



# TiSA REVIEW<sup>1</sup>

WikiLeaks releases new secret documents from the Trade in Services Agreement (TiSA) which is being negotiated by the US, EU and 22 other countries that, along with the TTIP and the TPP, account for 2/3rds of global domestic product (GDP)



<sup>1</sup>This essay was produced in an academic module to draft the main topics from the secret trade agreement exposed by WikiLeaks, on November 2015. The author of this document, known on the web by the nickname Praxis (@enterpraxis), is an academic researcher, activist and journalist.

## INTRODUCTION

The TISA negotiations are an effort by 23 countries, accounting for more than 70% of the world's trade in services, to write new rules in an area that has been stalled at the multilateral level since the end of the Uruguay Round negotiations two decades ago. The goal is to expand trade in services among a smaller group of mostly wealthier countries that believe it to be in their interests to do so. The leaked texts are bracketed negotiating documents, with the brackets reflecting the still large areas of disagreement among countries. So any conclusions about the final outcome have to be tentative ones. That covers the situation where US companies with servers inside or outside the EU gather personal data in Europe, and then want to pull it back across the Atlantic.

TiSA negotiations started in February 2012. Fifty countries are involved, with the European Union and the United States representing two-thirds of world trade. All the large emerging countries have been carefully kept out and, in actual fact an anti-BRICS (Brazil, Russia India, China, and

South Africa) alliance is being forged. Currently, that's possible using the totally useless "Safe Harbor" agreement, which may be cancelled in the wake of *NSA spying*. If the **European Commission** signs up to TiSA with the above clause, there would be no way it could stop US companies from taking information - including, specifically, "personal information" - overseas. At that point, the EU's data protection framework would be completely neutered.

But the damage doesn't end there. Article **X.5** on "Open Networks, Network Access and Use" is as follows. Each Party as recognizing that consumers in its territory, subject to applicable laws, and regulations, should be able to:

- 1. access and use services and applications of their choice available on the Internet, subject to reasonable network management;*

The problem is that "subject to reasonable network management" is not only undefined here, but it is not well defined anywhere." That opens the door to any kind of network management that might

be claimed as "reasonable" - including forms that destroy network neutrality.

What the latest WikiLeaks **re-release** reminds us is that fast track won't just be used to pass the TiSA. It will also be used to pass the TTIP, the TPP, and future agreements<sup>2</sup> -- perhaps not even yet imagined. Behind closed doors, in the offices of lobbying firms and corporate boardrooms, law firms and foreign ministries, smart people working for special interests will be empowered to reshape the world, through secret negotiations, and under the banner of "free trade".

Trade in services is an esoteric concept for most, including many at the highest levels of government. To a great extent this is because the concept has changed so dramatically in recent years, with the Internet and the forces of globalization having massively altered opportunities for the cross-border move-

ment of services. Yet services could make up more than 40% of global trade today, according to the World Trade Organization, and account for some 80 percent of U.S. jobs.

For greater clarity, here we are summing up the very numerous partial analyses that are available, as well as some of our own insights into the different proposals for 'free trade' agreements. To put it more precisely, for business freedoms, the best known treaty being the one between the European Union and the United States as well as the parallel one with Canada, the Trade in Services Agreement, as well as three proposed treaties between the European Union and Africa. We shall also consider other treaties on free trade, bilateral and multilateral investment treaties that have been in force for years, particularly NAFTA (North American Free Trade Agreement). In fact, at the beginning of 2014 there were already some 3,300 bilateral or multilateral agreements on investments or free trade treaties in the world, of which 1,400 have been signed by Member States of the European Union. The European Union itself has already signed about fifty trade agreements and is currently negotiating a dozen of them.

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<sup>2</sup> "The Three Trade in Services Agreement exposed in a 17 document dump by Wikileaks on November 2015, relates to ongoing negotiations to lock market liberalizations into global law. that corporations would be able to use the law in its current form to hold sway over governments, deciding whether laws promoting culture, protecting the environment or ensuring equal access to services were 'unnecessarily burdensome', or whether knowledge of indigenous culture or public services was essential to achieve 'parity'". Source: <http://www.independent.co.uk/news/business/news/trade-agreements-like-tisa-tpp-and-ttip-will-sideline-national-laws-wikileaks-says-10299907.html> Access: 18 December 2015.

