or manually typed e-mail are not.[2]

E-commerce transactions are usually classified by four kinds of relationships, and are increasingly conducted across the border:[3]

- **Business-to-business (B2B),** which covers sales from producers to retailers, and transactions along supply chains, warehousing and logistics operations (the top 20 B2Bin 2016 included Huawei, IBM, Microsoft, Wells Fargo, Exxon Mobile, HSBC, Citi and Fedex);[4]
- **Business-to-consumer (B2C),** sales of goods and services online through direct purchase (eg. online insurance, Amazon, AliBaba), electronic marketplaces (eg. Expedia, Uber) and multi-channel retailing options (eg. Walmart, Tesco);
- **Consumer-to-consumer (C2C)** that connects people online, including through auctions, advertising and social media (Airbnb, eBay,[5] Facebook);
- **Business-to-government (B2G)** where governments purchase goods and services online, including significant government procurement contracts.

The actual product being bought and sold may be tangible goods, services that are organised online but delivered in person, or digital goods and services. Payment is generally on-line through separate

1 WTO General Council, 'Work Programme on Global Electronic Commerce', adopted on 20 May 1998, WT/L(274), 30 September 1998, para 1.3

2 OECD Glossary of Statistics Terms, https://stats.oecd.org/glossary/detail.asp?ID=4721

3 UNCTAD, *In Search of Cross-Border E-Commerce Trade Data,* Technical Note no.6, TN/UNCTAD/ICT4D/06, April 2016, p.1, Box 1.1

4 'Top 20 most valuable B2B brands revealed', B2B Marketing, 8 June 2016, https://www.b2bmarketing.net/en-gb/resources/news/top-20-most-valuable-b2b-brands-revealed

5 As with others, eBay also does B2C

payment systems, such as credit cards or PayPal, but can be at point of delivery. Sales and follow-up support for intangible services, such as insurance, ISPs or online courses, can be produced purely online. Many online services dealing with goods still require physical delivery, which engages postal, courier, logistics, and multi-modal transport.

Regulating telecoms, not the Internet

Telecommunications and the Internet operate as an integrated service. However, US free trade agreements have distinct annexes on telecommunications and e-commerce. That is because the US will not agree to anything in such agreements that requires it to change its laws,[6] and the US maintains two distinct regimes.

Historically, AT&T operated as a private monopoly. It was broken into regional operating monopolies in 1984. The Telecommunications Act of 1996 required the regional Baby Bells to open their networks to competitors. The statutory goal was to '***promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of telecommunications technologies***'. Despite that, ownership of the traditional telecommunications networks has remained highly concentrated.

Meanwhile, the Internet was evolving. Even though computer users connected through the telephone network, first using the copper loop and then fibre-optic cables, the regime for regulating the Internet reflected the defence and security context in which it was developed. Under the Telecommunications Act it became US policy to '***preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation***'.[7] The US has ensured that the Internet and other interactive computer services have been effectively quarantined from the International Telecommunications Union (ITU) as the international standard setting body. Hence, TiSA has separate annexes on electronic commerce and telecommunications.

The e-commerce annex

An annex dedicated to e-commerce is a must-have for Team TiSA, on top of the core rules and schedules that guarantee access to countries' markets and non-discrimination.[8] Although the annex is notionally about services, it is really making binding and enforceable rules to facilitate the networked economy. Successive versions of the annex have been leaked. While there are strong similarities to the US-led e-commerce chapter in the TPP, there are differences and disagreements that reflect the sensitivities of other TiSA parties.

As of November 2016, there were three documents setting out text on e-commerce: the full Annex on Electronic Commerce,[9] a 'Small Group Non Paper' on a number of provisions,[10] and a 'Non-Paper TiSA Landing Zone' from the US on Article 2: Movement of Information. The documents indicate a significant level of disagreement on basic rules. The annex is not limited to *cross-border* electronic commerce. Indeed, very little of it is about commerce *per se*. The main purpose is to restrict government regulation of the digital domain and the operations of the major tech companies and other transnationals. This analysis evaluates four substantive elements of the annex, the first of which is the most important:

i. ***Prohibiting national regulations*** that require local storage and processing of information, transfer of or access to source code, use of local computer facilities, local content in electronic transmissions, no ISP liability for uploaded content;

6 United States, *Cyber Security Strategy and Programs Handbook, Vol 1: Strategic Information and Developments*, International Business Publications, 2017, 153-55

7 Code 47 U.S.C.¶230(b)

8 AT&T, BSA Software Solutions, Cisco Systems Computer and Communications Industry Association, Consumers Electronic Association, Computer & Communications Industry Association, ebay, Express Association of America, Google, IBM, Information Technology Industry Council, Intel, Microsoft, Oracle Corporation, Software and Information Industry Association, TechAmerica, Verizon, Western Digital

9 TiSA, Annex on Electronic Commerce, undated (November 2016) http://www.bilaterals.org/IMG/pdf/annex_on_electronic_commerce.pdf

10 http://www.bilaterals.org/IMG/pdf/ecommercenonpapersmallgroup.pdf

ii. ***Weak privacy and consumer rights*** involving online consumer protection, personal information protection, unsolicited commercial electronic messages, and conditional access to and use of the Internet and open networks;

iii. ***Strong state security powers*** that allow deviations from the provisions on a self-judging basis, including from already weak protections; and

iv. ***Streamlining actual cross-border commerce*** through electronic authentication and e-signatures, no customs duties, and international cooperation.

Scope of coverage

The annex needs to be read alongside each party's commitments to the market access and non-discrimination (national treatment) rules in their annexes, and the restrictions on regulating licensing requirements and procedures and technical standards in the domestic regulation annex. Commitments to remove restrictions in cross-border services (mode 1) are especially important, whether they are for computer-related or substantive services like health, financial or audio-visual services. If the principle of technological neutrality is accepted (see Chapter 5), the restrictions in this annex would apply to digital delivery of services in ways that were never foreseen by governments when they drafted their schedules.

It had not been agreed, as of November 2016, whether the annex would apply to financial services. Switzerland wanted them excluded; other powerful countries wanted them covered, although the US had a complicated proposal that is discussed in Appendix 6: Annex on Financial Services.[11]

There was no agreement in the leaked text from November 2016 on the status of **government data**. A large number of countries want to exclude information held or processed by or for the government, or measures related to such information, including its collection.[12] If accepted, that would apply to all levels of government. The US is considering whether to support this and the EU has not taken a position.

Proposals to exclude other key public policies of subsidies and grants,[13] and government procurement,[14] were also still being debated. However, government procurement would have a very limited meaning; at most it would protect purchasing for the internal purposes of government agencies. The procurement of e-commerce activities provided by the government that people might have to pay for, such as on-line services and facilities, would still be covered by the text.

There was also no agreement by November 2016 on whether countries would be allowed to schedule restrictions on the application of the most significant obligations dealing with movement of information, location of computing facilities, source codes and local content.[15] The US was 'considering' the possibility and the EU was silent on it. The Small Group Non Paper proposed allowing some limitations, but only on a negative list basis: governments would have to list any measures, limitations and conditions they want to keep with no realistic chance of adding to it in the future. These limitations might be added to a country's main schedule or in a separate schedule. As the Internet Digital Economy Alliance remarked: 'A negative list approach is much more future proof, but also means that countries must be comfortable with the idea that over time the commitments to liberalization they are making will expand automatically'.[16]

Protecting digital providers from national regulation

The five most important provisions of the annex reflect the industry wish-list.

11 TiSA, Article 1.6, Annex on Electronic Commerce, undated (November 2016). The EU, US, Australia, Canada, Chile, Iceland, Norway, Peru.

12 TiSA, Article 1.5(c) Annex on Electronic Commerce, undated (November 2016). Supporters are Australia, Canada, Chile, Colombia, Costa Rica, Iceland, Japan, Mauritius, New Zealand, Pakistan, Peru, South Korea, Taiwan, Turkey.

13 TiSA, Article 1.5(b), Annex on Electronic Commerce, undated (November 2016)

14 TiSA, Article 1.5(a), Annex on Electronic Commerce, undated (November 2016)

15 TiSA, Article 1.4, Annex on Electronic Commerce, undated (November 2016)

16 International Digital Economy Alliance, 'The Trillion Dollar Question: How trade agreements can maximize the economic potential of data in the networked economy and support the Internet as the world's trading platform', 2013, Fn 12, p.3

Unrestricted movement of data (Article 2)

The primary goal of the Team TiSA lobby is to prohibit a government from requiring that data is held inside its territory, which they argue prevents them taking advantage of economies of scale, state of the art technology, and in-house expertise. The description of such policies as 'forced localisation of data' or 'data protectionism' is a crude attempt to transfer the negative connotations of trade protectionism from goods to the totally different issue of control over data.

The basic rule says no TiSA party can require a service supplier from another TiSA party to hold data inside its country where the supplier is transferring the data *in connection with* its business. The information transferred offshore can include personal information. For example, the EU could not require an Australian transport company operating in Germany to hold data regarding its loads and drivers' hours within Germany or Europe; likewise, the Canadian government could not require an American health insurance provider to hold data on its clients within the country. There is no suggestion that a government could even specify a list of acceptable countries where its data could be held and processed. The restriction is very broad, as it does not say the transfer is necessary for the business, just done in connection with it.

There are several variations. The US proposed 'landing zone' would apply to the transfer and processing of information within or outside the territory.[17] A number of mainly TPP countries[18] want to retain the right to require information to be *processed* inside the country, presumably so local rules apply, and to restrict the movement of information *within* the country (the reason for that is not clear).

The leaked text showed broad agreement to the rule, but strong disagreement about whether and how it might be limited. There were three options:

1. As discussed above, a number of countries want to limit their exposure to this rule in their schedules, but on a negative list basis that identifies the measure, activity or sector that is not subject to the rule.[19] It is unclear whether this would allow a full policy space reservation or just maintain the country's current regulation with a ratchet that locks in further liberalisation.
2. A lot of countries favour a rhetorical recognition that each can have its own regulatory requirements on the transfer of data by electronic means.[20] What is not spelt out is that those requirements would still be subject to the annex. The US did not commit even to include this.
3. Switzerland wanted a positive assertion that a country has the right to apply its own regulatory requirements concerning information transfer. It may be concerned to protect citizens' rights, but it would also want to protect the strict privacy rights of rich clients of Switzerland's legal and banking industry.
4. Hong Kong, Mauritius and Iceland had an intermediate position that would make the obligation subject to domestic laws; but those laws could not involve arbitrary or unjustified discrimination or disguised barriers to e-commerce, which would create serious uncertainty for regulators.
5. A number of countries propose a defence that would allow a government to keep or adopt a measure that restricts the movement of information to achieve a 'legitimate public policy objective', so long as it was not applied in a way that amounts to 'arbitrary or unjustified discrimination' or a backdoor way of restricting 'trade' as broadly defined in TiSA.[21] Because this is a defence, it would have to be argued during a dispute and accepted by the adjudicating panel of trade experts. Again, that could create uncertainty and potentially have a chilling effect on policy makers and regulators.

17 US, Non-Paper, TiSA Landing Zone, Article 2: Movement of Information, undated (November 2016)

18 Australia, Canada, Chile, South Korea and New Zealand

19 TiSA, Article 1.4, Annex on Electronic Commerce, undated (November 2016)

20 TiSA, Article 2.1, Annex on Electronic Commerce, undated (November 2016). Supporters are Australia, Canada, Chile, Colombia, Costa Rica, Iceland, Japan, Mauritius, Mexico, New Zealand, Pakistan, Panama, Peru, South Korea, Taiwan.

21 TiSA, Article 2.3, Annex on Electronic Commerce, undated. Supported by Australia, Canada, Chile, Colombia, Japan, Mauritius, Mexico, New Zealand, Panama, Taiwan.

This proposal is a variation on the general exception in the core TiSA text, which applies similar wording to public morals, public order, health and the environment, but is further limited by a 'necessity' test that means a government must adopt the approach that can achieve its policy goal while imposing the least burden on commercial interests.[22] The inclusion of this option in the e-commerce annex suggests the TiSA parties don't think their policy objectives relating to data would fall within those categories and/or that the protection in the general exception is too weak. The consumer protection and privacy part of the general exception is even weaker, as discussed below.

The US has not supported this defence. It is considering a narrower exception that would allow conditions on transfers of *personal* (not commercial) information, if the measure was *necessary* (the least burdensome option) to protect *personal privacy* only *and* is not applied in a way that amounts to arbitrary or unjustified discrimination or a backdoor way of restricting 'trade'.[23]

Location of computer facilities (Article 8)

Team TiSA argues that the benefits to companies of free movement of data are undercut if a country can insist that service suppliers use or locate computer facilities within its territory, another example of what it labels 'forced localisation'. Hence, the annex would prevent a government from requiring the use or location of computing facilities inside the country as a condition of supplying a service in that country. 'Computing facilities' is defined as 'computer servers and storage devices for the processing or storage of information for commercial use'.[24]

Fewer protections are being proposed than for the data localisation rule, but they are similar. The same group proposes a rhetorical recognition that each may have its own regulatory requirements on the use of computing facilities, including requirements that 'seek to' ensure the security and confidentiality of communications.[25] Again, those requirements would be subject to the TiSA rules, including this annex. A number of countries also want a similar defence for 'legitimate public policy objectives' provided the requirement does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on trade.[26] The wording is very like the TPP, although that imposed an additional restriction that the restrictions were no greater than needed to achieve the public policy objective (a necessity test).[27] Neither the US nor the EU has stated a position on this protection.

Colombia and Mauritius have proposed that a country could still make a subsidy or other advantage conditional on the use, expansion or establishment of computing facilities inside the country.[28] The Small Group Non Paper notes the inconsistency of this article with the flexibility on 'performance requirements' in the 'localisation' text;[29] it is unclear which text would prevail so the group suggests consulting on the matter.

Keeping source codes secret (Article 6)

A source code is the formula for a computer programme that humans can read, which is then converted into an object code or machine code that can be read by the computer. Open source means it is accessible to everyone to use, copy, check, alter or correct. The scope of the TiSA rule proposed by the US, Canada, Switzerland and several others is very broad: no TiSA government can require a person (firm or individual) of another TiSA country that owns software to transfer or provide access to source code for that software '*in connection with* the supply of a service'.[30] The non-paper suggests 'as a condition for the supply of a service' as an alternative. Although it is not stated, the ban presumably includes requirements to transfer source code to another TiSA government.

22 TiSA, Article 1.9, Core text, dated 14 July 2016.

23 TiSA, Article 2.3*alt,* Annex on Electronic Commerce, undated (November 2016)

24 TiSA, Article 14, Annex on Electronic Commerce, undated (November 2016)

25 TiSA, Article 8.1, Annex on Electronic Commerce, undated (November 2016)

26 TiSA, Article 8.4, Annex on Electronic Commerce, undated (November 2016)

27 TPP, Article 14.13.3(b), Annex on Electronic Commerce (November 2016)

28 TiSA, Article 8.3, Annex on Electronic Commerce, undated (November 2016)

29 Article X.3.4 Performance Requirements of the TiSA Localisation text, dated November 2016, allows countries to condition such benefits on locating production or supply services inside the country.

30 TiSA, Article 6.1, Annex on Electronic Commerce, undated (November 2016)

Keeping source codes secret gives monopoly rights to the creator. The argument that this is not a problem because other digital products and individual apps compete for customers ignores the reality that the digital domain is not a level playing field. Secrecy of source codes perpetuates the power of the handful of corporations that control the major search engines and digital platforms, and of mega-corporations with massive research budgets that dominate the tech sector and smart products. Various kinds of risks could go unchecked and unchallenged:[31]

Corporate non-compliance: Computer programmes are now embedded in smart products, from household appliances to motor vehicles to smart phones. Non-disclosure makes it impossible to monitor compliance with product standards. The scandal over Volkswagen's fraudulent emissions software for monitoring emissions shows the importance of disclosure for consumer protection, enforcing environmental standards, and prosecuting criminal acts.[32]

Security and safety: Software operates artificial intelligence, such as robots, drones, and driverless vehicles. Aside from risks of error and design faults, there are serious concerns about potential for hacking and installing malware, including by routing attacks indirectly through less secure software.

Personal information: Algorithms are used for:

- profiling that can lead to bans from activities (such as no-fly lists), differential charges for services (so-called dynamic pricing), selective exposure to information;
- employment decisions, performance monitoring, and assessing and rating applicants and employees; and
- risk assessments for credit ratings or health insurance, based on assumptions about gender, race, income and other factors.

Economic development: Manufacturers of generic components and servicers of smart products are unable to provide local inputs, and technology transfer to developing countries is meaningless without the source code.

