

# **Annex on Domestic Regulation**

## **Analysis of October 2015 Draft**

### **Background – Corporate Lobbying for Deregulation through TiSA**

Trade officials are currently negotiating a TiSA Annex on Domestic Regulation as well as a separate TiSA article on regulatory transparency, with the October 2015 drafts the most recent to be leaked. These TiSA provisions target regulations even if they are free from any bias in favor of domestic companies. TiSA work on the annex and on transparency takes the negotiations very far from legitimate trade concerns into the territory of a sweeping deregulatory political agenda.

By creating a wide range of new avenues to challenge or obstruct domestic regulation, TiSA negotiators would realize the deregulatory ambitions corporate lobbyists have set for the negotiations. The head of the Coalition for Services Industries, Samuel di Piazza, has testified to the US Congress that TiSA members should “modify or eliminate regulations.”<sup>1</sup> The National Retail Federation not only wants TiSA to ensure their members can enter overseas markets but to ease regulations “including store size restrictions and hours of operation that, while not necessarily discriminatory, affect the ability of large-scale retailing to achieve operating efficiencies.”<sup>2</sup>

The National Retail Federation is therefore claiming that a proper role for the public servants negotiating TiSA is to deregulate store size and hours of operation so that large corporations can achieve “operating efficiencies” and operate “relatively free of government regulation” – completely disregarding the public benefit in regulations that foster livable neighbors and reasonable hours of work. The leaked TiSA drafts and strategy documents from TiSA negotiators reveal that corporate lobbyists are right to believe they will take up their deregulatory cause.<sup>3</sup>

### **Enabling Foreign Interventions against Domestic Regulation**

The sections in the latest draft of TiSA that deal with government regulation are at their core about regulating government in the interest of transnational corporations, prescribing what regulations will be permitted and how they may be administered. The October 2015 draft of TiSA’s article on transparency puts a long list of obstacles in the path of government wanting to introduce new regulations. The article imposes the following requirements to enable foreign interests to intervene in a country’s domestic regulatory process:

- 1 Samuel A. Di Piazza, Jr., Vice Chairman, Institutional Clients Group, Citi, Chairman, Coalition of Service, Testimony, 12 March 2013, response to USTR ‘Request For Comments On An International Services Agreement’ Docket Number: USTR–2013–0001. Online at: <http://www.regulations.gov/#!documentDetail;D=USTR-2013-0001-0043>
- 2 National Retail Federation, ‘Comments of the National Retail Federation regarding International Services Agreements: Request for Comments and Notice of Public Hearing’, 26 February 2013. Online at: <http://www.regulations.gov/#!documentDetail;D=USTR-2013-0001-0050>
- 3 See, for example, European Commission, “TiSA – market access negotiations by country – Turkey”, 25 January 2015. Online at: <https://wikileaks.org/tisa/market-turkey/>

Requirement to publish in advance, paragraph 2(a) - Regulations and other measures would have to be published “in advance” and with sufficient detail so that foreign governments, corporations and individuals would be alerted that their trade interests might be affected. Some countries are proposing this requirement should be conditioned on whether such interventions are consistent with domestic law, but the US and Canada, among others, are advocating that this shall be done “to the extent possible” – leaving it to a trade panel to decide what is and is not possible. Regulations introduced to address an emergency, such as the increased licensing requirements for mines quickly implemented by a Canadian province after a catastrophic failure of a tailings dam<sup>4</sup>, would violate a TiSA requirement to publish in advance and to give “reasonable opportunity” for foreign interests to comment.

Requirement to give foreign interests the right to comment, paragraph 2(b), 3, 6 - Foreign interests are to be given “a reasonable opportunity” and “sufficient time” to comment on proposed regulations. “Reasonable” and “sufficient” are terms left to dispute panels to define. A “reasonable” lag time would have to be created between publication of a regulation and its entry into force.

Requirement to consider comments from foreign interests, paragraph 4 – The US, among other delegations is proposing in the October 2015 draft that governments “shall consider” comments they receive from foreign interests on proposed regulations.