- **Sectors being negotiated:**

- International Maritime Transport Services
- Air Transport Services
- Financial Services
- Electronic Commerce
- Telecommunication Services
- Environmental Services
- Movement of Natural Persons
- Professional Services
- Government Procurement
- Competitive Delivery Services / Logistics

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## 1. TiSA – Annex on Energy Related Services

*Proposal by Iceland and Norway*

The "market access", applied on the Iceland and Norway proposal, measure the rules of the **TiSA** limit public regulation of the number of services suppliers; the total value of the services supplied; the legal form of the services corporation; and other regulatory aspects, and would affect not only the energy and environmental services covered by the specific annexes but approximately 160 services sectors, many of which greatly impact the environment, including: real estate; retail; construction, air, road, and maritime passenger and freight transport; electricity, gas, and water distribution; services for agriculture, hunting, forestry, fishing, mining, utilities; and others.

The draft annex on road transport reveals similar problems to the annexes on maritime and air transport previously released. While citizens and elected officials have public environmental and job creation goals around the construction of infrastructure including bridges and roads, and environmentalists and labor activists have a huge stake in taxing and regulating maritime and air transport in order to fund cli-

mate adaptation and mitigation and reduce carbon emissions from the transport industries, the TiSA proposes to impose a corporate model that would favor the transnational corporations' "rights" to operate, and limit regulation. On the WikiLeaks analysis of the Cross-Border Trade, Commercial Presence and Sovereignty over Energy Resources chapter, the International Transport Workers Federation (ITF)<sup>3</sup> notes that the "combined impact of the leaked TISA documents' provisions would constitute serious barriers for any state wanting to invest in, manage and operate its national infrastructure, to plan development or to defend social and safety standards across the transport industry itself."<sup>4</sup>

These new and improved commitments are very important for the EU,

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<sup>3</sup> The International Transport Workers' Federation (ITF) is an international federation of transport workers' trade unions. The ITF represents the interests of transport workers' unions in bodies that take decisions affecting jobs, employment conditions or safety in the transport industry, such as the International Labour Organization, the International Maritime Organization and the International Civil Aviation Organization.

<sup>4</sup> WikiLeaks - The US strategy to create a new global legal and economic system: TPP, TTIP, TISA – Video Documentary:  
<https://www.youtube.com/watch?v=Rw7P0RGZQxQ>

because the services sector constitute the most dynamic maritime economic activity in this region.

The EU companies are leading providers of services in many sectors and are the biggest exporters of services worldwide, with almost 26% of world total export of services and half of all foreign investment flowing from the EU

to other parts of the world. Legal security and new market access opportunities are therefore crucial for European companies.

## 2. TiSA as an environmental hazard

*An assessment of the environmental impact of the leaked Annex on Environmental Services in the context of TiSA as a whole*

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At the same time an agreement on **TPP** (Trans-Pacific Partnership) was under negotiation since March 2010 between 12 countries from America, Asia and Oceania, including the United States. It was initialed in October 2015. Many other treaties of lesser importance are being negotiated in parallel. All of them are very similar and share many common characteristics, which we shall now analyze. The financial services, logistics and technological corporations, largely in the United States and also the EU, are attempting to expand the *World Trade Organizations* (WTOs) and *General Agreement on Trade in Services*

(GATS) to develop a set of deregulation and privatization rules that constrain public oversight of how services operate domestically and globally, setting aside environmental, labor, and development issues in favor of transnational corporate rights to operate and profit.

The analysis of a proposal for an Energy Related Services (ERS) annex of the WikiLeaks TiSA leak, it would give "rights" to foreign energy corporations in domestic markets. Far from mandating reductions in carbon emissions or promoting access for poor countries to clean technologies, the proposed TiSA annex would actually limit the ability of governments to set policies that differ entitle between polluting

and carbon-based energy sources, such as oil and coal, from clean and rene-

The protections and supports for renewable energy that are being called for by countries across the globe are nowhere to be found in the leaked chapters of the proposed TiSA. Thus far, the restrictions on subsidies for renewable energy, such as India's supports for solar power that have been successfully challenged by the United States in the WTO, remain in place, along with a lack of disciplines on similar subsidies that are forked over by public coffers to the fossil fuel (oil, coal, and gas) industries in the hundreds of billions according to Oil Change International.

The TiSA also shares similarities with another agreement being negotiated in contrast to environmental goals, according to environmental analysis: the Transatlantic Trade and Investment Partnership (TTIP). The new rights for investors and corporations proposed in the TiSA and the TTIP, like the TPP, would become legally binding and enforceable, while any environmental provisions would not. This situation is

ble energy sources such as wind and solar.

reflected in the Paris conference for a new United Nations Framework Convention on Climate Change (UNFCCC) agreement, where the U.S. has led the call for environmental targets to be only voluntary and has refused any provisions that would be binding under international law.

WikiLeaks

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### 3. TiSA - Annex on Road Freight Transport

*Review on a secret draft of the Trade in Services Agreement Annex on Road Freight Transport and Related Logistics Services*

**O**n this annex, it is measured that the 23 governments involved, together with the EU, aim to conclude an international trade treaty that would liberalize the worldwide trade of services, including transport. The TiSA texts have been negotiated in secret with no possibility of the inclusion of a sustainability or labor chapter.