Financial risk and fraud: Complex algorithms are used to engineer financial products, calculate the LIBOR[33], conduct automated trading in currency, shares and derivatives, allocate ratings to financial products, assess risk for insurance, and many other activities that have been associated with fraud, and financial instability and crises. (It is not yet decided whether the e-commerce annex will apply to financial services.)

Several countries – but not the US or EU- propose a 'legitimate public policy' defence similar to that for localisation of data and computer facilities. The public policy objective for requiring the transfer of or access to source code must be 'legitimate', the measure must not involve 'arbitrary' or 'unjustified discrimination' against the owner of source code, and the requirement must not be a disguised restriction on trade. A requirement to disclose a source code could be challenged on any of those grounds. The November 2016 text explicitly questions whether the (limited) general exception in the Core text would apply here and, if it does not, why the Article 6 protection is needed – in other words, ***why any exception is needed***.

The US and Australia would ensure that terms and conditions on providing source code could still be written into commercial contracts. A party could also require the source code software to be modified where *necessary* for the software to comply with laws or regulations, ***provided those laws and regulations are already permitted under TiSA*** (eg. not discriminatory). Again, 'necessary' means the government must choose the least restrictive option to achieve compliance with those laws.

31 Based on research by Sanya Reid Smith, Third World Network, Malaysia, 2017

32 Russell Hotten, 'Volkswagen: the scandal explained', 10 December 2015, http://www.bbc.com/news/business-34324772

33 The London Interbank Offer Rate that provides the benchmark for interest rates from the City of London, which was subject to fraudulent manipulation by bankers from 2012-2014. 'Libor Scandal: the bankers who fixed the world's most important number', *The Guardian,* 18 January 2017, https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number

No local content requirements (Article 10)

The US wants to prohibit a TiSA country from giving preferential treatment to local electronic content on the grounds that it was created, produced, published, contracted for, commissioned or first made available on commercial terms locally, or where the creator, producer, developer or owner is local.[34] This restriction would not apply to subsidies or grants, government-supported loans, guarantees and insurance.[35]

While the US proposal could apply to many services, it is most sensitive for the culture sector. For example, the EU proposed a requirement in 2016 that video-on-demand providers, such as Netflix, Amazon.com and Apple's iTunes, would have to dedicate at least one-fifth of their catalogues to European content.[36]

Although the US is not a party to the UNESCO Convention on Cultural Diversity, many TiSA countries are.[37] Principle 2 of the Convention adopts the

> *principle of sovereignty: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.*[38]

Article 20 of the Convention requires the parties to foster mutual supportiveness with the other treaties to which they are parties. The US proposal does the opposite. This is not the only place where cultural content is under attack in TiSA; making commitments on market access, adopting a standstill on discriminatory measures, and applying domestic regulation disciplines could have a similar effect. TiSA is silent on cultural rights, even in the flawed general exception.

This is a familiar battle-ground in the GATS. The US, on behalf of Hollywood, has a long-standing opposition to local content quotas or other preferences for the cultural sector. The EU is committed internally to maintain a 'cultural exception' in trade agreements. That is basically limited to audio-visual services, but is enough to create a major conflict with the US.[39] The US says the e-commerce provision is without prejudice to whether electronic transmissions are treated as goods or services,[40] but its approach would make that distinction redundant for local content.

No ISP liability for uploaded content (Article 11)

The Internet industry wants to maximise its freedom while avoiding any liability. The US wants to help it by including rules that protect providers and users of 'interactive computer services', described as 'a system or service that provides or enables electronic access by multiple users to a computer server'.[41] Australia, Canada, Colombia and South Korea oppose the entire provision and the EU opposes all the substantive parts of it.

The US proposal says: where *information* provided through a platform (like Google or Facebook) has been created or developed by another person or entity, and there is potential liability for the harm that *information* has caused (such as breach of libel, privacy or hate laws that are not criminal laws[42]), a TiSA government must not treat *the supplier* or *the user* of the computer service as a supplier of the information content, unless they were actively involved in creating the information.[43]

Predictably for a US proposal, this protection from liability would not apply to measures relating to intellectual property (IP), including infringements of IP. Nor would it prevent enforcement of the criminal law, or requirements that an ISP complies with an order of a law enforcement authority that is 'not inconsistent with the provisions of this article'. In other words, the US proposes that ***this obligation could overrule a lawful order of a law enforcement authority where it would conflict with a provision of TiSA!***

Internet self-governance

Champions of global e-commerce promise a future of inclusion and empowerment. Appeals to 'Internet freedom', 'unfettered information highways' and 'open access' convey the impression of a neutral force. But the technology is controlled by commercial interests who have accumulated enormous power. Very few rules currently govern the Internet, and they are made in forums which the tech giants like Google, Apple, Amazon, and Facebook dominate. Even civil society voices tend to split on the basis of who is funded by Google.

As discussed below, the provision to enable choice of networks and apps is subject to 'reasonable network management',[44] which is undefined in the text. In a global system of Internet self-governance, those who run the networks will decide what is reasonable network management. The European Consumer Organisation (BEUC) observes that a secretive and non-participatory trade agreement is not the place to determine Internet governance.[45]

Sham consumer and citizen protections

The first article of the e-commerce annex recognises that e-commerce provides 'opportunities for inclusive economic growth' and the 'importance of avoiding *unnecessary barriers'* to the use and development of e-commerce.[46] Again, 'necessary' means that rules which could negatively affect the big tech companies and the network or gig economy must be the least restrictive or burdensome of the available options that can achieve the policy goal.

Article 1.2 also talks of the need to promote 'consumer confidence' in e-commerce. But the proposals for consumer and privacy protections, and for Internet freedom, which might build that confidence are weak and contested. The US is even resisting the most ineffective powers to regulate the e-commerce industry to protect people's rights. Moreover, there are no development flexibilities or obligations to close the digital divide. Instead, the annex empowers those states and corporations that already dominate the digital domain.

Consumer protection (Article 3)

It has been agreed that TiSA parties must have consumer protection laws, but ***there are no minimum standards for those laws***. They could be absolutely minimal. The scope of the required laws is also restricted to those that 'proscribe fraudulent and deceptive commercial practices that cause harm or potential harm to consumers engaged in online commercial activities'. Other anti-consumer practices such as re-routing, geo-blocking and price discrimination are not mentioned. For cross-border e-commerce transactions, consumers have no clarity on whose law applies or guaranteed access to dispute mechanisms and enforcement of remedies. They may not even know where the provider is located or where the relevant data they would need to access is held.

Privacy protection (Article 4)

The article on privacy is entitled 'Personal Information Protection'. Personal information is defined as information, including data, relating to an identified or identifiable natural person – Switzerland wants to include legal persons (such as companies).[47] None of the article is agreed.

Positions span a broad spectrum. On one hand, the US and Hong Kong are still considering whether they will even support a statement that recognises the economic and social benefits of protecting

34 TiSA, Article 10.3, Annex on Electronic Commerce, undated (November 2016)

35 TiSA, Article 10.5, Annex on Electronic Commerce, undated (November 2016)

36 http://www.bloomberg.com/news/articles/2016-05-25/netflix-amazon-face-minimum-eu-quota-for-european-films-shows

37 Australia, Belgium, Canada, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Mexico, Netherlands, New Zealand, Panama, Peru, Portugal, South Korea, Slovakia, Slovenia, Spain, Sweden, Switzerland, UK and EU

38 http://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf

39 This argument underpins their dispute on whether digitised products are a good (the GATT has an exception for audio-visual content) or a service (the GATS has no such exception) - a question that is explicitly left open in footnote 7 to Article 10: Customs Duties, Annex on Electronic Commerce, undated (November 2016)

40 TiSA, Article 11, Annex on Electronic Commerce, undated (November 2016)

41 TiSA, Article 14, Annex on Electronic Commerce, undated (November 2016)

42 TiSA, Article 11.(c)(i), Annex on Electronic Commerce, undated (November 2016)

43 TiSA, Article 11.2, Annex on Electronic Commerce, undated (November 2016)

44 TiSA, Article 7(a), Annex on Electronic Commerce, undated (November 2016)

45 BEUC, 'Analysis of the TiSA E-Commerce Annex and Recommendations to the Negotiators', September 2016

46 TiSA, Article 1.2, Annex on Electronic Commerce, undated (November 2016)

47 TiSA, Article 14, Annex on Electronic Commerce, undated (November 2016)

personal information of users of electronic commerce – wording the US agreed to in the TPP[48]. The US also wants parties to *endeavour* to provide flexibility for firms engaged in transactions between countries with different privacy regimes. This would allow them to protect personal information in ways that are 'substantially similar' to the requirements of parties' laws, effectively re-writing a sovereign country's laws.[49] It could be costly and burdensome for a country to challenge the company's interpretation of its privacy law and the equivalence of another.

By contrast, Switzerland wants a total carve out from the annex for all national laws and policies that aim to protect intellectual property, privacy, confidentiality of personal and confidential information, consumer protection, and protection of cultural diversity.[50] In the November 2016 text only Pakistan was considering whether to support Switzerland. Sixteen negotiating parties opposed the carveout: Australia, Canada, Chile, Taiwan, Colombia, the EU, Iceland, Japan, South Korea, Mauritius, Mexico, New Zealand, Norway, Peru, Turkey and the US. Switzerland also wants to reserve its right to take 'all measures necessary' to protect the data of natural and legal persons – clearly, on behalf of its banking system – and for countries to enhance their enforcement capacity to ensure their privacy and data protection laws are complied with.[51]

The wording supported by most countries is exceptionally weak: governments are required to have a domestic legal framework to provide protection for personal information, which *should* (but does not have to) *take into account* (rather than apply) principles and guidelines of relevant international bodies (which may be less ambitious than countries' domestic laws).[52] The relevant international bodies are not necessarily inter-governmental. They might be principles developed by TiSA parties in the OECD or Asia Pacific Economic Cooperation (APEC) forum, or rules agreed by stakeholders in the private forums that the Internet industry dominates. The US seeks to weaken this provision further by a footnote that says it would be enough to have a law to enforce voluntary undertakings by companies relating to privacy.[53] A number of countries propose that governments *shall endeavour* to ensure their domestic framework is *applied* in a non-discriminatory way.[54]

The European Union has been unable so far to develop an internally agreed position on privacy, which is a constitutional right. The European Commission has apparently drafted a compromise that it believes satisfies the EU Charter of Fundamental Rights and the EU General Data Protection Regulation. However, political sensitivity means a decision is unlikely until after the German elections in September 2017. European consumer organisation BEUC has made it clear that TiSA is not the place to decide countries' data protection and privacy rules.[55]

Because there is no mandatory standard, a country's domestic law could therefore fall below the weakest international standards. Where a country is more ambitious, it could be challenged for going beyond what is *necessary* to achieve the policy objective under the general exception.

The flawed general exception

In the absence of specific protections for privacy and consumers in the annex, governments would have to rely on the general exception that was imported from the GATS[56] into the TiSA core text.[57] That exception is especially problematic for consumer protection and privacy for several reasons:

- It is not a carve out or exclusion that protects privacy or consumer protection measures from the rules, but a defence that the government must establish during a dispute to the satisfaction of a panel of trade law authorities;

48 TPP, Article 14.8.1.

49 TiSA, Article 4.3, Annex on Electronic Commerce, undated (November 2016)

50 TiSA, Article 1.5bis, Annex on Electronic Commerce, undated (November 2016)

51 TiSA, Footnote 2 to Article 4.1, Annex on Electronic Commerce, undated (November 2016)

52 TiSA, Article 4.2, Annex on Electronic Commerce, undated (November 2016)

53 TiSA, Footnote 3 to Article 4.2, Annex on Electronic Commerce, undated (November 2016)

54 Article 4.4, proposed by Canada, Chile, Colombia, Mauritius, Pakistan; Taiwan, Colombia, South Korea, Mexico considering

55 BEUC, 'Analysis of the TiSA E-Commerce Annex and Recommendations to the Negotiators', September 2016

56 GATS 1994, Article XIV.

57 TiSA, Article I-9, Core text, dated 14 July 2016

- It does not actually refer to consumer protection, but only to the prevention of deceptive or fraudulent practices or to deal with the effects of a default on a services contract (which carries a further burden of proof);
- The privacy protection relates only to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts, not to improper use by those who collect the data.
- Rather than giving governments relief, the exception imposes an *additional* restraint on what governments are otherwise allowed to do under TiSA to protect consumer protection and privacy. The consumer or privacy measure must be
    - adopted to secure compliance with a law or regulation that is consistent with TiSA, which means the law could not require data localisation or the location or use of computers within the country, or treat foreign providers differently from nationals; plus
    - *necessary* to achieve that compliance, meaning it is the least burdensome option reasonably available to ensure compliance with the law or regulation.

  By making those laws subject to a necessity test, the 'exception' actually restricts what TiSA would allow governments to do.
- Because the exception makes explicit reference to consumer protection and privacy, it would be hard to invoke the public order or public morals categories in the general exception to provide protection.

Spam (Article 5)

An 'unsolicited commercial electronic message' (spam) is defined as one sent without consent of the recipient or against their explicit wishes.[58] The main proposal says TiSA parties must have measures that require suppliers of spam to either *facilitate* opting out of receiving unsolicited messages or *require consent* as set out in a country's laws. Government have to provide some kind of legal recourse, presumably to the recipient, when the supplier does not comply, but it does not require that the recourse is effective. The US and Latin American countries want a third option, whereby a government measure merely 'provides for the minimisation' of spam. Canada has suggested an alternative approach that requires states to adopt a *legal framework* for regulation of spam that requires either opting in by recipients or facilitates their ability to opt out.

The US has also proposed an exclusion for messages between parties to an existing transaction (for example, until an e-purchase with Amazon is completed) or between parties with an existing relationship, which could cover any website or ISP provider with whom someone has registered, such as Netflix, Agoda or Google. That would render the spam protection useless for a large amount of traffic. The EU is considering the US proposal.

Conditional network access, use of Internet and open networks (Article 7)

As noted above, Internet freedom is a loaded term, especially in agreements like TiSA that are designed to advance the commercial interests of powerful countries and tech corporations. At first glance, Article 7 appears to recognise that end-users should be able to choose which services, apps and devices they want to connect to. However, there is no obligation in relation to open networks and network access, just a statement that the parties recognise the benefits of consumers being able to have access to and use services and apps of their choice on the Internet. There are several illusions in the article's wording:

- it recognises the benefits of freedom of choice, but imposes no obligations to guarantee it;
- it refers to choice of services and apps, but not to choice of networks or platforms;
- freedom to choose services and apps is still subject to the applicable laws and regulations of the TiSA country; and

58 TiSA, Article 5 and Article 14, Annex on Electronic Commerce, undated (November 2016)

- choice of services and apps is subject to 'reasonable network management', but in a global system of internet self-governance, those who run the networks will determine what is reasonable network management.

The article also recognises the benefits of consumers having access their ISP's network management practices. But again, there is no obligation.

National Security (Article 13)

Several countries, including the US and Australia,[59] have proposed a security exception specific to this annex that gives even stronger rights to governments than the security exception in the TiSA core text.[60] A government could define what are its 'essential security interests' and what action it considers is necessary to protect them. Japan wants more clarity on what 'essential security interests' means. There is nothing that would require a state to disclose to the other TiSA countries, let alone to users or ISPs, when it was breaching any rule in the annex (including the weak consumer and privacy provisions). Past practice shows the US would interpret this wording to prevent a dispute body from reviewing a party's actions altogether. The International Digital Economic Alliance, an industry think tank, observed that this kind of overreach generates distrust and unwillingness to locate data in countries that are likely to invoke this kind of exception.[61] However, many Internet users would not know where the server hosting their data was based.

Facilitating cross-border electronic transactions

Only three provisions are really directed towards facilitating commercial transactions conducted through digital trade.

Electronic authentication and e-signatures (Article 9)

The expansion of cross-border trade requires changes to rules and practices that assume the physical presence of the participants. One of the few agreed provisions in the annex says that a signature cannot be rejected just because it is in electronic form, but would allow governments to say the contrary in their domestic law. They have also agreed not to adopt any measures for authentication[62] that would prohibit the parties to an e-transaction from deciding the appropriate methods for authentication, or from being able to establish before a judicial tribunal that they have complied with any legal requirements on authentication. It is still possible for a country to make the electronic authentication of a specific category of transactions meet certain performance standards or be certified by an authority accredited under its domestic law.

The term 'electronic signature' is only used in the heading of the provision, which avoids the thorny question of its scope and the distinction between electronic and digital signatures.[63]

No customs duties (Article 10)

WTO members have maintained a temporary moratorium on customs duties for electronic transmissions that has been rolled over at successive ministerial meetings.[64] This annex would make that permanent. 'Electronic transmissions' is not defined. Where the term is used in the WTO it does not extend to physical products bought through offshore electronic transactions.