"In road freight transport this is particularly disastrous. There are so many labor market and social problems in the sector that even the EU has stated it sees no value in this text," said ITF road transport secretary Mac Urata. Which means that it will allow multi-modal transport operators unfettered access to and rights to supply road, rail or inland waterways transport services, generally public infrastructure — and enable them to fast-track their goods through ports.

In that scenario, major corporations will play an important role on the trade agreement. Corporations would get to comment on any new logistic

regulatory attempts, and enforce this regulatory straitjacket through a dispute mechanism similar to the investor-state dispute settlement (ISDS)<sup>5</sup> process in other trade agreements, where they could win money equal to “expected future profits” lost through violations of the regulatory cap.

The local leaders further emphasize that the TiSA negotiations shall not cover the privatization of public services and call for the government right to regulate in the public interest of European, national, regional and local authorities to be fully recognized in the negotiating transport text. They also favor a "positive list" of policy areas in the context of market access to be covered by the agreement instead of the envisaged "negative list" of spheres excluded. This would make it much

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<sup>5</sup> ISDS grants a foreign investor the right to initiate dispute settlement proceedings against a foreign government. It is commonly included in free trade agreements, but opponents say it could leave local level policymakers vulnerable to libel proceedings from overseas investors, should local laws interfere with their ability to turn a profit. – ISDS Democracy challenge: <https://www.youtube.com/watch?v=7NaLCIb5YOg> .

clearer and transparent which policy

areas the agreement affects.

#### 4. TiSA – Annex on International Maritime Transport Services

*And other Maritime Services*

The TiSA's releases confirms the hazards identified by the ITF (International Transport Workers' Federation)<sup>6</sup> when it warned that a previous airing of the trade agreement documents predicted a power grab by transport industry players at the expense of the public interest, jobs and a voice for workers. Despite some slight changes to the proposed TiSA Maritime Annex originally revealed in November leak, its replacement still contains a least one highly potentially damaging clause.

The annex recognizes the standards adopted by the United Nations' International Maritime Organization and the International Labor Organization – the two giants of international regulation on work at sea and the safety and rule of law at sea. Crucially,

though, it fails to recognize that their standards set **minimum** protections. Typically, as in the example of the enormously important Maritime Labor Convention 2006, the standards co-exist with actual or desired higher ones set by individual nations.

Despite this, in **Article 12**, the annex states that in cases where parties 'apply measures that deviate from the above mentioned international standards, their standards shall be based on non-discriminatory, objective and transparent criteria'.

ITF president **Paddy Crumlin** stated: "This questions seafarers' conditions everywhere. The ILO minimum wage standard for seafarers is intended as a safety net – not an absolute. Who decides these criteria, and how will this be enforced? What will happen to safety provisions, pay or qualifications which are better than the minimum? The ILO Maritime Labor Convention explicitly sets minimum standards, with member states being encouraged to go above and beyond its provisions. Almost unbeliev-

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<sup>6</sup> International Transport Workers' Federation is a global union federation of transport workers' trade unions, founded in 1896. In 2009 the ITF had 654 member organizations in 148 countries, representing a combined membership of 4.5 million workers.  
<http://www.internationaltransportforum.org/>

ably this fact appears to have escaped those drawing up the TiSA plans.”<sup>7</sup>

The concerns on TiSA International Maritime Transport Services are that in the three areas covered - maritime transport, air transport and express delivery – deregulation and will aim to:

- Enhance the bargaining power of major shipping lines over port services, and give global port operators further consolidated power
- Open up offshore energy services raising potential sustainability and environmental concerns
- Allow multimodal transport operators unfettered access to and rights to supply road, rail or inland waterways transport services, generally public infrastructure – and enable them to fast-track their goods through ports
- Undermine the social and safety standards of the International Labor Organization (ILO), by failing to recognize these as

minimum standards subject to continuous improvement

- Create an aviation industry dominated by global giants whilst allowing flags of convenience to become an established practice in the global aviation market
- Shift the aviation system onto a fully liberalized multilateral system in one go, in a way that’s unmanageable for many countries and aviation workforces
- See the worst employment conditions at airports and in ground handling mirrored by similar trends in aircraft repair and maintenance
- Remove the economic regulation of international air transport from the International Civil Aviation Organization (ICAO), leaving aviation policy to be determined by international market forces and by decisions made in boardrooms serving shareholder interests
- Increase potential safety risks, by separating the safety regulation and economic regulation of international air transport and undermining their close interaction under the same regime
- Protect the position of the major, private global courier companies

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<sup>7</sup><http://worldmaritimenews.com/archives/16312/1/itf-leaked-tisa-annexes-give-all-power-to-transport-industry-heavyweights/> Access: December 22 2015

against the growth of those national or regional operators that are secured through historical or current monopolies in national postal services

- Break open the relationships between the State, post, and the unions especially in the develop-

ing world, because the mature world markets do not offer significant longer-term growth opportunities

- Break the unions that exercise power in the sector and maintain the social and economic floor.