The US wants to extend this provision to make electronically transmitted *content* duty free, or at least to make it explicit that the rule covers content transmitted electronically. That would exempt from customs duties a wide range of digitised products, such as e-books, music, movies, and other

59 Australia, Mauritius, Pakistan and US

60 TiSA, Article I-10, Core text, 14 July 2016.

61 International Digital Economy Alliance, 'The Trillion Dollar Question: How trade agreements can maximize the economic potential of data in the networked economy and support the Internet as the world's trading platform', 2013, p.6

62 Electronic authentication is defined in Article 14 as the process or act of verifying the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication.

63 'The difference between digital signatures and electronic signatures', 1 June 2016, https://www.globalsign.com/en/blog/electronic-signatures-vs-digital-signatures/

64 https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_ecommerce_e.htm

commercial content transmitted electronically, such as architectural or engineering drawings, IT programmes, back office transcriptions, etc. Technological innovations would introduce new uncertainties: for example, would electronic transmission cover an instruction conveyed to a 3-D printer across the border by the Internet?

A government could still impose an internal tax, such as a consumption tax, provided it is consistent with the rest of the agreement, for example that it does not impose a higher rate on cross-border transactions.[65] Other leaked TiSA texts say that tax matters have not yet been resolved in TiSA. A proposed footnote says this provision is without prejudice to whether electronic transmissions are a good or a service, which could prove important for tax purposes.[66] However, market power may prove a bigger obstacle to tax. The major electronic marketplaces are threatening to geo-block Australian users from buying goods from overseas if the federal government proceeds with plans to impose the goods and services tax on transactions conducted through their platforms and make them collect it.[67]

The fiscal consequences of this provision could be significant if cross-border transactions displace local services that benefit the economy through employment, payment of business taxes and secondary economic benefits. Global e-commerce firms are notorious for transfer pricing and tax avoidance. Governments give away the right to restrict international transfers and payments for current transactions[68] and movements of capital where they have taken market access commitments on cross-border supply of the service.[69] An outflow of foreign exchange could also cause balance of payments issues; yet the core text provides very limited room for interventions even in an emergency.[70]

International cooperation (Article 12)

The annex contains a weak commitment for the TiSA parties to exchange information and share experiences. The cooperation provision merely 'recognise(s) the importance' of various activities: exchanges of information and experiences on technology and research, commercial practices and applicable laws, regulations, policies and standards. Some countries would extend this to online consumer protection and spam,[71] and consumer access to online products and services.[72]

There is a nod to the digital divide, possibly motivated by the goal of inserting TiSA back into the WTO. The parties appear to have largely agreed to cooperate to reduce disparities in access to and use of ICT and enhance national regulatory capacity,[73] and recognise the importance of positively assisting access for SMEs and participation in e-commerce. But these are unenforceable promises. A large number of countries want to preface this with a specific purpose: 'with a view to promoting the development of innovative and sustainable electronic commerce'.

Less benign proposals from the US, Switzerland and others[74] would encourage the private sector to adopt methods of self-regulation that foster e-commerce.[75] That foreshadows likely arguments from the US and from the tech industry that self-regulation is an appropriate form of regulation, and should be preferred when the right to regulate e-commerce is subject to a 'necessity' or least-trade restrictive test.

The US and a different group of countries[76] propose 'recognising the importance' of TiSA parties 'actively participating in regional and multilateral fora', presumably to push a TiSA-style text. The November 2016 draft deleted an explicit reference to the WTO as one such forum.[77] The proposal

65 TiSA, Article 10.2 and Article 14, Annex on Electronic Commerce, undated (November 2016). It also excludes antidumping or countervailing duties or fees charged commensurate with a service provided.

66 TiSA, footnote 7 to Article 10, Annex on Electronic Commerce, undated (November 2016)

67 'Amazon, Alibaba, eBay and Etsy may block Australian users if GST changes go ahead', *NZ Herald,* 22 April 2017, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11843234

68 TiSA, Article I-7, Core text, dated 14 July 2016.

69 TiSA, Footnote 2 to Article I-3, Core text, dated 14 July 2016.

70 TiSA, Article I-8, Core text, dated 14 July 2016.

71 Australia, Colombia, Costa Rica, Turkey and the US; Chile, Taiwan, EU, Korea, Lichtenstein, Mexico and New Zealand 'considering'

72 Australia's proposal; Chile, Taiwan, Costa Rica, EU. South Korea, Lichtenstein, New Zealand, Turkey 'considering'

73 TiSA, Article 12(e), Annex on Electronic Commerce, undated (November 2016)

74 Proposed by US, Switzerland, Mauritius with Canada, Chile, Colombia and South Korea 'considering'

75 TiSA, Article 12(c), Annex on Electronic Commerce, undated (November 2016)

76 Canada, Costa Rica, South Korea, US, NZ 'considering'

77 TiSA, Article 12(d), Annex on Electronic Commerce, undated (November 2016)

to include the WTO was clearly linked to the push by many TiSA countries to secure a mandate to negotiate e-commerce at the WTO ministerial meeting in Argentina in December 2017.[78] It may have been removed to avoid inflaming concerns from non-TiSA developing countries who oppose such negotiations in the WTO.

78 https://www.wto.org/english/news_e/news17_e/serv_14mar17_e.htm

APPENDIX 5

OVERVIEW OF THE TiSA CORE TEXT

The Core text of TiSA has a Preamble plus four parts:

I. ***General Provisions***, which largely mirror the rules in the GATS;

II. *Scheduling Commitments*, which says how countries must schedule their commitments to the rules;

III. *New and Enhanced Disciplines*, which refers to the proposed annexes on specific services and regulatory issues (these currently number around 18);

IV. *Institutional Provisions* on how TiSA would be run, including settling of disputes and steps to insert it into the WTO.

Part 1: General Provisions

Almost all of Part I is common to the GATS and uses the standard definitions and rules to make it easier to export TiSA back into the WTO. The agreement has sweeping application to any

- '***measure***' (defined as a law, regulation, rule, procedure, decision, administrative action, or *any other form*)
- at *central, regional or local government levels* and bodies exercising authority delegated by any of those levels (with central government required to take reasonable steps to ensure their observance)
- '***affecting***' (not just directed at) the
- '***supply***' (defined as production, distribution, marketing, sale and delivery)
- of a '***service***'.

The ***classification list for services, known as W/120***[1] has over 160 sub-sectors (Annex 4). It dates back to 1991 and some TiSA annexes seek to modify or supplement it. Many of the same activities would fall the service itself (eg. retail distribution (of a book)) or constituent parts of the service (eg. financial (billing), labelling and packaging, courier services), or within the extended definition of 'supply' of a service (eg. distribution, sale or delivery (of a book)).

'Trade in services' can be conducted in four ways:

1. across the border (eg. offshore call centres selling insurance, international courier delivery, buying books from Amazon) (***mode 1***)
2. consuming a service delivered abroad (eg. offshore bank accounts, reinsurance through foreign firms, using credit cards at foreign ATMs, study abroad) (***mode 2***)
3. establishing a commercial presence in another TiSA country (eg. foreign ownership of telcos, a Boots or Uber franchise, Tesco's overseas subsidiaries, the foreign agency or branch of an insurance company) (***mode 3***)
4. temporary entry of foreign natural persons (eg. bank managers, engineers, IT specialists, drivers) (***mode 4***)

1 'Services Sectoral Classification List', MTN.GNS/W/120, 10 July 1991. See Appendix 2.

Some who argue that none of these relate to the Internet have proposed the introduction of a ***'mode 5'***.[2] But they are not clear about what it covers, and there is no likelihood that such a dramatic change to how trade in services would be agreed because of the flow-on effects for existing commitments and rules.

The two core rules are unchanged from the GATS:

i. the ***'national treatment'*** rule says a government cannot give local services and suppliers better treatment than their counterparts from TiSA countries. Examples of discriminatory treatment include local hiring requirements; only paying subsidies to locally owned Internet providers; restricting deposit guarantees to domestically-owned banks; a ban on foreign ownership of land or capping foreign ownership in privatised businesses; reserving certain retail sectors for local firms; allowing only nationals to be chief executives of financial institutions;

ii. a government must not restrain competition in, and the potential expansion of, services markets, regionally or across the country (***market access***), by imposing limits that are numerical or have a similar effect, even if the limits apply to locals as well. Examples include a monopoly that provides disaster insurance, a requirement to show unmet need before opening a new hypermarket, limits on the size and numbers of liquor outlets in a region, a cap on currency trading licenses, restricting the ratio of call centres to street front bank outlets, a ban on trading in the latest toxic derivative, or requiring investment in investment banks through a subsidiary rather than an agency.

There are several significant and controversial changes proposed to other parts of the GATS text:

- a light-handed approach to future ***domestic regulation*** of
  - *qualifications requirements and procedures* (eg for telco technicians, financial advisers, engineers)
  - *licensing qualifications and procedures* (eg. pension fund managers, training providers, courier operators)
  - *technical standards* (eg. financial trading rules, staffing levels, health and safety rules, location and size of warehouses and hypermarkets)

  and a corporate-friendly approach to their administration[3];
- guaranteed rights for foreign states and corporations to comment on proposed new policy and regulation (***transparency***)[4]; and
- the right of all TiSA parties to share the benefits of any FTAs that other TiSA parties have in force (***most-favoured-nation treatment***); the scope of that provision is in dispute.

Part II: Scheduling commitments

Each party's schedule of its commitments to the core rules on market access and national treatment voluntarily limits the government's right to maintain or adopt more restrictive approaches in the future – and opens them to legal challenges and economic penalties if they breach those obligations. The TiSA approach to scheduling imposes more restraints than the GATS.

Countries' schedules are developed through a process of requests and offers between individual parties, and then consolidated so all countries receive the same benefits.

Each TiSA party guarantees to open its 'market' in a service sector or sub-sector (market access) the same way as in the GATS: they list what sub-sectors will be covered for each way of delivering the service (known as a ***positive list***), and any limitations on that opening. TiSA parties are expected to commit at least the highest level of market access in their existing FTAs, even though the impacts

2 Lucian Cernat and Zornista Kutlina-Dimitrova, 'Thinking in a box: a "mode 5" approach to service trade', European Commission Chief Economist Note, Issue 1, March 2014

3 Whether these provisions are in the core text and Annex on Domestic Regulation has not been finalised.

4 This occurs in both the leaked core text and the TiSA, Annex on Transparency, dated 6 November 2016

of giving that to all TiSA countries could be quite different; whether they do that comes down to bargaining power.

Where a government has promised market access for a service sub-sector, TiSA presumes the non-discrimination rule will apply – all levels of government will not give local firms any better treatment than their foreign counterparts. There are two ways a party could counteract that presumption, *provided all the other parties consent*:

- a government could negotiate to keep 'discriminatory' measures that exist when TiSA comes into force (a '***standstill'***). Any new liberalisation would be automatically locked in (a '***ratchet'***). Existing preferential treatment for locals that was not expressly listed would breach the rules (this is a ***'negative' list*** approach).
- a government could exclude some services or sectors from the non-discrimination obligation to preserve its ***future policy space***, but that must be spelt out in the country's schedule (again, a 'negative' list) and all the other countries must agree.

Some annexes, including on financial services, telecoms, and delivery services, seek to restrict the schedules even further, by not allowing any reservations for certain services or imposing a standstill for both the market access and national treatment rules.

Services are generally being identified using the 1991 W/120 ***classification list***,[5] so they are consistent with the GATS. However, countries' offers that have been released show additional sub-sectors have been used and they are often embedded in clusters of commitments and model schedules. Certain annexes, eg on delivery services, alter the standard GATS classifications.

Schedules are technically complex and raise problems of foreseeability and error. Negative lists are especially high risk. It is almost impossible to change a schedule later, as that requires consent of all other parties and new concessions can be demanded as the price of their consent.

Committing a service in the schedule for market access and national treatment would trigger other rules, such as the 'disciplines' on a government's regulation of qualifications, licensing, technical standards in those sectors, discussed in detail below.

Part III: New and enhanced disciplines

This Part of TiSA refers to the 18 or so proposed annexes (see Appendix 1). Each annex has a specific focus and aims to achieve one or more of the following:

- extend the GATS rules that restrict how governments can approach the regulation of services generally (eg. least-burdensome domestic regulation, rights of foreign states and corporations to comment on proposed laws);
- expand the coverage of sectors where that is limited under the GATS (eg. express delivery, digital services);
- introduce new rules for sectors of particular interest to some countries (eg. road transport, energy, professional services, environment); and
- apply the services rules to activities or entities not covered by GATS, but which are included in some FTAs, often introduced as a fallback for the TPP (eg. e-commerce, SOEs, government procurement, prohibitions on requiring a local presence, and prohibited performance requirements on foreign investors).

Part IV: Institutional Provisions

The final Part of TiSA sets out mechanisms for decision making, dispute settlement, and operating the agreement. These are being designed so that TiSA can fit back into the WTO.

Disputes: The panel of arbitrators hearing a dispute under TiSA would be trade experts, not proper judges. Unlike the WTO, the current proposal does not provide any appeal from a panel's decision. If a party was found in breach of the TiSA rules, it would have to abandon or adjust the non-compliant

5 WTO, W/120. Appendix 2.

measure, or face the risk of sanctions against other parts of its export economy, such as agriculture or manufacturing.

Entry into force: A minimum number of the original negotiating parties would have to ratify TiSA before it could enter into force. The July 2016 leaked text proposes two-thirds of original signatories.[6] It is not weighted to require the major powers to be among those parties, as in the TPP.

Joining TiSA (accession): Any country wanting to join TiSA would have to get approval from a Working Group that can include all existing parties, who often negotiate one by one and then collectively.[7] That inevitably means they would have to promise more than was in the original TiSA.

6 TiSA, Article IV:16, Core text, dated 14 July 2016

7 TiSA, Article IV:10, Core text, dated 14 July 2016

APPENDIX 6

THE TiSA RULES ON TELECOMMUNICATIONS SERVICES

The telecoms annex is analysed in relation to five core functions:

i. Deregulation and access to services and networks for telecom suppliers;

ii. Requiring major telcos (mainly from developing countries) to facilitate competition;

iii. Undermining telecoms as a public service;

iv. Providing minimal consumer rights and protections;

v. Securing compliance through institutional regulatory frameworks.

Scope of coverage

As usual for TiSA, the rules apply to ‘measures’ ‘affecting’ ‘trade’ in telecommunications services (however they end up being defined), at all levels of government including by bodies exercising delegated authority.

Schedules: Chapter 6 of the report referred to the pressure for governments to schedule full, or at best negative list, commitments on market access and national treatment for the cross-border supply (mode 1) and commercial establishment (mode 3) of a long list of telecom services in the W/120 classification list (see Box 6A.1). When it comes to the rules in the Annex on Telecommunications, some countries want the right to limit coverage of the annex through negative lists in their schedules, but the US, EU and many other countries want the annex to apply to the entire sector.[1]

Definitions: It is important to stress that a ‘major supplier’ is carefully defined as one that can materially affect the terms of participation in the relevant market for public telecoms through its control over essential facilities or use of its position in the market.[2] That will predominantly affect state-owned telcos in developing countries, as the global telecom giants will claim they don’t control essential facilities and they operate under effective competition regimes.

Classifying telecoms

The US insists there are separate regulatory regimes for telecoms and the Internet and has quarantined the latter from the ITU. But it also wants to ensure that TiSA’s rules guarantee its telcos and the tech industry non-discriminatory access to the telecoms infrastructure in other countries.

There is a long-standing battle between the EU and US on whether the ‘telecommunications’ sector refers only to the *means* of transporting telecommunications or includes ‘value-added’ activities, such as storage, forwarding and processing (that is, whether it includes or excludes the Internet). The classifications used for making telecom commitments in the GATS 1994 schedules were from the document called W/120, which dates back to 1991 when value-added services were just emerging:

1 TiSA, Article 1, Annex on Telecommunications Services, dated November 2016. Those wanting unlimited coverage are Australia, Canada, Colombia, EU, Iceland, Japan, South Korea, Mauritius, Norway, US.

2 TiSA, Article 23 Definitions, Annex on Telecommunications Services, dated November 2016

Box 6A.1 W/120 Telecom classifications[3]

C.	**Telecommunication services**	
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**
k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl. transaction processing)	843**
o.	other	

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

In 2005, as part of the GATS 2000 negotiations, the EU promoted the classification used in the GATS Annex on Telecommunications Services: '*all services consisting of the transmission and reception of signals by any electromagnetic means*'.[4] It reasoned that value-added telecommunications services were already covered by commitments made under the W/120 heading of computer and related services or could be scheduled in that sector in the future. The EU had earlier developed an Understanding on Computer Related Services setting out what it said was covered by that category[5]. Its 2005 paper contained a model schedule on telecommunications, which included an optional footnote that would include electronic mail, voice mail, electronic data interchange, code and protocol conversion in the definition.

The US objected that 'value-added' services are an essential component of the telecommunications services sector and to any classification scheme, and that the content of commitments need specificity.[6] By focusing just on the transmission function of telecommunications, the EU's approach would eliminate the entire sub-sector of value-added services and heighten uncertainty, because it was not clear how those services would be covered. Relegating them to an optional footnote, and then limiting the specific services in that footnote, had the potential to diminish countries' existing GATS commitments. The US wanted the principle of technology neutrality to apply to market access commitments for the value-added sector, and include services provided through IP-based networks.

The US proposed an alternative extended definition: 'All services consisting of the transmission and reception of signals by any electromagnetic means, *alone or in combination with enhancing, storing, forwarding, retrieving, or processing functions added to the transmission and reception of signals.*'[7]

There was no agreed definition in the TiSA annex on telecoms dated November 2016. The EU, Switzerland and several other countries proposed an EU-style 'transport' definition, and explicitly excluded services providing content or involving editorial control.[8] A TiSA 'non-paper' from November 2016 offered an alternative that also reflected ongoing sensitivities about content.[9] There were no country attributions in that paper, but it is assumed that the US has not agreed.

However, the parties have agreed that the annex won't apply to broadcasting or cable distribution of radio or television programming, except to the extent that the provider also supplies public telecom services.[10]

Telecoms in the GATS 1994

To understand the TiSA telecoms annex it is necessary to explain the special regime in the GATS for telecoms. The US Telecommunications Act was passed as trade in services negotiations in the Uruguay round were concluded. When the round was ending in 1994 the US was not happy with the proposed levels of commitments to open telecom markets or with the rules being proposed, and insisted that negotiations on telecommunications were extended. The result was consistent with the 1988 version of the ITU's regulatory framework for telecommunications, which was heavily influenced by the US.

In addition to scheduled commitments to the market access and national treatment rules on telecommunications services, as listed in the classification document W/120, the GATS has two specific documents on telecoms:

- an Annex on Telecommunications, which guarantees that telecom suppliers of WTO Members can access and use basic telecoms networks and services in telecom sub-sectors where a country has scheduled a commitment; and
- a voluntary Reference Paper on Basic Telecommunications, which sets out additional rules for telecoms regulation. That paper has now been adopted by 82 WTO members.[11] Four TiSA parties have not adopted it: Taiwan, Costa Rica,[12] Liechtenstein, and Panama.

The agreed parts of the leaked text of the TiSA telecoms annex dated November 2017 mainly come from these two documents.

The GATS 2000 negotiations

The negotiating objectives for telecoms that were prepared for the WTO ministerial meeting in Hong Kong in 2005[13] set out the following wish list from countries wanting the GATS to go further:

Telecommunication Services

Members have identified individually or in groups the following objectives:

Scope of commitments (sectoral or modal)

- broad coverage of the sector in a technology-neutral manner
- significant commitments in all modes of supply
- work with [least-developed countries] and developing country Members to find ways to encourage new and improved offers and provide technical assistance to support this process

Limitations for reduction or elimination

- exclusive rights

3 The numbers in the right-hand column cross-reference to the provisional UN Central Product Classification (UNCPCprov) https://unstats.un.org/unsd/cr/Registry/regcs.asp?Cl=9&Lg=1&Co=752

4 Council for Trade in Services, Communication from the European Communities, 'Classification in the Telecom Sector under the WTO-GATS framework', S/CSC/W/44, 10 February 2005 referring to GATS, Article 3(a), Annex on Telecommunications

5 Council for Trade in Services, Communication from the European Communities and their Member States, Coverage of CPC84 – Computer and Related Services, TN/S/W/6, 24 October 2002

6 Council for Trade in Services, Communication from the United States, 'Classification in the Telecommunications Sector under the WTO-GATS Framework', S/CSC/W/45, 22 February 2005

7 Significantly, the US strenuously objected to adding 'processing' to the ITU definition of telecommunications, because it wanted to argue that the Internet falls outside the ITU's remit.

8 TiSA, Article 23, Annex on Telecommunications, dated November 2016.

9 TiSA, Non-paper on Telecommunications Services, dated November 2016

10 TiSA, Article 1.2, Annex on Telecommunications, dated November 2016

11 The 82 countries are (TiSA participants in bold): Albania, Antigua and Barbuda, Argentina, **Australia**, Bangladesh, Belize, Bolivia, Brazil (unclear if ratified), Brunei, Bulgaria, **Canada**, **Chile**, **Colombia**, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, Georgia, Ghana, Grenada, Guatemala, **Hong Kong**, Hungary, **Iceland**, India, Indonesia, **Israel**, Jamaica, **Japan,** Jordan, **South Korea**, Malaysia, **Mauritius, Mexico**, Morocco, **New Zealand, Norway,** Oman, **Pakistan,** Papua New Guinea, **Peru**, Philippines, Poland, Romania, Senegal, Singapore, Sri Lanka, **Switzerland**, Slovak Republic, South Africa, Thailand, Trinidad and Tobago, Tunisia, **Turkey**, Uganda, **United States,** and Venezuela, plus the **European Union**. https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm

12 CAFTA has an equivalent in the CAFTA-DR FTA 2006.

13 Special Session of the Council for Trade in Services, 'Report by the Chairman to the Trade Negotiations Committee', 28 November 2005, TN/S/23

- [economic needs tests]
- restrictions on the types of legal entity permitted
- limitations on foreign equity

Regulatory issues and additional commitments for negotiation

- commitment to all provisions of the Telecommunications Reference Paper

MFN Exemptions for reduction or elimination

- elimination of [most-favoured-nation MFN] exemptions

Scheduling issues to be addressed

- ways to improve clarity and certainty in view of scheduling- and classification-related concerns.

TiSA moves well beyond these goals in two main ways:

1) some countries are demanding a much higher level of commitments from governments to lock open their telecom markets to foreign firms, including from across the border- although the US and EU have a major disagreement about how telecoms should be defined for this purpose; and

2) the regulatory framework that should apply to telecoms (but not to the Internet).

Deregulation and access to services and networks

Rights to access public telecom services and networks

The GATS 1994 Annex on Telecommunications already contains rights for service suppliers (other suppliers of telecom, banking, retail, ISPs, etc services, both foreign and local) to access and use public networks and services on a 'reasonable and non-discriminatory' basis, in sectors where commitments have been scheduled.[14] The wording is almost identical in TiSA, although not everyone is accepting their application to telecom transport *networks*- probably because the obligation would now apply to all telecom services, not just those committed under the country's schedule.[15]

Service suppliers of other TiSA countries must be able to interface with the public telecom network and provide services using circuits they own or lease. The list of activities they must be allowed to perform includes to: [16]

- buy or lease and attach terminal or other equipment that interfaces with a public telecom network;
- provide services to individual and multiple end-users over leased or owned circuits;
- connect leased or owned circuits with public telecom networks and with circuits or circuits leased or owned by third supplier; and
- use operating protocols of the supplier's choice (the EU wants to limit this to where it is 'necessary' to ensure the availability of networks and services to the general public).

Leased circuits

Leased circuits allow private communications of voice, data, or Internet. Businesses use them for internal communications, including across countries, and they have become especially important for both corporate and public Internet connections. The US and others are proposing that a major supplier in a TiSA country must provide services suppliers of other TiSA countries (such as banks, express delivery firms, e-retailers, Internet companies) with leased circuits services in a reasonable

14 GATS, Para 5(a), Annex on Telecommunications

15 TiSA, Article 9.1, Annex on Telecommunications Services, dated November 2016.

16 TiSA, Article 9.2 ,Annex on Telecommunications Services, dated November 2016. The EU opposes the inclusion of signalling, switching, processing and conversion functions.

period of time, on terms, conditions and rates that are 'reasonable and non-discriminatory' and that are available generally.[17] The word 'reasonable' invites challenges and may have a chilling effect on regulators.

The telecom regulatory body can require a *major supplier* to offer leased circuit services that are public telecom services at 'capacity based and cost-oriented prices'. Cost-oriented rates are defined as 'based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services'.[18] Cost-oriented rates are a way to limit abuses of market power by major telcos, but they also reduce the ability of state-owned telcos to levy charges that contribute to maintaining the network. As already noted, the tactical definition of 'major supplier' means this provision would be unlikely to apply to big developed country telcos.

Interconnection

Interconnection is the physical link between the network of a telecom carrier and the equipment of its customers or another supplier. TiSA says the regulatory body must be able to require suppliers of public telecom services to provide suppliers from other TiSA countries with interconnection at 'reasonable' rates, directly or indirectly (presumably via third suppliers) within the country.[19] Again, the potential to challenge 'reasonableness' may chill the setting of rates. When the regulatory body exercises this authority, it must protect the confidentiality of commercially sensitive information on suppliers or end-users that was obtained when negotiating and providing interconnection; the EU wants a strict duty, many others want the body to take 'reasonable steps'.

Unconditional access and use of public telecom services[20]

Every TiSA party must also ensure the only conditions imposed on access to and use of public telecom services (and possibly networks) are 'necessary' to safeguard public services responsibilities, in particular to make sure networks and services are available to the public and to protect the technical integrity of the network. Again, 'necessary' works to minimise the scope for regulatory action to the least burdensome option reasonably available to achieve the purpose. The kinds of conditions a government might adopt, where 'necessary', are listed, and include requirements for interoperability of networks and services, and notification, registration and licensing. Those conditions that mirror the GATS annex on telecoms have been agreed, but there is a split over new ones, with the US and EU on opposite sides.

A number of (mainly developing) countries want to include another justification for a government to impose conditions, which would allow them to prevent the supply of a service they had not committed in their country's schedule. Similar wording is in the GATS annex on telecoms, where it restricts the scope of the entire annex.[21] A large number of countries, including the US and EU, oppose its inclusion in TiSA, presumably because they want blanket application of the annex.

The TiSA annex has also removed the flexibility in the GATS telecom annex for a developing country to impose conditions 'necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services', provided they were set out in the country's schedule.[22] ***Its omission is another example of the removal of development flexibilities throughout TiSA and reveals the true purpose of this proposed Annex.***

Allocation of scarce resources.

Entrants to the telecom market require access to finite resources. As with the GATS, procedures to allocate scarce resources, including numbers, frequencies and rights of way, must be *objective,*

17 TiSA, Article 10, Annex on Telecommunications Services, dated November 2016

18 TiSA, Article 23, Annex on Telecommunications Services, dated November 2016

19 TiSA, Article 11, Annex on Telecommunications Services, dated November 2016

20 TiSA, Article 9.5, Annex on Telecommunications Services, dated November 2016

21 GATS, Para 2(c)(i), Annex on Telecommunications

22 GATS, Article 5(g), Annex on Telecommunications

timely, transparent, and non-discriminatory.[23] 'Objective' is another problematic term, as it means the criteria and processes must be explicit, easily identified and evaluated, and not involve discretion.

Spectrum:[24] The agreed goals in relation to spectrum are to maximise information about who holds what frequency and to promote market mechanisms, such as auctions, for allocation. However, this is muted by the word 'endeavour', and by the right to withhold detailed information on frequencies allocated for government uses. It is made clear that the market access rule (which prohibits quantitative restrictions) does not apply to the way frequencies are allocated and assigned, even where that limits how many can supply a public telecom service. However, the national treatment rule can still apply.

Numbers:[25] A government must give all suppliers of public telecoms from other TiSA parties who are established within the country non-discriminatory access to telephone numbers. All suppliers of public telecom services (local and from other TiSA countries) must provide number portability, without impairing the quality or reliability of the service, and it must be on 'reasonable' and non-discriminatory terms and conditions (however, there is a grandfathering clause for states that have not yet implemented portability). Most parties want flexibility for TiSA countries that do not apply portability to all or any services at the time the agreement is concluded, allowing them to apply it when it becomes economically feasible.

It is noteworthy that IP addresses (and Internet domain names) are not included in these provisions. That means there are no requirements for non-discriminatory access to these essential resources, which are ultimately controlled by ICANN[26], a private-sector entity based in the US. In another example of TiSA anti-development bias, the agreement would require countries in the global South to give access to their national resources (telephone numbers), while the US does not have to give access for the resources controlled by ICANN.

Use of services [and possibly networks] for moving data

Service suppliers of other TiSA countries must be able to use public telecom services (and possibly networks) to move information inside the country and across borders, and to access information stored in data bases or digital form in any country.[27] There is a limited exception that would allow a government to protect the security and confidentiality of messages, and protect the privacy of users, in relation to personal data, but only to the extent 'necessary' to do so (meaning the option that is least burdensome on the commercial interests) and so long as it does not involve 'arbitrary' or 'unjustifiable' discrimination or a disguised restriction on foreign supply of services.[28] The EU is opposing the reference to protection of privacy; it is unclear why, but that may be a holding position until the European internal discussions on privacy are resolved.

Major telecom suppliers and competition

Interconnection obligations of major telcos

TiSA governments must ensure their *major suppliers* provide interconnection for facilities and equipment of public telco suppliers from other TiSA countries at any technically feasible point in network.[29] Interconnection must be of the same quality as its own services or those of its subsidiaries, on non-discriminatory terms and conditions, and at 'cost-oriented' rates that are 'reasonable'. The rates must also be sufficiently unbundled so the suppliers do not have to pay for components they don't need.

The *major supplier* must go further if asked and provide interconnection additional to the normal network points that it offers to most suppliers. It can only recover charges that reflect the cost of

23 TiSA, Article 19.1, Annex on Telecommunications Services, dated November 2016

24 TiSA, Article 19.2-19.4, Annex on Telecommunications Services, dated November 2016

25 TiSA, Article 19.6-19.8, Annex on Telecommunications Services, dated November 2016

26 Internet Corporation for Assigned Names and Numbers

27 TiSA, Article 9.3, Annex on Telecommunications Services, dated November 2016

28 TiSA, Article 9.4, Annex on Telecommunications Services, dated November 2016

29 TiSA, Article 16, Annex on Telecommunications Services, dated November 2016

constructing the additional facilities. This potentially poses significant additional operational burdens on major suppliers to the benefit of its competitors. Again, big developed-country telcos would probably not fall within the definition of 'major supplier', so they would not incur any additional burdens.

The government must also make sure its major suppliers give the opportunity to interconnect with their facilities and equipment to public telecom suppliers from other TiSA parties through a standard offer or through existing or new interconnection agreements.[30] The terms on which it offers interconnection must be publicly available.

Resale

New entrants want to sell various services and products using networks and facilities they access from the major telcos. Those who supply private firms using their own infrastructure also want to sell excess capacity in the public market. There are several overlapping proposals.[31] The EU does not state a position.

- The US wants a rule that countries cannot prohibit the resale of any public telecom service. That has limited support.[32]
- Others say that, where a government requires a public telco to offer its public telecom services for resale, it must ensure the telco does not impose 'unreasonable' or discriminatory conditions or limits on resale.[33]
- The US and many others want governments to ensure that all *major suppliers* offer the suppliers of public telecoms from other TiSA parties, for resale and at reasonable rates, the same services that they supply at retail to end-users. They cannot impose 'unreasonable' or discriminatory terms or limits on their resale.[34] Each government could specify in accordance with its domestic law which public telecom services the major supplier must offer for resale, but the only criteria for deciding are to promote competition and the long-term interests of end-users – not for any social or other public good reason.[35]

If a government does not require a major telco to offer a specific public telecom service for resale, others services suppliers still can ask for it to be offered.[36]

Access to essential facilities

The annex has two options for ensuring that major suppliers give others access to essential facilities.[37] This benefits all telecom suppliers, not just those from other TiSA countries. Both options require a *major supplier* to give other suppliers of telecom services access to its essential facilities, including network elements, on 'reasonable' and non-discriminatory terms and conditions. However, one option would allow access to be withheld where a market review shows it is not necessary to achieve effective competition, and a party's regulatory body could decide what essential services had to be made available. Under the second option, the regulatory body would determine what are essential facilities, based on the goal of effective competition plus any other policy objectives it is bound to apply under domestic law. The EU and a number of other countries proposed both options.

The main difference between the two involves the link between access to essential facilities and unbundling the different elements of the network. The first option, which four countries[38] are

30 TiSA, Article 16.2, Annex on Telecommunications Services, dated November 2016

31 TiSA, Article 12, Annex on Telecommunications Services, dated November 2016

32 TiSA, Article 12.1, Annex on Telecommunications Services, dated November 2016. Proposed by Japan, South Korea, Peru and the US.

33 TiSA, Article 12.2, Annex on Telecommunications Services, dated November 2016

34 TiSA, Article 12.3, Annex on Telecommunications Services, dated November 2016. This is supported by Canada, Chile, Colombia, Hong Kong, Japan, South Korea, Mauritius, Panama, Peru, Pakistan, Taiwan and the US. Costa Rica opposes it. The US doesn't state a position.