On the last article from the annex, deregulation aims to enhance the bargaining power of major shipping lines over port services and further consolidate the power of global port operators. It will create an aviation industry dominated by global giants while allowing flags of convenience to flourish, and increase potential safety risks by separating the safety regulation and economic regulation of international air transport. This deregulation will also protect the position of the major, private global courier companies against the growth of those national or regional operators that are secured through historical or current monopolies in national postal services.

open up all international and domestic road transport services – including coastal navigation – of all TiSA signatories to operators from the other signatory countries.

An additional problem was the envisaged issuance of visas to drivers via transport associations, not governments. "This is an irresponsible and unacceptable safety and security risk," he said. If progressed, this Annex would

Leaks

## 5. TiSA – Annex on Electronic Commerce

*Trade in services by electronic means*

The recent leak of this TiSA Annex on e-commerce once again demonstrates that trade negotiations are playing an important role in shaping the future of **internet governance**. Because these negotiations are closed, they are a poor forum for making internet policy, leading to policy that naturally favors businesses with major lobbying operations in Geneva and Washington DC, rather than the sort of open and multi-participant forums deciding issues on the merits we would prefer. In one of the clauses, it states a hazard to digital rights, stepping aside that privacy is a fundamental human right central to the maintenance of democratic societies. TiSA on *electronic commerce* includes requirements that could damage privacy protections.<sup>8</sup>

For example, one step that might be considered to improve the dire state of security of consumer routers might be to require that they be supplied with source code, so that their security could be more broadly reviewed, and third

parties could contribute patches for critical vulnerabilities.

The documents show that the TISA will impact even non-participating countries. The TISA is exposed as developed countries' corporate wish lists for services which seek to bypass resistance from the global South to this agenda inside the WTO, and to secure an agreement on services without confronting the continued inequities on agriculture, intellectual property, cotton subsidies, and many other issues.

TISA contains many provisions in its **Telecommunications** and **Electronic Commerce** chapters that could significantly impact the Internet. The two major provisions for which tech companies are angling are rules that would prohibit countries from adopting mandates for sensitive data to be hosted locally, and rules prohibiting countries from placing limits on cross-border information flows—including flows of personal data. The agreement would also prohibit countries from enacting free market and open source software mandates. Although “software used for

<sup>8</sup> Burcu Kilic, a lawyer at Public Citizen.

<https://www.citizen.org/Page.aspx?pid=183>

critical infrastructure” is already carved out from this prohibition, there are other circumstances in which a country might legitimately require suppliers to disclose their source code, for especially the e-commerce directions.



When the commercial Internet arrived in the late 1990s, the U.S. government established a set of national policies to promote electronic commerce across the United States. These included policies on electronic contract formation, e-mail marketing, copyright infringement and safe harbor protections for Internet service providers, and computer services provider immunity from lawsuits seeking to hold them liable for third-party speech.<sup>9</sup> These laws created a predictable legal environment for online businesses, and prevented state governments from creating inconsistent rules.

By focusing exclusively on services, as in the articles from 10 to 15 of the annex, we are raising awareness that services are of vital importance, not

only as a source of exports but as a driver of competitiveness throughout the economy. By pursuing ambitious outcomes for market access, we are working to establish a level playing field as the global norm. And by pursuing common rules of the road in areas like telecommunications, E-Commerce, and regulatory transparency, we are working to minimize policy conflicts and smooth the flow of trade.

TiSA is highly prescriptive on the topic of **cross-border data flows**. Promoting free data flows across national borders appears to be a leading TISA policy objective. U.S.-proposed Article X.6 contains this language:

*'No Party may prevent a service supplier of another Party from transferring, accessing, processing, or storing information, including personal information, within or outside the Party's territory, where such activity is carried*

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<sup>9</sup> In his 2013 book, *The Electronic Silk Road*, Prof. Anupam Chander of the University of California, Davis, School of Law describes the role that law has played in the remarkable success of U.S.-based electronic services companies, many of which are world leaders in their markets.

*out in connection with the conduct of the service supplier's business.'*

Other U.S. proposals include prohibitions on national laws mandating **local presence, local management, local content, and local technology**. On the subjects of **data localization** and **physical presence**, the Article 9 prohibits national laws that condition the right to supply electronic services on local data storage or physical presence.