35 TiSA, Article 12.4, Annex on Telecommunications Services, dated November 2016. Supported by fewer countries, but still Canada, Japan and the US

36 TiSA, Article 12.5, Annex on Telecommunications Services, dated November 2016

37 TiSA, Article 13, Annex on Telecommunications Services, dated November 2016

38 Chile, Colombia, Japan, Mauritius

proposing and the US and several others are 'considering', says the regulatory body could require a major supplier to offer access to the essential facilities part of its network on an unbundled basis, on terms and conditions, and at 'cost-oriented' rates, that are 'reasonable, non-discriminatory and transparent' for such services. Each party could decide the network elements to be made available, and which suppliers could obtain those elements, as set out in its law. Under the second option, the regulatory body could require a major supplier to offer access to the essential facilities part of its network on an unbundled basis. But it is silent about the terms or conditions on which access would be provided and who defines 'essential facilities' according to what law. The US opposes that option.

In addition, any major supplier of telecoms must treat suppliers of public telecoms from other TiSA countries at least as well as its own subsidiaries and affiliates on the availability, provision, rates and quality of the same service.[39] (Some want this to be a direct obligation, others want the regulatory authority to be empowered to require it.)

Unbundling

Unbundling of networks is a key demand from the industry as it allows firms to cherry pick parts of the network they want to access without having to contribute to the network as a whole. This is another example of general deregulation whose benefits are not limited to firms from other TiSA countries. Two approaches to unbundling are linked to the two options on access to essential facilities. Either:

i. The telecom regulatory authority could require a major supplier to offer other public telecom services suppliers access to network elements on an *unbundled* basis, on terms and conditions, and at 'cost-oriented' rates, that are 'reasonable, non-discriminatory and transparent'. However, this obligation is not automatic. A country could specify in its domestic laws which network elements must be made available and to whom, and the regulatory authority could then require compliance. The US is considering this option, which was proposed by Chile, Japan and several others; or

ii. Under the second option for access to essential facilities, the telecom regulatory body could require the major supplier to offer access to the essential facilities of its network on an *unbundled* basis (so the suppliers did not have to pay for components they don't need).[40] As with the broader interconnection proposal, the EU, Canada, Japan, Norway and others proposed this wording; the US, Chile and Peru are opposed.

Technology of choice

There is no agreement on a proposal that a supplier of public telecom services must be able to choose the technology it wants to use to supply the service.[41] Governments could limit this by measures that are 'necessary' (the least burdensome on the commercial interests) to satisfy 'legitimate' public policy interests, provided the measure was not prepared, adopted or applied in a way that creates 'unnecessary' obstacles to trade. This double 'necessity' test aims to severely narrow the space available to governments and would increase the potential to challenge a measure as going further than was needed. Some governments[42] are clearly concerned to ensure that expensive new infrastructure that they have financed, such as broadband networks, use technologies that meet their public policy interests.

Interconnection to undersea cables

Submarine cables are an essential point of interconnection in countries with a coastline. There are several drafting options; the EU opposes them all.

Option 1: Where a supplier operates a submarine cable to provide public telecom services, the government must ensure that it gives the public telecom suppliers of other TiSA parties 'reasonable

39 TiSA, Article 14, Annex on Telecommunications Services, dated November 2016

40 TiSA, Article 13.2(b) *Alt*, Annex on Telecommunications Services, dated November 2016

41 TiSA, Article 4, Annex on Telecommunications Services, dated November 2016

42 Australia, Japan, Mauritius, New Zealand

and non-discriminatory access' to the cable system including landing facilities.[43] The US supported this but then withdrew that support.

Option 2: Where a major supplier of international public telecom services in a TiSA country controls cable landing facilities and services for which there is no economically or technically feasible alternative (a natural monopoly), the government must ensure that the major supplier allows suppliers from other TiSA countries to use its links to connect their equipment and co-locate their transmission and routing equipment in the submarine cable landing station. That must be provided on terms and conditions, and at 'cost-oriented' rates, that are 'reasonable, transparency and non-discriminatory'. So, foreign firms must be able to connect with and work out of the facilities of the natural monopoly on terms that are 'reasonable'. By being non-discriminatory and 'cost-oriented' the users also can't be required to make a broader contribution to the cost of facilities that have been funded by consumers, taxpayers and debt. The US initially supported this too, but then withdrew its support.

Option 3: The third alternative is proposed by the US. Where a major supplier of international public telecom services in a TiSA country controls cable landing facilities and services for which there is no economically or technically feasible alternative (a natural monopoly), each TiSA government must ensure that the major supplier provides access to those landing stations for public telecom suppliers of other TiSA countries, *consistent with the TiSA rules on leased circuits and interconnection with major suppliers*. This is another instance where the definition of 'major supplier' would result in obligations for public telcos in developing countries without corresponding obligations for big developed country telcos. The major supplier must also provide physical or virtual co-location arrangements for necessary equipment, based on a generally available offer, 'reasonable' and non-discriminatory terms and conditions, and at 'cost-oriented' rates. The government can decide by domestic law what premises must be made available.

Anti-competitive practices

'Appropriate measures' must be adopted to prevent one or more dominant suppliers from engaging in *anti-competitive practices*, for example by cross-subsidisation, using competitors' information against them, or not giving suppliers of telco services technical information on essential facilities and relevant commercial information.[44] A similar provision is in the GATS Reference Paper. Such a provision might have value if it applied to the Internet giants, such as Google, Amazon, Facebook, etc., but the Annex will certainly be construed as not applying to those activities.

Chile is concerned to minimise interference with a major telco, arguing that 'a very high market share does not always mean consumers are paying excessive prices since the threat of new entrants to the market can restrain a high-market-share firm's price increases'.[45] It would require evidence that the conduct of a dominant firm has negatively affected consumers or efficiency.

Telecommunications as a public service

Public services in telecommunications are usually delivered in two ways: first, a universal service obligation that provides broad public access to telecommunications services, pursuant to a state's obligations under the ITU; and second, through state-ownership of one or more telecommunications companies.

Universal service obligation (USO)

The annex says a country is free to define the kind of USO it wants to apply, but it must

- *administer* it in a 'transparent, non-discriminatory and *competitively neutral* way', and
- ensure that the USO is *no more burdensome than necessary* to achieve the public objective.[46]

43 TiSA, Article 17, Annex on Telecommunications Services, dated November 2016

44 TiSA, Article 15, Annex on Telecommunications Services, dated November 2016

45 'Rule of reason and the *per se* rule in the context of Article 15 of the TiSA telecommunications Annex', dated July 2016

46 TiSA, Article 18, Annex on Telecommunications Services, dated November 2016

Similar wording is used for the universal postal obligation in the Annex on Delivery Services, and it poses the same four problems.

First, it is unclear whether *administer* means allocate the responsibility to deliver the service to a supplier or how the supplier to delivers the service. It seems likely to be the former.

Secondly, *non-discriminatory* means foreign firms would get the benefit of subsidies and other supports that were intended to provide the country's people with access to telecom services. However, the discrimination is not necessarily restricted to foreigners, and could also apply to different categories of domestic users.

Thirdly, *competitive neutrality* might apply to the choice of who delivers the USO, meaning a foreign firm could deliver it rather than the local SOE, and the decision would be made on purely commercial grounds; or it could mean that all customers must be treated on the same commercial basis. The separate reference to non-discriminatory suggests the former.

Fourth, the government can choose the *kind* of universal service it wants – for example, targeting geographical coverage, or ensuring all low-income households have an option to connect to a landline free of charge. But *the way* it provides that kind of service must be the least burdensome approach that is reasonably available; that might mean providing only basic line services or low-speed broadband in remote areas, or using market competition to govern prices rather than regulation.

There is no such obligation in the GATS, but there is similar wording in the Reference Paper. If transferred back to the WTO, this provision would impose new restrictions on how a large number of countries can deliver their USO.

State-owned public telecoms companies

Many, mainly developing, countries still have a telecommunications company that is at least partly state-owned. Many of the rules in the TiSA telecoms annex that refer to major suppliers of public telecom services are targeted at those SOEs. The SOE annex proposed by the US for TiSA would put additional constraints on state-owned telcos. In particular, they:

- must operate on the same commercial considerations as a private business;
- could not receive preferential treatment because they are publicly owned, such as lower tax rates or a different regulatory regime, licensing requirements, fees, or reporting rules; and
- must not discriminate between local and foreign service suppliers when buying or selling services, which rules out special relationships with other SOEs or local firms.

The SOE Annex has additional implications for the USO. The SOE doesn't have to operate on purely commercial considerations where it is delivering an explicit *public service mandate,* such as a USO. But that only applies to activities *inside* the country, not the international aspect of any USO (for example, overseas calls or satellite connections). In practical terms, it would be very difficult for most state-owned telcos to separate their domestic and offshore operations. The SOE would still have to treat foreign service suppliers like locals when it sells the domestic telecom services covered by the USO mandate – another situation where foreign firms have rights under TiSA to benefit from the USO, even if they don't contribute to the cost by helping to maintain the network.

Rural communities

The US and Peru have proposed an appendix (specific to themselves) for their Rural Telephone Suppliers, with each country defining its own. The appendix would protect those suppliers from various rules, including unbundling, number portability, resale and interconnection.

Consumer rights and protections

Consistent with the rest of TiSA, there are no effective protections for consumers of telecom services, and a blatant unwillingness to rein in the extortionate charges for international roaming.

Confidentiality

An obligation on major suppliers to take 'reasonable steps' to protect confidentiality of the supplier and end-users when negotiating inter-connection agreements is weak, and is as much about protecting other commercial players as it is about citizens.[47] The EU is opposing the 'reasonable steps' language and wants the obligation to apply generally to the supply of public telecom services in a country.

International Mobile Roaming

Extortionate charges for mobile roaming is one of the biggest issues for consumers. The TiSA provision is largely useless: governments must 'endeavour to cooperate on promoting reasonable and transparent rates' to enhance trade and consumer welfare.[48] But so far they haven't even agreed to require retail rates to be made public. The annex says governments can choose to take measures that affect wholesale global roaming rates with the aim of ensuring they are reasonable, but no country is obliged to do so.

They can also choose to cooperate with another TiSA country to help implement those measures. A reciprocal agreement between TiSA countries to regulate wholesale roaming charges would not be treated as discriminatory against the other TiSA parties and they could not be required to provide it to them under the most-favoured-nation (MFN) rule. However, non-TiSA countries that have a MFN rule in their agreements might well try to use it to access the deal, which is a disincentive to have one.

Institutional and Regulatory Framework

The GATS Reference Paper on Basic Telecommunications targeted *regulation* of telecoms through rules and institutional arrangements. The TiSA annex takes this framework much further.

Domestic regulation

It is unclear whether the Annex on Domestic Regulation would apply to telecoms. There is no consensus in the telecoms annex to prescribe regulatory approaches to telecoms; rather it recognises that a government may choose how best to implement the objectives. A number of countries, including the US, appear to support the heading 'Approaches to Regulation' but not the current content of the provision.[49]

Nevertheless, Australia, New Zealand and Peru want specific recognition of the importance of relying on competitive market forces to achieve 'legitimate public policy objectives' for telecoms, especially in parts of the market that are or could be competitive. They assume that market competition can increase choice, improve services, and drive down costs better than direct regulation. Yet telecom markets are notorious for monopolies and oligopolies, especially as privatised telcos usually retain a large market share and may control the network infrastructure as well. Domestic competition law and market competition also does nothing to blunt the global market power of dominant transnational corporations. Other parties have added the ability of governments to choose any appropriate means other than market competition to benefit the long-term interest of its consumers.

When a government opted to use direct regulation, it could decide under its domestic law not to apply that regulation to a particular service.

International Standards and Organisations

The International Telecommunications Union (ITU) is the inter-governmental body tasked with developing standards for telecoms since 1865. It has been neutered over the years, with the US ensuring that it was unable to take a pro-development position, and blocking any regulation of the Internet and the development of Internet-related standards within the ITU.

47 TiSA, Article 11(b), Annex on Telecommunications Services, dated November 2016
48 TiSA, Article 20, Annex on Telecommunications Services, dated November 2016
49 TiSA, Article 5, Annex on Telecommunications Services, dated November 2016

The provision on International Standards and Organisations in the TiSA telecoms annex[50] has adopted a weaker version of the equivalent in the GATS annex on telecoms.[51] It simply recognises the importance of having international standards for global compatibility and interoperability of networks, and undertakes to promote them through relevant bodies like the ITU. A second paragraph that recognised the role of international organisations, especially the ITU, in the efficient operation of domestic and international services, and promising consultation with them on matters arising from the annex, has been struck out.

This follows a pattern whereby TiSA's enforceable pro-corporate rules effectively sideline the specialist international organisations that, in theory at least, seek to balance a range of development, social and economic considerations.

Telecommunications regulatory body

A country's telecoms regulatory body must be separate from any supplier, and it must not have a financial interest or operating or management role in any telco supplier.[52] This is designed to remove regulatory roles from state telcos.

Where a government entity other than the regulator has a financial stake in a telecom supplier, the activity associated with that ownership would have to be structurally separated from the regulatory function.[53]

Under the annex, the national telecoms regulatory body would be given the authority to impose or enforce a number of obligations:

- enforce measures in the annex (meaning the obligations in the annex must be incorporated into domestic law and be made enforceable)[54];
- require suppliers of public telecom services to provide interconnection at 'reasonable' rates, directly or indirectly[55] within the country.[56] When it exercises this authority, it must protect the confidentiality of commercially sensitive information on suppliers or end-users obtained when negotiating and providing interconnection; the EU wants a strict duty, many others want the body to take 'reasonable steps'.
- require a major supplier (not solely of *public* telecom services) to offer leased circuits services that are public telecom services to the suppliers of other TiSA parties at capacity-based and 'cost-oriented' prices;[57]
- require a major supplier to treat suppliers of public telecom services from other TiSA countries at least as well as its own subsidiaries and affiliates with regard to availability, provision, rates and quality of an equivalent public telecom service, and the availability of technical interfaces;[58]
- decide what are the essential facilities a major telco must provide access to, on 'reasonable' and non-discriminatory terms and conditions;[59]
- require a major supplier to offer all public telecom services suppliers access to network elements on an unbundled basis, on terms and conditions and at cost-oriented rates that are 'reasonable', non-discriminatory and transparent.[60]

50 TiSA, Article 21, Annex on Telecommunications Services, dated November 2016

51 GATS, Article 7, Annex on Telecommunications

52 TiSA, Article 3, Annex on Telecommunications Services, dated November 2016

53 TiSA, Footnote 6, Annex on Telecommunications Services, dated November 2016. It is not clear what problem this is trying to solve, but it may aim to prevent a quasi-government body being established to get around the rule.

54 TiSA, Article 3.2, Annex on Telecommunications Services, dated November 2016

55 Presumably meaning from third suppliers.

56 TiSA, Article 11, Annex on Telecommunications Services, dated November 2016

57 TiSA, Article 10, Annex on Telecommunications Services, dated November 2016

58 TiSA, Article 14, Annex on Telecommunications Services, dated November 2016. There is disagreement whether this should be a direct obligation or the regulatory authority can require it.

59 TiSA, Article 13.2 and 13.2alt, Annex on Telecommunications Services, dated November 2016. There is disagreement whether this should be a direct obligation or a matter for the regulatory authority to decide. Some also want it to be based on the objective of achieving effective competition and other policy objectives that the regulatory body is bound by under domestic law.

60 TiSA, Article 13.3, Annex on Telecommunications Services, dated November 2016

Suppliers of public telecoms must be given recourse to the telecom regulatory body (or other competent body) to resolve disputes on matters relating to the Annex.[61] The body must give a written explanation, if asked, for not taking action on a dispute.[62] Where the country's law provides, the applicant must be able to seek a review of a decision of the regulatory body, but that cannot be used as a reason not to comply with the initial decision, unless compliance has been waived.

Regulatory decisions and procedures must be impartial with respect to all participants in the market.[63]

Licensing

Under the telecom annex, if a supplier of a telecom service was required to have a license, the government would have to ensure all information about the criteria, procedures, timelines, terms and conditions are publicly available. The applicant could ask for reasons if the license was refused, subjected to conditions, revoked, or not renewed.[64]

Licences are also affected by various rules in the core TiSA text: market access (eg. not limiting the number of licenses or licensed suppliers in a country or region); national treatment (eg. not restricting foreign firms access to licenses or applying different criteria); MFN (eg. not treating a firm from one TiSA country differently from similar firms from any other country); and domestic regulation (the administration of general regulations must be 'reasonable, objective and impartial'[65]).

If it applies, the Annex on Domestic Regulation would require licensing requirements and procedures to be based on 'objective and transparent criteria' and reached independently (although it seems unlikely that proposals for a least burdensome test would be adopted).[66] Decisions would have to be made in an independent manner and avoid requiring applicants to seek approval from more than one agency.[67] A long list of rules relating to the processing of authorisations includes licensing fees, which would have to be reasonable, transparent and not in themselves restrict the supply of the service.[68]

Potentially, a breach of obligations relating to telecom licenses could also form part of an investment dispute brought by a foreign telco under a bilateral investment treaty.

Resolution of disputes

A public telco supplier from a TiSA party must have recourse to a regulatory body or other competent authority to resolve disputes relating to matters under the annex.[69] The body must give a written explanation if it declines to take action when asked to do so. This would apply, in particular, where there was a dispute about the terms, conditions and rates for interconnection with a major supplier. To the extent that the country's law allows, the complaining company could appeal or petition for a reconsideration. A company could not rely on the fact that a review was underway to justify non-compliance with an order of the regulatory body, unless the decision had been stayed.

Transparency

A government must make publicly available its regulations, etc, relating to public telecommunications services on a wide range of matters.[70] These include tariffs, technical specifications for interface, conditions for attaching terminals and other equipment to the public telecom network, notification and licensing requirements, general procedures for resolving disputes, and any delegations to other bodies that have responsibility for standards-related measures that affect access and use.

61 The US and EU vigorously opposed including a similar provision in the ITU's International Telecommunications Regulations.

62 TiSA, Article 8, Annex on Telecommunications Services, dated November 2016

63 TiSA, Article 3.3, Annex on Telecommunications Services, dated November 2016

64 TiSA, Article 6, Annex on Telecommunications Services, dated November 2016

65 TiSA Article […] Domestic Regulation, para 2, Core text, dated 14 July 2016

66 TiSA, Article 4.4, Annex on Domestic Regulation, dated 15 November 2016

67 TiSA, Article 4.5, Annex on Domestic Regulation Annex, dated 15 November 2016

68 TiSA, Article 5, Annex on Domestic Regulation Annex, dated 15 November 2016

69 TiSA, Article 8, Annex on Telecommunications Services, dated November 2016. As noted above, the US and EU vigorously opposed including a similar provision in the ITU's International Telecommunications Regulations.

70 TiSA, Article 7, Annex on Telecommunications, dated November 2016

Supplementing this, the transparency provision in the core text and the Annex on Transparency would give foreign states and telcos an opportunity to comment and lobby in advance of new law or regulation that affect their interests 'to the extent practicable'. [71]

71 TiSA, Article 3, TiSA Transparency, dated 6 November 2016

APPENDIX 7

TiSA ANNEX ON FINANCIAL SERVICES

The financial services annex reflects the accumulation of the various financial services instruments in the GATS, subsequent free trade agreements (FTAs), and demands from the finance industry for further innovations that protect their interests and profitability.[1] As with the rest of TiSA there is an added focus on cross-border financial services and data.

Scope of coverage

As with the rest of TiSA, the rules apply to *'measures'* (law, regulation, rule, procedure, decision, administrative action, or any other form) *'affecting'* (not just directed at) the *'supply'* (production, distribution, marketing, sale and delivery) of financial services, as well as measures affecting the purchase, payment or use of those services.[2] Financial services are defined extremely broadly through the same long non-exhaustive list as in the GATS Annex on Financial Services (see Box 6.1).[3]

Box 6.1 Article X.2 of the Annex on Financial Services (15 November 2016)

For the purpose of this annex/section

(A) a financial service is any service of a financial nature offered by a financial service supplier of a Party. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

i. Direct insurance (including co-insurance):

(A) life

(B) non-life

ii. Reinsurance and retrocession;

iii. Insurance intermediation, such as brokerage and agency;

iv. Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

v. Acceptance of deposits and other repayable funds from the public;

vi. Lending of all types, including consumer credit, mortgage, credit, factoring and financing of commercial transaction;

vii. Financial leasing;

1 For additional analyses see Andrew Lang and Leonie Amarasekera, *Financial Services Liberalisation and TiSA: implications for EU Free Trade Agreements*, 26 July 2016 (Lang Report); Peter Rajsingh and Stéphane Mage, 'The Financial Services Annex of the Trade in Services Agreement: Impact Analysis in light of the Global Financial Crisis', February 2016, https://www.tizianabeghin.eu/images/newsletter/TTIP_LEAKS/tisa_eng.pdf

2 TiSA, Article X.1.1, Annex on Financial Services, dated 15 November 2016, cross referencing to TiSA, Article I-1(a), Core text, dated 14 July 2016

3 TiSA, Article X.2, Annex on Financial Services, dated 15 November 2016. Other definitions are set out in the TiSA, Article I-2(c), Core text, dated 14 July 2016

viii. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

ix. Guarantees and commitments;

x. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits);

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

xi. Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

xii. Money broking;

xiii. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

xiv. Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

xv. Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

xvi. Advisory, intermediation and other auxiliary financial services on all the activities listed in sub-paragraphs (v) to (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

As with the GATS, the annex excludes activities of central banks or monetary authorities in pursuit of monetary or exchange rate policies. It also excludes activities that are part of a statutory social security or public retirement plan, and other activities conducted by a public entity for the account of, with the guarantee, or using the resources of the state – unless they are supplied in competition with another entity.[4]

Presumptions of commitments

Special rules apply to scheduling of financial services that go beyond the standard TiSA approach.

Market access

Under the November 2016 leaked text, a negative list approach applies to market access for almost all financial services. TiSA countries must make **market access** commitments for:[5]

- all financial services supplied inside the country by a provider from another TiSA country (Mode 3)
- all financial services and supplied in another TiSA country (Mode 2), and
- cross-border supply (Mode 1) of certain insurance services plus a wide range of auxiliary services to insurance and banking, and financial information and data transfer and processing services.[6]

4 TiSA, Article 1.2 and 1.3 Annex on Financial Services, dated 15 November 2016

5 TiSA, Article X.3.1, Annex on Financial Services, dated 15 November 2016

6 eg. maritime shipping and commercial aviation, goods in international transit, reinsurance and retrocession

A negative list applies, meaning governments would have to list what is not subject to the rule. Any restrictions, such as limiting a foreign supplier's share of the local market or banning certain kinds of financial services would have to be specified in the country's schedule. If it is not listed, it cannot be restricted. Those commitments would apply to new technologies to deliver those services –new apps for online travel or vehicle insurance that require informed consent and are difficult to assess, or new kinds of apps or algorithms for online trading in food derivatives.

Some of these services are easily offshored: financial information, financial data processing and related software services, advisory, brokering and agency services, and support services for the entire list of financial services covered by the annex. The proposal specifically mentions credit reference and analysis, investment and portfolio research and advice, and advice on mergers and acquisitions, corporate restructuring and strategy.

There are obvious problems even with these non-core financial services. For example, it is already hard to monitor employment practices and regulatory compliance at call centres that provide advice within a country, especially when workers are under pressure to take short-cuts to meet impossible performance requirements or win bonuses. It would become almost impossible to monitor those practices from offshore. The same applies to ethical requirements on brokers and agents. Firms that can supply their services from across the border will have incentives to operate from countries that rely on self-regulation or disclosure, for example for financial advisers, and push for that regime to be recognised in the other TiSA parties.

National treatment and local presence

The text refers to a 'Supreme Understanding' (not otherwise explained) that countries 'will include' for the scheduling of commitments on the **national treatment and local presence** rules.[7] This appears to preserve policy space (Section A of the schedule) for all financial services, except for the insurance services they have already been required to make market access commitments on. Presumably, the reason for describing it as a 'Supreme Understanding' is that all TiSA countries would adopt it in the column of the schedule where they would usually list specific sectors.

However, there is a fallback if 'all participants [are] not satisfied with the outcome of this approach'. In that case, national treatment alone would apply fully to the cross-border (mode 1 and mode 2) insurance services and auxiliary services they have already been required to make market access commitments on, unless the schedule indicated otherwise. It is unclear whether this means making additional commitments or taking limitations on those insurance services. The ratchet would not apply.

Whichever of these options was adopted, the combined effects of the market access and national treatment commitments would be far more extensive exposure to financial services rules designed to serve the global finance industry.

Foreign finance firms operating locally

- **Collective investment schemes and portfolio management**: Investment advice and portfolio management for collective investment schemes (sometimes called pooled investments) is big business, and there have been some high-profile examples of 'mis-selling' investments (fraud).[8] The schemes are often unregulated because they fall outside defined categories. A large number of countries want to include these services in the list that is guaranteed market access, but only when the firm supplying the services has a local presence.[9] The proposal would allow each country to list its current legal definition in an annex, which suggests that a standstill would apply to prevent new regulation. Some countries are opposing the proposal.[10]
- **New financial services and products**: A government of a TiSA country cannot stop a firm from another TiSA country that is established in its territory from selling novel and risky new services

7 TiSA, Article X.4, Annex on Financial Services, dated 15 November 2016

8 'Sipp fraud case poised to be first of many', *Financial Times*, 10 December 2014, https://www.ft.com/content/7bbd7a90-7fc9-11e4-adff-00144feabdc0

9 TiSA, Article X.3 (vi), Annex on Financial Services, dated 15 November 2016, proposed by Australia, Canada, Switzerland, Chile, Colombia, Israel, Japan, South Korea, Mauritius, Mexico, Panama, Taiwan and the US.

10 Costa Rica, the EU, Hong Kong, Turkey, Lichtenstein, and New Zealand.

and products if its local firms could sell them.[11] But most financial 'innovations' are designed to find gaps in a country's existing laws. These are the kinds of complex and opaque products that were at the centre of the global financial crisis. The government won't have a regulation in place because it has never thought of the service or product, let alone been able to assess the risks and the need to regulate them. All the government would be allowed to do is require the service or product to be supplied through a particular legal form and to be authorised- but authorisation can only be refused for prudential reasons, which assumes the product and its potential impacts are understood. Precautionary measures are unlikely to be allowed because the government would have to be able to show the potential risks to justify a prudential measure.

- **Foreign directors and managers** – The recent Wells Fargo fraud in the US shows how difficult it is to hold senior managers and directors to account where customers have been systematically cheated so as to profit the bank.[12] Accountability becomes even more problematic if the government can't require that at least some senior managers or essential personnel are nationals or come from another specified country that has a good reputation for financial regulation and is familiar with the host country's financial and regulatory system.[13] The annex may also prevent nationality requirements for a majority (or even some) of the board of directors.
- **Too big to fail** – The market access rule would prevent a government from restricting the size of financial institutions, despite the infamous bailouts of banks and insurers that are deemed too big to be allowed to fail.[14] This problem continues after the global financial crisis. For some time in 2016 it appeared that Deutsche Bank (half the size of the German economy) would need a government bailout to pay a massive $14 billion fine imposed by US authorities for its trading in toxic mortgages during the global financial crisis.[15]
- **Gambling with depositors' funds** – The market access rule also says governments cannot prescribe the legal form of a financial service supplier. That means they can't prevent a firm engaging in multiple and potentially conflicting activities, such as insurance, retail banking and investment banking, at the same time. This has become an important issue in the US. The US Glass Steagall Act 1933 was designed to prevent the use of depositors' or policy-holders' funds for speculative market trades. It was repealed in 1999 as part of the massive deregulation of US financial markets around the same time as the financial services agreement was concluded in the GATS. As part of the re-regulation following the global financial crisis, Democrat Senator Elizabeth Warren and Republican John McCain submitted a bill to the US Congress in 2016 that would have reinstated the firewalls between basic consumer banking and speculative high-risk banking.[16] If passed, the Bill would likely have breached both TiSA and the TPP. An executive order from President Trump in February 2017 signalled a review of that bill and other re-regulation.[17]

Insurance

The insurance industry has made more aggressive demands than the banks. The GATS definition of financial services sets out four categories of insurance (Box 6.1): *direct life and non-life insurance; reinsurance and retrocession; insurance intermediation, such as brokerage and agency; and auxiliary services, such as consultancy, actuarial, risk assessment and claim settlement services*. Proposals to remove restrictions on those services could have a huge impact on UNI workers. This repeats the earlier description of commitments in an attempt to make the sectoral impacts more apparent.

11 TiSA, Article X.9, Annex on Financial Services, dated 15 November 2016

12 'Wells Fargo whistleblower says she flagged fraud years ago', *CBS News*, 4 October 2016, http://www.cbsnews.com/news/wells-fargo-accounts-fraud-california-whistleblower-yesenia-guitron/

13 TiSA, Article X.13, Annex on Financial Services, dated 15 November 2016

14 TiSA, Article X.3, Annex on Financial Services, dated 15 November 2016

15 'No way Merkel can bail out Deutsche Bank, German media say', CNBC, 2 October 2016 http://www.cnbc.com/2016/10/02/no-angela-merkel-bail-out-deutsche-bank-german-media-say-amid-lehman-moment-worries.html. Deutsche Bank settled in January 2017 for $7.2 billion, still a massive sum.

16 https://www.bloomberg.com/features/2016-elizabeth-warren-interview-issue/

17 Robert Pozen, 'What will happen to Dodd-Frank under Trump's Executive Orders?', *Brookings*, 6 February 2017, https://www.brookings.edu/blog/up-front/2017/02/06/what-will-happen-to-dodd-frank-under-trumps-executive-order/. That is ironic, given Trump's campaign slogan of 'draining the swamp' of Wall Street influence. Instead, the appointment of several top executives from Goldman Sachs to his cabinet makes it more likely the US will remain in the TiSA negotiations and become even more assertive on behalf of Wall Street.

- **Unrestricted cross-border insurance services:** All TiSA countries must agree to allow a financial service supplier in another TiSA country to deliver the following insurance services across the border: *maritime shipping and aviation, goods in international transit, reinsurance and retrocession, insurance intermediation related to those services* and the broad range of '*auxiliary services*', which are easily offshored or outsourced. Any restrictions, such as limiting its share of the local market or banning certain kinds of insurance services, would have to be listed in the country's schedule on a negative list basis. Services not listed can't be restricted. The effect of a negative list is to capture new services and new technologies to deliver services that have not been protected.
- **Expedited approval of insurance products:**[18] The TiSA parties have singled out insurance products offered by licensed suppliers for special treatment by short-cutting normal authorisation requirements. This is additional to the rules that prevent the regulation of new financial services or products that can be sold locally. It presumably applies to insurance services that are supplied across the border, provided the supplier is licensed to operate in the country. Several ways of expediting approval are identified, although none is compulsory:
    - allowing the introduction of products that have not been *disapproved* within a 'reasonable' time; that puts the onus on the regulators, not the insurance firms, to understand and move quickly to regulate new products;
    - not requiring insurance products to be approved unless they are sold to individuals or involve compulsory insurance, on the presumption that 'sophisticated' customers can assess the products for themselves – a belief that was proved spectacularly wrong during the global financial crisis; and
    - no limits on the number or frequency of new insurance products introduced – with the consequence that financial regulators could be submerged under a steady stream of new products they need to assess, especially if the burden to regulate within a specific time also applied.

Pressuring public insurance schemes

The insurance industry has long complained that public insurers have unfair advantages and have pushed for their privatisation or deregulation. Two TiSA provisions sponsored by the US are principally targeted at Japan's insurance cooperatives and Japan Post's insurance arm, although similar arrangements in other countries would also be affected.

Postal insurance

The first provision, supported by the EU, is taken directly out of the TPP and acts as a backstop to the broader SOE annex in TiSA.[19] Japan[20] is trying to resist it this time around. When a state-operated postal insurance entity that is owned by the state post office provides or underwrites direct insurance services to the public it must operate as if it was a private business. Insurance directly related to its postal services activities are excluded.

A government can't give the state entity a competitive advantage over a private supplier of similar services, for example by imposing more onerous conditions on its licence or providing the state entity with a more favourable distribution channel (meaning the post office's entire distribution network must be available to private insurers). The state entity must be subject to the same regulations and enforcement activities and produce detailed financial statements subject to the equivalent auditing. If there is a dispute that finds a breach of these obligations, the home country (eg Japan) must consult the complaining country before allowing the state entity to issue new competing products or increase the limit on the value of the insurance product. These are all very specific complaints the US insurance industry has made against Japan in the past.

18 TiSA, Article X.20, Annex on Financial Services, dated 15 November 2016

19 TiSA, Article X.21, Annex on Financial Services, dated 15 November 2016

20 as well as Colombia, Costa Rica, South Korea, Panama and Pakistan

These rules apply to state-owned postal insurance entities and to any private entity that is given some competitive advantage. A postal entity would be exempt if the amount of direct life and non-life insurance it underwrites does not exceed 10% of premiums paid in the country for each of those products on 1 January 2015 – the date Japan joined the TPPA negotiations! If it exceeds the 10% after TiSA was signed then the obligations relating to regulation and reporting would apply.