The provision on physical presence may create jurisdiction problems for signatory countries, inasmuch as physical presence in a country is common basis for asserting jurisdiction to enforce national laws against a multinational entity. It's an open question whether this aspect of TiSA will insulate companies from national laws outside of their home country.

## 6. TiSA – Annex on Financial Services

*References to the supply of financial services*

There are four key ways in which the leaked TiSA text promises to threaten stable economic growth by exceeding the scope and coverage of the existing global liberalization of FDI<sup>10</sup> (Foreign

Direct Investment) in financial services: right of establishment, automatic “new financial service” coverage, prohibition on non-discriminatory measures, and transparency requirements.

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<sup>10</sup> It's an investment made by a company or entity based in one country, into a company or entity based in another country. Foreign direct investments differ substantially from indirect investments such as portfolio flows, wherein overseas institutions invest in equities listed on a nation's stock exchange. Entities making direct investments typically have a significant degree of influence and control over the company into which the investment is made. Open economies with skilled workforces and good growth prospects tend to attract larger amounts of foreign direct investment than closed, highly regulated

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economies. Definition by *The Financial Times*: <http://lexicon.ft.com/Term?term=foreign-direct-investment>. Access 16th December 2015

○ ***Rights of Establishment***

*“Each Party shall grant financial service suppliers of any other Party the right to establish or expand within its territory, including through the acquisition of existing enterprises . . . a commercial presence” (X.7).*

Subject, of course, to conditions and limitations in the parties’ schedules, the European Union and United States propose that each party must allow foreign financial companies onto their soil and allow them to acquire and expand their companies with minimal restriction. Panama proposes furthermore that host countries may not impose numerical restrictions on the number of foreign financial establishments.

Unpacking that provision, it does allow host countries to enforce terms and conditions for authorizing those foreign financial service providers. However, ultimately, the right to establish, on equal footing with host state nationals, is upheld. Rights of establishment are key because, rather than permitting countries to limit which types and quantities of service providers they admit, they owe a legal duty to private foreign companies before they even arrive. Indeed, as discussed below under the non-discriminatory measures article (X.15);

foreign financial service suppliers may have even greater rights of establishment than nationals under this agreement.

○ ***Automatic National Treatment on “New Financial Services”***

*“Each Party shall permit financial service suppliers of any other Party established in its territory to offer in its territory any new financial service” (X.10).*

Additional proposals suggest that the article would be limited by a commitment to national treatment (“any new financial service that a party would permit its own like financial service suppliers to supply . . .” (US/Panama proposal)). It also would grant to the host state the freedom to “determine the institutional and juridical form” of the new financial service supplier. These two proposals reach far beyond the traditional transparency requirements of making regulations and rulings available to affected people. The EU proposal provides foreign financial service suppliers the right to comment, along with national interested parties, on regulatory measures proposed by the host govern-

ment. The US proposal goes further to demand that final regulations address the substantive comments received from those service suppliers. If combined, these provisions could give foreign financial service suppliers even more power than nationals in quasi-legislative matters of the host state. Allowing foreign investors such direct access a host state's domestic regulation, would greatly increase the political power of these foreign financial service suppliers worldwide.

- ***Non-Discriminatory Measures***

*“Each Party shall endeavor to remove or to limit any significant adverse effects on*

*financial service suppliers of any other Party of . . . measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Party to operate, complete or enter the Party's market” (X.5, **emphasis added**).*

This is a startling provision that seems to prohibit certain measures, even though they are also applied to national services suppliers and therefore, not in violation of national treatment. In practice, this grants foreign financial service supplier's greater rights than national suppliers, allowing them to petition their government to bring a complaint against the host state for measures that adversely affect them in any way.

## **7. TiSA - Annex on Telecommunication Services**

*Measures applicable by a Party affecting trade in telecommunications services*

One of the highly ambitious paragraphs in the telecommunications chapter, which is geared to open up telecom markets for companies of the signatory states, is the attempt to mandate global interconnection. Major providers have to furnish non-discriminatory access to interconnection with their network and accord-

ing to a proposal by the U.S. and Colombia, access to cable landing facilities shall also be made obligatory.

“Where a supplier of telecommunications services in the territory of a Party operates a submarine cable system to provide public telecommunications services, that

a Party shall ensure that the supplier accords suppliers of public telecommunications services of another Party reasonable and non-discriminatory treatment with respect to access to that submarine cable system, including landing facilities”, said Burcu Kilic to The Huffington Post.

According to the draft text from TiSA, one of dozens of sections exposed by WikiLeaks, on Telecommunication Services:

- Undermines financial reforms enacted since the financial crisis and bank bailouts of 2008 but continues to restrict “how legislators, regulators and supervisors can regulate the financial sector”;
- Contains a “standstill” clause, meaning that financial sector regulations may be literally frozen and no new restrictions allowed; and
- Would require each country to remove or limit any measure of public access, even if they’re unlimited conditions

“Governments should not require ICT<sup>11</sup> service suppliers to use or establish any local infrastructure, as a condition for the supply of services,” an initial text innocently

qualifications, related to broadcast, that has “significant adverse effects” on global communication system on foreign services suppliers, such as when these suppliers argue that they “cannot expand their activities in the whole of the host country, or cannot sufficiently compete in the host country even if all TiSA provisions are respected.” \*Peru has opposed this measure.

The most recent negotiation session on telecommunications had focused in particular on the market access offers, obligations for major suppliers and transparency in the international mobile roaming. In effect, one expert from the EU explained to *Intellectual Property Watch*, the issues were similar to access rules laid out in the EU Telecom package, allowing competitors to interconnect and use existing networks.

But hidden in the many pages, lies some sensitive issues. “Forced localization” and “free flow of data” are two with regard to e-commerce and telecom.

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<sup>11</sup> ICT is often used as an extended synonym for information technology (IT), It is a more extensive term (i.e. more broad in scope) that stresses the role of unified communications and the integration of telecommunications (telephone lines and wireless signals), computers as well as necessary enterprise software, middleware, storage, and audio-visual systems, which enable users to access, store, transmit, and manipulate information.

reads. Yet service localization has developed much more into a menace to some national industries with the revelations of *Edward Snowden* about massive surveillance.

Brazil in a first reaction declared platform service providers would have to keep data national (in Brazil), and some EU countries like Germany for a while talked about a German or Schengen routing.

Localization also has another aspect, slightly overlooked as experts like Pierre Sauvé, director of external programs and academic partnerships at the *World Trade Institute (WTI)* in Bern, have underlined for some time now: the

issue of taxation of cross-border services in the digital colonies of large US-based platforms.

With the inclusion of obligations to not obstruct providers of transfers of data, more generally labeled as free flow of information, another topic contentious at least in Europe is on the table: the issue of privacy. There comes a direction for the next annex text: *Transparency Negotiations*.

## 8. TiSA – Annex on Transparency

*Regulations provided for Internet content proposals*

Free trade agreements now regulate the Internet, determining digital policies across borders and around the world. TiSA in particular addresses digital privacy, a critical issue at home and abroad. Yet the negotiations are not being held in a normal venue for discussing human rights or even ordinary law. The Internet is global, but privacy regulations incorporate localized norms. The U.S., for example, protects only some things, like your video-watching

history and health information, while the European Union has a comprehensive framework for safeguarding far more information.

The EU also tends to give privacy more weight and free speech less, when compared with the U.S., as evidenced by the controversy over the “right to be forgotten,” a policy that allows EU citizens to request delisting of pages from Google search results on searches of their names. International

law in general, and trade law in particular, is a theoretically attractive place for resolving such conflicts, as countries traditionally use trade agreements to harmonize divergent regulations and to govern the flow of goods (and data!) across borders.

But TISA is different. The leaked draft language, proposed by the U.S. and several other countries, states that a government may not prevent a foreign services company “from transferring, (accessing, processing or storing) information, including personal information, within or outside the Party’s territory.” Essentially, this says that privacy protections could be treated as barriers to trade. This language could strike most privacy regulations as they apply to foreign companies—and not just in the EU. It would also apply to U.S. regulation of foreign companies at home. For instance, U.S. health privacy law requires patient consent for health information to be shared. This, technically, is a restriction on transferring information that could be invalidated by TISA, if nothing changes.

In the context of net neutrality, there is some language that is particularly striking. It calls on the signatory governments to *endeavor* not to restrict

Internet traffic. It begs the question what does endeavor mean in this context? Should governments legislate or simply ask nicely that providers do not impose restrictions? Asking nicely, of course, is ineffective and the concern is that this language would open wide a hole in the law that would permit – or not forbid – broadband providers from imposing restrictions.

Evan Greer, campaign director for *Fight for the Future*<sup>12</sup>, said on statement: “Internet users have become increasingly aware that seemingly obscure and complex policies that impact technology can have profound impacts on our most basic rights to communicate and express ourselves freely. Based on the latest leaks, it’s clear that Tisa is not only unacceptably secretive, it contains provisions that could threaten internet freedom, privacy, and even global net neutrality.”