Insurance cooperatives

This provision is novel and is directed at Japan's insurance cooperatives and the Consumer Cooperative Union,[21] but it would have much wider impact. A cooperative is defined as an entity that underwrites and sells insurance only to its members, who own it in whole or part. It would be subject to this provision if its premium income from either life or non-life insurance ranks it among the largest suppliers in the country, and together account for 75% of total premiums from such insurance in the country (presumably 'together' means the sum of its share of life and non-life insurance).

Under the rule cooperatives *should to the extent practicable* be regulated by private insurance regulators, especially for solvency matters related to the sale of insurance. To the extent they are not, they *should* not enjoy a competitive advantage over private insurers. The wording 'should' and 'to the extent practicable' give some flexibility, but governments would still be bound to perform that obligation in good faith. This rule would have major implications for dominance insurance cooperatives that exist in many countries, including those run by trade unions and coordinated through the national trade union congress. It was initially proposed by the US and EU, but the November 2016 draft shows the US is now just 'considering'. A large number of countries are opposed, which shows concern about its potentially broad reach.[22]

Monopolies

In addition to the provisions in the core TiSA text, any monopolies and exclusive service suppliers of financial services that exist at the date TiSA comes into force must be listed in an annex.[23] That includes a public entity that carries out financial activities with a government guarantee or using public financial resources, which are otherwise exempt from the annex.

Electronic payment services

The US wants no restrictions on the use of electronic payment services and transactions provided from offshore[24] and suggests an updated classification for those services.[25] A large number of countries are opposed. The obligation would only apply to payment services that use proprietary (private and closed) networks to process the transactions. The US would allow countries to keep their existing restrictions on market access and discriminatory measures as of a certain date.

Finance industry capture of regulation

Self-regulation by private firms – Nothing is done to rein in the self-regulation or light-handed regulation of privately-owned entities, such as stock markets and futures exchanges, which have monopolies over various financial services activities. They just have to allow foreign players to join those activities.[26]

Opportunities for pressure – The more intrusive domestic regulation annex would not apply to financial services, apparently because the US cannot override the states' jurisdiction over financial

21 This includes the Japan CO-OP Insurance Consumers' Cooperative Federation (JCIF) and National Federation of Workers and Consumers Insurance Cooperative (ZENROSAI)

22 Australia, Colombia, Costa Rica, Japan, Korea, Mauritius, Mexico, Panama

23 TiSA, Article X.5, Annex on Financial Services, dated 15 November 2016

24 TiSA, Article X.3(viii), Footnote 3, Annex on Financial Services, dated 15 November 2016

25 UNCPC Version 2.0, https://unstats.un.org/unsd/cr/registry/cpc-2.asp

26 TiSA, Article X.2(e) and Article X.12, Annex on Financial Services, dated 15 November 2016

regulation.[27] The alternative provision, called 'transparency',[28] contains a number of provisions regarding processing of applications for authorisation and the right to object that financial regulation is not being ***administered*** in a ***'reasonable, objective and impartial'*** way. There is no indication that the TiSA annex on Transparency does not apply to financial services, which would guarantee the finance industry's ability to lobby on proposed new regulations.

Finance industry arbitrators deciding disputes – If a dispute involves financial services, the arbitrators who hear the dispute must have expertise in the financial sector.[29] There is a high likelihood they will be drawn from the industry, rather than a regulatory, consumer, or social perspective.

Indirect investor-state disputes still possible – While TiSA would not allow a foreign investor to directly enforce the agreement against a country, an investor could argue that it had a 'legitimate expectation' of compliance with the rules as part of a claim under the investment chapter of another free trade agreement or bilateral investment treaty.

Lack of consumer protections

Increased risk without consumer protection – The annex greatly multiplies the risks to consumers through more online delivery of services, a negative list on both market access and national treatment, no regulation of new financial services and products, and more. Yet there is no attempt to protect consumers of financial services or ensure they have a remedy. If a government was convinced to provide protection that breached one of its TiSA obligations, it would have to rely on the seriously inadequate protection for consumers against deceptive or fraudulent practices in the general exception in the core TiSA text (see Chapter 5).

Aggressive offshore sales – It is practically impossible for individual consumers to seek redress for fraud, lack of informed consent, or predatory practices when funds managers, financial advisory services, or services auxiliary to insurance (eg. claim settlement) operate from offshore (which governments are required to commit to allow[30]), and very difficult for domestic regulators to effectively monitor compliance or enforce penalties for breaches.

Failure to protect data privacy – The annex says governments cannot restrict the transfer of financial information offshore for data processing when that processing is necessary for the conduct of its ordinary business.[31] While governments are *allowed* to adopt privacy rules, they *do not have to*, so data may be processed in a country (eg the US) that has weak privacy protections. The GATS exception provides no additional comfort: its circular provision on personal privacy and confidentiality only applies where the government's action is to secure compliance with a law that is consistent with TiSA (see Chapter 5)! The only explicit protection in the financial services annex says the annex cannot be interpreted to require a government to disclose information about individual customers or confidential or proprietary information that is held by a public entity.[32]

The prudential defence

The leaked November 2016 text of the financial services annex follows the deeply flawed GATS approach on prudential measures. It does not state a positive right for governments to adopt measures for prudential reasons that don't comply with the rules; it says governments are not prevented from doing so under certain conditions.[33] If a prudential measure was challenged for breaching the TiSA rules the government would have to establish as a defence that it met those conditions.

Prudential reasons include the protection of investors, depositors and policyholders who are owed a fiduciary duty, and to ensure the integrity and stability of the financial system. A footnote[34] specifically

27 As with TiSA, Article X.15.3*bis*, Annex on Financial Services, dated 15 November 2016 on licensing requirements and procedures and qualification procedures.

28 TiSA, Article X.15, Annex on Financial Services, dated 15 November 2016

29 TiSA, Article X.19.1, Annex on Financial Services, dated 15 November 2016

30 TiSA, Article X.3, Annex on Financial Services, dated 15 November 2016

31 TiSA, Article X.10, Annex on Financial Services, dated 15 November 2016

32 TiSA, Article X.17, Annex on Financial Services, dated 15 November 2016

33 TiSA, Article X.16, Annex on Financial Services, dated 15 November 2016

34 TiSA, Footnote 11, Annex on Financial Services, dated 15 November 2016

also includes the safety, soundness and financial responsibility of individual financial institutions as a reason. The problem arises with the circular requirement in the second sentence of the provision: ***a prudential measure that breaches the TiSA provisions must not be used as a means to avoid the country's commitments or obligations under TiSA!***[35]

The EU has taken important steps in its free trade agreements with the Cariforum states, Vietnam and Canada to strengthen the prudential powers of financial regulators, in particular by dropping that second sentence. The CETA includes an Annex that sets out a consultative process in the case of an investment dispute (not directly applicable in TiSA).[36] That annex also set out a number of high level principles, including the presumption that: '*those applying these principles shall defer to the highest degree possible to regulations and practices in the Parties' respective jurisdictions and to the decisions and factual determinations, including risk assessments, made by financial regulatory authorities'*.[37] As noted earlier, the European Parliament explicitly warned the European Commission not to dilute these advances in TiSA, which it has done.

Location of Financial Data

The leaked e-commerce text prohibits restrictions on data transfer,[38] or requirements to use or locate computers locally[39] and disclosure source code.[40] This text is discussed in Chapter 4 and Appendix 4. As of November 2016, the application of the e-commerce annex to financial services was undecided.[41] But there were two proposals in the financial services annex that sought to address the issue.

Cross-border transfer of financial data

In July 2016, the US proposed a blanket provision in the financial services annex that would prohibit countries from stopping a 'covered person' from transferring information, including human resources information or other personal information, into or out of its territory by electronic means or otherwise.[42] The US defined a 'covered person' to be a financial institution of another party that is authorised and regulated by law to do business, or a cross-border supplier of a financial service that the receiving country would require a financial institution to supply.[43] As the Lang report observed, such an outcome would be *'a major development'.*[44]

By November 2016 the leaked annex showed a complicated range of options for the transfer of information. The core of the proposal said every TiSA government must allow a financial service supplier of another TiSA country to transfer information in electronic or other form into and out of its territory.[45] Numerous variations then extended or qualified the obligation. Basically, the US wanted the broadest scope and others wanted to narrow it. The US-supported proposals:

- specify that information can include human resources information and other personal information (proposed by US, opposed by Australia); and
- the transfer is for the conduct of business within the scope of the licence, authorisation or registration of that financial service supplier (US proposal, Australia considering).

The US opposed proposals that:

- data transfers can be subject to prior authorisation by a regulator (US, Australia, Japan, Switzerland, Norway and others oppose);

35 TiSA, Article X.16, Annex on Financial Services, dated 15 November 2016

36 CETA, Annex 13-B, applicable to Article 13.16

37 CETA, para 8(c), Annex 13-B

38 TiSA, Article 2.2, Annex on Electronic Commerce, dated November 2016

39 TiSA, Article 8, Annex on Electronic Commerce, dated November 2016

40 TiSA, Article 6, Annex on Electronic Commerce, dated November 2016

41 TiSA, Article 1.6, Annex on Electronic Commerce, dated November 2016. Switzerland and Mauritius want it excluded; Australia, Canada, Chile, the EU, Iceland, Norway, Peru and the US oppose its exclusions; South Korea, Mexico, New Zealand and Pakistan are undecided.

42 TiSA, US propose *Alt X10* (July 2016), Annex on Financial Services, dated 15 November 2016

43 TiSA, Article X.2 (f) and (h), Annex on Financial Services, dated 15 November 2016

44 Lang Report, p.27

45 TiSA, Article X, Annex on Financial Services, dated 17 November 2016

- limitations can be scheduled, even on a negative list basis (US, EU, Japan, Norway and others oppose);
- the reason for transferring the information must be for data processing (US and Australia oppose);
- the rule only applies where processing is required in the financial service supplier's ordinary course of business (US opposes); and
- governments can require the financial service supplier to get prior authorisation from the regulator to designate a particular legal entity the recipient of that information, based on prudential considerations, provided that does not circumvent the provision of this article (Chile, Mexico and Peru propose, the position US is not listed).

The November leaked text also records a 'landing zone' proposed by the US and others, which the EU was considering.[46] It basically followed the US line, without referring explicitly to personal information, with the addition of a second sentence that said parties could adopt regulations on personal data, personal privacy, confidentiality of records and accounts, ***provided they are not used to circumvent the ban on restricting transfers***. Like the prudential provision, this offered parties a potentially self-cancelling defence: the government will only need to invoke it where it is accused of circumventing the ban on restricting transfers.

Regulators' access to financial data

The US tabled a separate proposal on the *location of computer facilities*,[47] which was presumably intended to address the concerns of its own Treasury about being able to access financial information. The preamble to the proposal recognised that appropriate and effective regulation and supervision by financial regulators requires 'immediate, direct, complete and ongoing' access to information of 'covered persons' that was processed or stored in computing facilities inside or outside the country. It also recognised the need to eliminate potential limitations on such access.

But that was the preamble. The substantive rule says a government cannot require a covered person to use or locate computing facilities in its territory as a condition of conducting its business, so long as the financial regulators have 'immediate, direct, complete and ongoing' access to information processed or stored on the computing facilities the covered person uses or locates outside its territory. Then it goes soft: where the covered financial institution does not provide that access, it must 'to the extent practicable' be given 'a reasonable opportunity to remediate' the problem before the government requires it to use or locate computing facilities inside the country.

So, the US solution relies on self-regulation and voluntary compliance where a financial institution fails to comply. That provides no guarantees whatsoever to a government seeking to prevent or respond to an emergency, and they would have to fall back on the prudential defence. Yet US Treasury Secretary Lew earlier rejected suggestions that the prudential defence would have provided adequate protection for a government that breached this rule: '*U.S. financial regulators advocated for the explicit ability to restrict cross-border data flows in TPP, in addition to the flexibility provided by the prudential exception'.* [48]

Japan and Australia were considering the proposal. Australia wanted to exclude government procurement[49] and information held or processed by or on behalf of a party or measures related to such information. That would leave all financial data and transactions that do not involve government information to the whim of these financial institutions. Australia also wanted this cross-checked against equivalent localisation provisions in the e-commerce chapter and any policy space reservations in countries' schedules, to ensure the parties' level of commitment was not undermined.

46 Australia, Canada, Colombia, Hong Kong, Japan, Turkey, US, with EU, South Korea, Mauritius and Switzerland 'considering'.

47 TiSA, Art X.10 bis, Annex on Financial Services, dated 17 November 2016

48 Rachel Fefer, 'Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress', Congressional Research Service, 3 January 2017, p.12

49 It is unclear if this means the limited definition of government procurement that is for internal government purposes and not used directly, or indirectly, in services or goods for sale.

APPENDIX 8

TiSA TEXT ON POST AND DELIVERY SERVICES

The TiSA core text

The core text of TiSA is always the starting point for analysis. It is important to stress that ***there is no carve out for public services from TiSA***. The core TiSA text excludes a 'service supplied in the exercise of governmental authority' from the definition of 'services'.[1] To qualify, the service must be 'supplied neither on a commercial basis, nor in competition with one or more service suppliers'. Monopoly postal services are non-competitive, but they are commercial. Other public postal services would fail to qualify on both grounds.

The core rules

The standard ***market access rule*** from GATS would give the courier and express delivery industry unrestricted access to a country's market without facing monopolies, or limits on the size or scope of their operation or geographical coverage. They could not be required to set up through subsidiaries or joint-ventures rather than using agents, or establish a local presence in the country when they operate from across the border (which most do). A full commitment to ***non-discrimination*** (national treatment) in a lightly regulated market would allow the oligopoly of global firms to exercise control in the absence of effective domestic competition.

Once a TiSA party makes a market access commitment the scheduling rules presume that countries will remove or freeze any discrimination in favour of locals in their delivery services and lock in any future liberalisation, unless they seek and secure a full policy space carve-out. There is no realistic way for countries to reverse those commitments once they are made.

Redefining postal services

The ***classification*** of a service is critically important for scheduling and the scope of the other rules and annexes in TiSA. The classification system used to define a service for the purpose of listing it in a GATS schedule was drawn up in 1991 (W/120, see Appendix 2). At that time, most postal services were still public monopolies[2] and the main mode of delivering letters and packages; private delivery services were marginal. Countries could limit their exposure to postal services in the GATS because they are classified separately from courier services, and the two are mutually exclusive: *postal services*

1 Based on Article 1.3 of the GATS 1994.

2 Sometimes including telecommunications and banking as well.

are 'rendered by the *national postal administration*';[3] *courier* services are *private*.[4] The positive list approach to GATS schedules meant few governments made any commitments on the public postal service. Since then the separate categories have blurred as public postal monopolies were deregulated and privatised, but the GATS classification has not been updated.

The 2014 leaked Annex on Commercial Delivery Services set out to update those classifications by distinguishing between a *postal monopoly*, and *express delivery services* (the US preference) or *competitive delivery services* (the EU preference). By focusing on the service rather than the provider, the *non-monopoly* parts of public postal services are shifted into the other delivery category.

The November 2016 leaked text, described as a 'proposed landing zone', had a similar effect by changing the two categories to *postal monopoly* and *delivery services*:[5]

- A ***postal monopoly*** is an exclusive right to supply a specified service. However, the scope of that right was not agreed: some countries wanted to limit it to an operator who is within the party's territory.[6]
- ***Delivery services*** are defined as collection, sorting, transport and delivery of documents, printed matter, parcels, goods and other items where service suppliers are in competition.

However, an ambiguous footnote says: 'For greater certainty, this Annex applies to services classified in CPC 751 (Postal and Courier Services)'.[7] That could mean the TiSA delivery annex applies to the high-level classification and does not distinguish between post and courier services; or it could mean that it still distinguishes between the component elements set out in the classification CPC751. Renaming the annex 'Delivery Services' from the earlier '*Competitive* Delivery Services' suggests they intend to remove the distinction between public and private services, except where the postal service is a monopoly and is subjected to specific rules.

Restricting the postal monopoly

The definition of a ***postal monopoly*** is not yet agreed in the delivery services annex.[8] Some countries want it restricted to delivery services *within* a party's territory that are specified by a government measure. No alternatives are suggested in the text.

Whatever definition they decide on, the scope of the postal monopoly must be defined using 'objective' criteria, including quantitative criteria of price and/or weight thresholds.[9] It is debatable whether geographic areas would be considered 'objective'; they can be clearly defined, but the examples given in the provision only relate to the product being delivered. Qualitative factors, such as the needs of particular communities, may not qualify if the criteria are considered too vague or subjective, especially as they could be covered separately under the universal service obligation. That

3 **Postal delivery** services were divided into:

Postal Services Related to Letters **(75111)**: *Services consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed matters, whether for domestic or foreign destinations, as rendered by the national postal administration.*

Postal Services Related to Parcels **(75112):** *Services consisting of pick-up, transport and delivery services of parcels and packages, whether for domestic or foreign destinations, as rendered by the national postal administration.*

Post Office Counter Services **(75113):** *Services rendered at post office counters, e.g. sales of postage stamps, handling of certified or registered letters and packets, and other post office counter services.*

Other Postal Services **(75119):** *Mailbox rental services, "poste restante" services, and public postal services not elsewhere classified.* Exclusion: Services related to postal giro and postal savings accounts are classified in class 8111 (Services of monetary intermediaries).