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<sup>12</sup> FFF is a non-profit organization founded in 2011 whose mission is to ensure that the web continues to hold freedom of expression and creativity at its core. The organization seek to expand the internet’s transformative power for good, to preserve and enhance its capacity to enrich and empower to envision a world where everyone can access the internet affordably, free of interference or censorship and with full privacy. See <https://www.fightforthefuture.org/>

### **The text being proposed is:**

*Each Party shall endeavor not to [...] restrict the ability of service suppliers to supply services over the Internet [and] shall endeavor to promote the interoperability of services and technologies, where appropriate.*

It is unclear what is meant, but my interpretation is that this is an attempt to preclude a net neutrality law – where net neutrality is perceived by the telecoms corporations as a restrictive law. It could be a weak attempt to prevent blocking or prioritization. The exact meaning depends on what is meant by “supply services over the Internet”: this clumsily-written phrase could be referring to hosting platforms and over-the-top services, or it could be referring to broadband providers.

The TISA also re-introduces

language of ‘reasonable network management’. This is a formula that the large telecoms corporations favor, because they believe it would allow them to implement a range of traffic management options on their networks. Traffic management is in part about congestion management, but also encompasses blocking, filtering and deep packet inspection.

*Each Party shall endeavor to ensure that internet access providers avoid unreasonable discrimination in transmitting lawful network traffic.*

In the EU, this language was debated at the time of the 2009 EU Telecoms Package, when it was found within amendments proposed by AT&T and other telecoms corporations.

## **9. TiSA - Annex on Government Procurement**

*Applies to government procurement of services*

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It is unclear whether the proposed text would open purchasing of services by all levels of government including municipal and other sub-national governments. In the World Trade Organization’s Government Pro-

curement, both the revised and 1994 versions, it covers both national and sub-central government purchasing, so there may be an attempt to do so in TISA as well. It is also unclear whether the proposed text would open the pur-

chasing by state owned enterprises.

State owned enterprises can be significant purchasers for example 61% of Uruguay's public invitations to tender in 2008 were by state owned enterprises, (Uruguay is negotiating TISA). In the WTO's GPA, purchasing by state owned enterprises is also opened, so there may be an attempt to do so in TISA as well. The proposed text would only apply to services GP via open tendering (which is likely to be most GP especially of larger contracts). This may be exacerbated by another trade agreement which requires that GP (including of services) covered by that other trade agreement is always via open tendering except in certain listed circumstances, as is the case in the Peru-U.S. free trade agreement, (Peru is negotiating TISA).

The proposed text would not apply to concessions to provide services to the public. Since a definition of GP equivalent to the one in the WTO's General Agreement on Trade in Services (GATS) will be used, it can be expected to be something like GP means the 'procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

The extreme liberalization of government procurement proposed in this text goes beyond liberalization under existing trade agreements with the resultant undermining of laws, programs and policies such as those outlined above. For:

• ***Countries which are already party to the WTO's GPA, if accepted, the proposed text here in TISA:***

- o Opens purchasing by more government entities
- o Opens GP of smaller services contracts
- o Can open GP of more services
- o Opens the services GP above to more countries

• ***Countries which have already opened services GP via an EFTA, EU or US FTA, if accepted, the proposed text here in TISA:***

- o Opens purchasing by more government entities
- o Opens GP of smaller services contracts
- o Can open GP of more services
- o Opens the services GP above to more countries

## 10. TiSA - Annex on Movement of Natural Persons

*Applies to measures affecting natural persons who are service suppliers of a Party and natural persons*

Under the services chapters of free trade agreements<sup>13</sup>, including the proposed Trade in Services Agreement (TiSA)<sup>14</sup>, this part of the trade document typically involve the movement of natural persons such as investors, intra-corporate transferees (managers, specialists, technical persons) and highly technical personnel such as those with expertise law, accounting, taxation, management consulting, engineering, computer, advertising, research and development services, translation services, higher education, architecture, and research and development, and the like.

TiSA or other trade and investment agreements should not place migrant workers under privatization of public training facilities because that would make them “independent service providers” or “independent contractors” supposedly working for their “own account”, and thus not considered as employees. Such erroneous characterization of the jobs that migrants typically render does not reflect the economic reality or the business reality of the relationship between the migrant and the employer. It would also take them out of the coverage and protection of labor laws of the host country.

Migrant workers, especially from developing countries, deserve protection under labor laws since they provide invaluable service to the countries where they work. The same money they send back home to their families also becomes part of the badly-needed foreign currency earnings of their home countries, which are invariably developing countries facing many developmental challenges. In some countries, migrants are in fact the top foreign currency earners, their remittances often ex-

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<sup>13</sup> See the Japan – Switzerland Free Trade Agreement, the ASEAN – Australia/New Zealand FTA, and the EUROPEAN FREE TRADE ASSOCIATION (EFTA) - Singapore FTA (ESFTA).