4 **Courier services** was divided into:

Multi-modal Courier Services **(75121)**: *Services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration. These services can be provided by using either self-owned or public transport media.*

Other Courier Services **(75129):** *Other courier services for goods, not elsewhere classified, e.g./trucking or transfer services without storage, for freight.*

5 TiSA, Article 1, Annex on Delivery Services, dated 9 November 2016.

6 A change in the wording in the 9 November 2016 text suggests this is intended to restrict the monopoly to a firm that is commercial established in the territory, rather than restrict the monopoly to services inside the territory)

7 TiSA, Footnote 1, Annex on Delivery Services, dated 9 November 2016.

8 TiSA, Article 1, Annex on Delivery Services, dated 9 November 2016.

9 TiSA, Article 2, Annex on Delivery Services, dated 9 November 2016.

restrictive approach to the scope of the monopoly is contested. Some unnamed party/ies want to preserve the right to decide their own criteria in their domestic law.

A separate provision on ***cross-subsidisation*** would prohibit a postal monopoly supplier from cross-subsidising its own or another supplier's[10] competitive delivery services with revenues from the monopoly.[11] Cross-subsidy is not defined and could be read to include sharing of premises and IT or administrative systems. The monopoly must also not 'unjustifiably' apply different prices or other terms for different users, such as bulk mailers or consolidators.

The annex requires the ***regulatory authority*** to treat equivalent (public and private) delivery services impartially in relation to the same services.[12] That regulatory authority will rest with the public Post Office in many countries. The annex would subject the processes it uses and its decisions to external oversight; however, an earlier requirement for the authority to be independent of suppliers has been dropped.

A firm supplying a non-monopoly delivery service cannot be required to contract, or not contract, with another service supplier (such as the public Post Office) to provide a segment of its service.[13]

Further restrictions on postal regulation

Once a country has scheduled a market access commitment using these definitions, the rules in the ***Annex on Domestic Regulation*** also apply.[14] These require ***licensing requirements and procedures*** to be based on 'objective' criteria, for example, they do not include any discretionary considerations. Some countries also want to minimise the burden on those seeking a licence; the US and EU oppose that, so it is unlikely to be accepted.

The requirement for 'objective' criteria also applies to ***technical standards***, which would include specifications of size, weight etc. for each delivery category, the frequency and location of delivery and collection, obligations to rural areas, ***and the terms of the universal service obligation***.

The ***administration*** of these regulations must be 'reasonable, objective and impartial', giving the express delivery lobby new scope to press their governments to object to other TiSA countries' regulatory processes and decisions.

Universal Postal Service Obligation (UPSO)

The November 2016 'landing zone' text drops some of the EU's more extreme proposals to restrict scope of the UPSO and how it is delivered.[15] The new version says countries can define what kind of UPSO they want. But they must ***administer*** it in a 'transparent, non-discriminatory and neutral/impartial way with regard to all suppliers subject to the obligation'.[16]

It is unclear whether the government's ***'administering'*** of the obligation includes allocating the responsibility for providing the UPSO, or just the conduct of the obligation once allocated. That is an important distinction: if it means allocating, then ***'non-discriminatory'*** and ***'neutral/impartial'*** means that foreign private firms could be contracted to deliver the UPSO and the public Post Office should not enjoy preferential rights to do so; if it means how the UPSO is supplied, then it means all firms, including foreign delivery firms, should benefit equally from the UPSO. The distinction between non-discriminatory and 'neutral/impartial' is also unclear. ***'Transparency'*** would mean the basis for decisions and how they are made are clear and public.

10 Such as a subsidiary.
11 TiSA, Article 7, Annex on Delivery Services, dated 9 November 2016.
12 TiSA, Article 3, Annex on Delivery Services, dated 9 November 2016.
13 TiSA, Article 9, Annex on Delivery Services, dated 9 November 2016.
14 New Zealand wants them to apply irrespective of schedules, but that is strongly opposed.
15 TiSA, Articles 6, 7 and 8, Annex on Competitive Delivery Services, dated 16 April 2014.
16 TiSA, Article 4, Annex on Delivery Services, dated 9 November 2016

The annex also says that commercial operators cannot be required to supply universal services as a condition of being authorised or licensed to supply other delivery services;[17] nor can there be a levy *solely* on those who are not supplying the UPSO to fund it.[18]

State-owned post offices

The US has proposed an Annex on State-owned Enterprises (SOEs) that would apply to the public Post Office if it was 50% or more owned by central government and 'principally' engaged in 'commercial activities'. 'Commercial activities' are defined as activities undertaken 'with an orientation towards profit-making', meaning anything more than cost recovery. Many public postal services would fall within that definition.[19] The Post Office would then have to operate on ***a purely commercial basis*** when buying or selling that service. Countries might be allowed to exclude their postal SOEs from the annex in a schedule, but that would have to be negotiated with all the TiSA parties, including the US.

The US is willing allow some limited protection for services supplied by an SOE under an explicit ***public mandate***, such as a clearly-defined UPSO.[20] But that could only apply to postal services supplied *inside* the country under the mandate; any international mail service would still be subject to the obligations in the annex. In practice, those mandated domestic postal services would often be integrated within the postal service's broader activities and impossible to separate out for a different kind of governance. The EU has proposed a broader protection for any 'legitimate public service obligation'.[21] However, both the US and EU approaches would require the SOE not to discriminate when it sells those mandated postal services to people or firms of another TiSA party.

17 TiSA, Article 5, Annex on Delivery Services, dated 9 November 2016
18 TiSA, Article 6, Annex on Delivery Services, dated 9 November 2016
19 TiSA, Article X.1, Annex on Stated-Owned Enterprises, dated November 2016
20 TiSA, Article X.4, Annex on Stated-Owned Enterprises, dated November 2016
21 TiSA, Article X.4, Annex on State-Owned Enterprises [EU Comments October 2016]

APPENDIX 9

TiSA ANNEX ON DOMESTIC REGULATION

A number of countries have been trying for years to secure 'disciplines' on government regulation of technical standards, qualifications requirements and procedures, and licensing requirements and procedures in the GATS. They are now attempting to advance their demands through TiSA, in both the core text and an Annex on Domestic Regulation. New Zealand, Australia, Hong Kong and Switzerland are the main proponents. The US, Canada and the EU oppose some of their worst aspects, but not all.

The leaked annex from November 2016 shows there have been severe cuts to the original proposals, but the rules would still put additional handcuffs on TiSA governments' right to regulate.

The scope of regulatory 'disciplines'

The annex targets three kinds of regulation:

- ***Technical standards***. Technical standards are 'measures that lay down the characteristics of a service or the manner in which it is supplied'.[1] They exist for virtually every kind of service that affects people's everyday lives, including health and safety codes, consumer protections, town planning and zoning, bank opening hours and universal service requirements for postal delivery, and more technical requirements for construction, infrastructure, mortgage lending or broadband.
- ***Qualification requirements and procedures*** refer to substantive requirements that show the competence of a real person to supply a service, and which they need to demonstrate before they are authorised to supply that service (eg. a specified degree or diploma from an accredited body), as well as the procedural rules to show they comply with those requirements (eg. proof of a period in practice or continuing education and training, accreditation by a professional board or body, payment of related fees). This clearly covers traditional professions and specialists, such as engineers or lawyers and people who require occupational skills training or apprenticeships, such as telecom technicians and electricians. Government may introduce new qualification requirements in response to market failures or poor practices, such as for financial advisers.
- ***Licensing requirements and procedures***. Many services require the company and/or personnel operating a service to hold a licence that authorises them to provide the service: banks, transport operators (bus, ferry, taxi, rail, ports, airports), utilities and networks (telecoms, satellites, ISPs), importers and customs agents, foreign exchange dealers, security firms, and personnel agencies, among others. As with qualifications, the 'disciplines' in the annex apply to the criteria for a licence and the procedures to gain that licence.

1 TiSA, Article 3(e), Annex on Domestic Regulation, dated 15 November 2016

The handcuffs on government regulation

A number of countries[2] want to impose a multi-layered test that would require governments to take the most light-handed approach reasonably available to achieve the goal of the regulation.[3] This mirrors the framework of the WTO negotiations,[4] and would mean that *existing and future* regulations must:

- not pose 'unnecessary' barriers to trade in services; this invites claims that a government could have taken a less restrictive approach to achieve its policy goal or that the evidence it relied on was flawed;
- be based on 'objective and transparent' criteria, such as the competence and ability to supply the service. That opens to challenge any regulations that apply 'subjective' criteria, such as broad environmental, social, and regional development considerations, concerns of the local community or indigenous rights, or that allow significant discretion to the authorising body.
- be the 'least burdensome necessary' to achieve 'quality'. This is again invites claims that a less burdensome alternative was reasonably available to achieve the narrow goal of 'quality'; and
- licensing and qualification procedures must not themselves restrict the supply of the service; for example, imposing procedural requirements that only some applicants could satisfy.

Canada and the US are opposed.

Potential challenges to administrators

General rules that 'affect' services transactions must also be *administered* in a '*reasonable, objective and impartial*' way, which are all contestable concepts:

- ***'Administration'*** spans assessing the authenticity of qualifications, self-reporting requirements on financial firms, decisions on whether to grant a resource consent or licence to operate a service, assessment of compliance with consumer protection laws, and taking disciplinary action and imposing penalties for breaches of regulations.
- Almost any administrative decision could be challenged as ***'unreasonable'*** by another TiSA government on behalf of an unhappy foreign business.
- ***'Objective'*** requires the interpretation of general criteria and the weighting given to them to be public, clear and explicit, and based on strong evidence, with no discretionary elements or implicit judgement calls.
- An ***'impartial'*** decision implies commercial and market considerations. Recognition of local cultural, social or development factors, for example, could be cited as evidence of bias. Equally, administration conducted by a state entity that is also a service supplier could be challenged as not impartial.

This applies to all regulation of general application, not just the three categories discussed above. The equivalent provision on administration in the GATS only applies in 'sectors where commitments are undertaken'. Australia and Japan want it to apply to all services in TiSA. Again, even if it only applies to countries' schedules the more extensive commitments in TiSA would broaden its potential impact.

As in the GATS, governments must provide for prompt review of administrative decisions, as soon as practicable.

Implications of the annex

The obligations in the annex, except for those on transparency, apply only to services for which the government has taken a market access or national treatment commitments in TiSA, and subject to

2 Colombia, Switzerland, Chile, Hong Kong, South Korea, Mauritius, Mexico, New Zealand, Peru

3 TiSA, Article 3, Annex on Domestic Regulation, dated 15 November 2016

4 GATS 1994, Article VI.4

any reservations it has listed.[5] However, those commitments in TiSA are extensively and these rules could severely restrict the policy space and regulatory sovereignty of every TiSA party. There is no place in a country's schedule to limit the application of the disciplines themselves, and governments rarely consider them when deciding on their market access and national treatment commitments.

Cumulatively these constraints on domestic regulation could have a serious chilling effect on regulators, administrative bodies and decision makers, making them overly cautious to avoid public embarrassment and long costly legal challenges. Ultimately, they restrict the sovereign right and responsibility of governments to regulate in the national interest.

Agreeing to these disciplines in TiSA would also create a worrying precedent for the ongoing GATS negotiations, even if they applied only to new regulation. Countries in the global South would face a high risk that new regulations, for example adopted when they decide to privatise a service, would be challenged as unnecessarily burdensome on commercial interests. Likewise, the rules would inhibit re-regulation when deregulation failed. Even rich countries that face regulatory failures through excessive deregulation and need to re-regulate would face severe constraints. If the disciplines apply to existing regulations as well, the administrative burden would be unbearable for many countries and the interference with regulatory sovereignty would be intolerable.

5 TiSA, Article 1, Annex on Domestic Regulation, dated 15 November 2016. New Zealand is the only country that wants the rules to apply to all services.

APPENDIX 10

TiSA ANNEX ON STATE-OWNED ENTERPRISES

In mid-2016 the US belatedly tabled an Annex on State-owned Enterprises that draws on the SOE chapter in the TPP. The EU responded to that text in October 2016.[1] The latest text from November 2016 has no square brackets and appears to be the US revision in light of the EU's comments; it shows few changes from the earlier text.[2]

Defining an SOE

A number of criteria determine whether an enterprise would fall under the annex:

- The annex only applies to enterprises owned by ***central*** government.[3] The EU wants it to apply at all levels, as did parties to the TPP. However, the US cannot bind its states to these rules without their consent.
- The enterprise must be 'principally' engaged in 'commercial activities'. These are defined vaguely as activities undertaken 'with an orientation towards profit-making'[4] and which produce a good or service in quantities and at a price that the SOE itself determines. Banks, insurance companies, telcos and post offices could all be caught.
- To be *state* owned the central government must hold more than 50% voting rights or the power to appoint 50% of the board of directors.[5] Whether that includes a golden share which gives the state voting rights and veto powers on strategic matters is unclear. The status of public-private partnerships (PPPs) in which the state has a majority stake is also uncertain, because they take various legal forms. The EU wants the definition to include any enterprise the government has the possibility to exercise control over, which is much broader.
- Most rules do not apply to an SOE that has derived annual revenue of less than 200 million IMF special drawing rights (about USD270 million)[6] from its commercial activities in *any one* of the three preceding years.
- Most of the rules do not apply to a sovereign wealth fund or independent pension fund whose investments are not directed from the government (which may preclude governments from giving instructions on ethical investments).[7]

What the rules require

There are three significant protections from these rules:

1 TiSA, Annex on State-owned Enterprises, dated November 2016.
2 TiSA, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016].
3 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016.
4 Footnote 1 of the SOE Annex, dated November 2016, says this does not include an enterprise that operates on not-for-profit or cost-recovery basis.
5 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016.
6 TiSA, Article X.7, Annex on State-owned Enterprises, dated November 2016.The threshold is adjusted every 3 years.
7 TiSA, Article X.2.4, Annex on State-owned Enterprises, dated November 2016.

1. The November 2016 text would allow each country to have a schedule of SOE activities that would otherwise breach the ***non-discrimination*** rule.[8] The schedule would not protect them from other rules in the annex, such as the requirement to operate on the basis of commercial considerations. The content of the schedule would have to be negotiated and agreed by the parties; the US bargained very hard over the SOE list in the TPP. The EU is considering how that annex would relate to countries' schedules of commitments on market access and national treatment.

2. An SOE would be allowed to apply non-commercial considerations (such as the need to ensure public access, affordability, or cultural sensitivities) where it is fulfilling a '*public service mandate'*. A public service mandate is defined as a government mandate under which an SOE makes a service available to the public, directly or indirectly, within its territory and includes the distribution of goods and the supply of general infrastructure services.[9] The EU suggests an alternative right to deviate from commercial considerations for a 'legitimate public service obligation'.[10] Even where that explicit 'mandate' (US) or broader 'obligation' (EU) exists, the SOE must not discriminate against services and service suppliers from other TISA countries, meaning they get the benefit of the taxpayer-funded mandate. This protection only applies to domestic services and excludes any cross-border activity. This assumes, often unrealistically, that SOEs will maintain a distinct firewall between domestic services that are mandated and those that are not, between domestic and international services, and between the goods, services and IT components of their operations.

3. A government or an SOE can make a temporary response to a national or global economic emergency that breaches the non-discrimination and commercial considerations obligations in the annex.[11] This provision is designed to protect the kind of corporate bailouts the US made during the Global Financial Crisis. Key terms, including 'temporary' and 'economic emergency' are not defined, but unlike the general security exception, and the stronger exception in the e-commerce annex, this is not self-judging. It does not protect responses to other emergencies, such as natural disasters or civil strife; in those situations, a government would have to rely on the inadequate general exception, discussed in Chapter 5.

4. The exclusion for government procurement is limited,[12] in the same way as the core text. It effectively only applies to procurement conducted for the internal non-commercial purposes of government agencies.

8 TiSA, Article X.5, Annex on State-Owned Enterprises, dated November 2016

9 TiSA, footnote 4, Core Text, dated 14 July 2016.

10 TiSA, Article X.2.1 and X.4, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016].

11 TiSA, Article X.7.3, Annex on State-Owned Enterprises, dated November 2016.

12 TiSA, Article X.2.6, Annex on State-Owned Enterprises, dated November 2016.