<sup>14</sup> EU Initial Offer – Nov. 2013 - Trade In Services Agreement, European Union Schedule Of Specific Commitments & List Of MFN Exemptions. See: [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152689.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf)

ceeding even proceeds from exports of agriculture and that of manufactured products taken separately.

Women workers, since they are vulnerable to physical and psychological harm through sexual harassment and/or outright sexual assault, and discrimination, are many times even more vulnerable. The situation becomes even more problematic when they work in rich countries where the rule of law is not at par with the level of economic development or when they in fact work in yet another developing country. This is not to say that no problem occurs in developed countries.

✓ ***Labor laws of host countries, and not the TISA of other trade agreements, should govern the status of migrant workers***

We believe that while each country has the right to pass and enforce its immigration laws in relation to its labor laws, it should always be the case that:

1. The existence of employer-employee, including with respect to migrants, should be determined under the labor laws of the host country where they work, and not by any trade or investment agreement;

2. That should a migrant be considered an employee, all of the pertinent labor laws of that host country should apply to her/him

A quick look at norms to determine employer-employee relationships in a few jurisdictions - Thailand, New Zealand, the U.S.<sup>15</sup>, the UK, and the Philippines – shows that one of the most important factors in determining the existence of employer-employee relationship is the existence of the right to employer to control not only the final outcome of the job, but also the means and manner of doing the job. Simply put, there is employer-employee relationship if the employer has the right to control the manner and means by which the work is done.

Also, provision of services, done on a full-time basis, over a long or indeterminable period of time would indicate the existence of an employer-employee relationship. The services provided by migrant workers such as factory workers, domestic helpers, of-

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<sup>15</sup> U.S. Department of Labor - Wage and Hour Division - Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA). (Revised May 2014) See: <http://www.dol.gov/whd/regs/compliance/wdfs13.pdf>

fice clerks, store clerks, etc. all have these characteristics of an engagement

relationship where there is an employer-employee relationship.

## 11. Tisa - Domestic Regulation Annex

*Applies to measures relating to licensing requirements and procedures, qualification requirements and procedures*

*"Regulation should be the prerogative of democratic legislators and devised to serve the public interest, not tailored to the whims of big business. This principle is being seriously undermined by the liberalization and deregulation agenda under TiSA and other international agreements. The leak confirms how even the reservations member states made are under threat. It is time for full transparency on these negotiations and for the negotiators to ensure the agreement does not undermine the right of democratic legislators to legislate."*

*Ska Keller*

*Greens/EFA vice-president and  
Trade spokesperson*

Putting conditions on domestic regulation constrains the basic capability to regulate on issues that do not in principle affect trade; it concerns measures that are non-discriminatory and that equally apply to domestic and foreign operators. As a consequence, it

implies a huge potential to reduce the regulatory margin of national authorities. It covers licensing requirements and procedures, qualification requirements and procedures, and technical standards, which are fundamental regulatory tools to guarantee high quality services. According to the proposals under TiSA, all domestic regulation would have to undergo a so-called 'necessity test': measures will have to be "administered in a reasonable, objective and impartial manner" and be "not more burdensome than necessary".

The "objectiveness" condition could, for example, turn a requirement to discriminate in favor of disadvantaged social categories (e.g. in order to get a license an operator has to hire a number of disadvantaged workers) incompatible with TiSA because it could be considered as a biased requirement. Requesting higher standards than international ones for being an authorized service provider could also be considered incompatible.

Domestic regulation disciplines strike at the core of the regulatory prerogative of public authorities. This has been a feature of various negotiations over the past 20 years since the GATS negotiations<sup>16</sup>. The EU hopes that, by reducing the number of negotiating parties under TiSA, it will be easier to reach an agreement on this issue in exchange for concessions elsewhere. From the leaked TiSA text, it appears that principles like proportionality and objectiveness take precedence over the right to regulate.

The text states that “Parties [merely] recognize the right to regulate and to introduce new regulations, on the supply of services within their territories in order to meet public policy objectives”. It is written nowhere that the right to regulate takes precedence over objectiveness and proportionality.

As in the annex, foreign corporations must receive the same “national treatment” as domestic ones, and could argue that such regulations violate their ability to provide the service. Allowable regulations could not be “more burden-

some than necessary to ensure the quality of the service,” according to TiSA’s domestic regulation leaks. No restrictions could be placed on foreign investment—corporations could control entire sector.

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<sup>16</sup> The negotiations on GATS rules focus on three distinct areas, which WTO members were unable to consider in detail and agree upon within the timeframe of the Uruguay Round. See [https://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_rules\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm).



**Written by @enterpraxis, correction by  
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