Application to all levels of government? – In new wording added to the October 15 draft, the US states that TiSA’s transparency article would apply “to regulations at any level of government” – resulting in an absurd situation where even the smallest local government would have to assess their regulations for all their possible impacts on foreign commercial interests and create a process for foreign intervention in their regulatory process. The US is proposing that TiSA members create an annex listing which of their regulations are captured by TiSA’s transparency provisions.

## **Achieving Deregulation**

While TiSA transparency provisions would increase corporate capacity to influence and/or frustrate regulatory initiatives, its domestic regulation annex would establish a wide range of new grounds for regulations to be challenged. The scope of the annex is so broad - applying to measures that relate to licensing requirements and procedures, qualification requirements and procedures, and possibly technical standards – and the definitions of these categories of regulation so all-encompassing that it is hard to think of any regulation that would not be covered.

Depending on which proposal is ultimately accepted, under TiSA regulations could be challenged if they were:

- “More burdensome than necessary to ensure the quality of the service”, paragraph 4 - This draconian “necessity test” would create wide scope for regulations to be challenged. For example, the public consultation processes that are required for urban development are

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4 Times Colonist, “Province lets Mount Polley mine reopen, with restrictions”, 9 July 2015.

about ensuring development is acceptable to the community rather than “ensuring the quality” of construction services. They would fail the necessity test as more burdensome than necessary to ensure the quality of the service. Environmental bonds that mining and pipeline companies are required to post in case of spills and other environmental disasters are another licensing requirement that would not meet the test of being necessary to ensure the quality of the service. (See the analysis of the first draft of the Annex for a detailed explanation of necessity tests at <https://wikileaks.org/tisa/domestic/analysis/page-3.html>)

- Not based on “objective and transparent” criteria “related to ...the service being supplied”, Article 5(a). The US attempts through a footnote to mitigate some of the problems with this provision, saying that it would still allow authorities “to assess the weight to be give to such criteria.” This highlights the problem that any regulatory decision is necessarily a subjective judgment of regulators weighing competing values.
- The requirement to be based on “objective” criteria could also allow challenges to any criteria that are hard to quantify. California’s Financial Code, for example, states that in order to obtain a license to as a mortgage originator an applicant must demonstrate “such financial responsibility, character, and general fitness as to command the confidence of the community”<sup>5</sup>, criteria that leave much to the discretion of the regulator and are arguably not objective and not transparent. New Zealand’s Education Act allows the New Zealand Teachers Council to register prospective teachers, and applicants are rejected if they cannot demonstrate “good character”.<sup>6</sup> The Council defines good character by any “matters that it considers relevant”, which violates TiSA’s transparency requirements.
- Not “impartial with respect to all applicants”, paragraph 5(b) – This provision could make it a violation for governments to show “partiality” to particular categories of applicants such as non-profits, small businesses, or disadvantaged groups. For example, Florida’s Department of Business and Professional Regulation is required by state law to waive a variety of licensing fees for military veterans and to provide discounted fees for disabled veterans in particular.<sup>7</sup>
- Speeding up regulatory reviews, paragraphs 5(c), 6 (g,h,i,j,k, l,m, and o) The draft Annex has many provisions to prioritize speed of regulatory approvals over the public interest in thorough regulatory reviews. These proposals include imposing the following obligations on government:
  - paragraph 5(c), ensure “procedures do not in themselves unduly impede fulfillment of requirements”;

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5 California Department of Business Oversight, “Mortgage Loan Originators – Licensing Status”. Online at: [http://www.dbo.ca.gov/Licensees/Mortgage\\_Loan\\_Originators/licensing\\_status.asp](http://www.dbo.ca.gov/Licensees/Mortgage_Loan_Originators/licensing_status.asp)

6 New Zealand Education Council, “Good Character Policy for New Zealand Teachers”. Online at: <https://educationcouncil.org.nz/required/goodcharacter2007.stm>

7 Florida Department of Business and Professional Regulation, “Veterans Services – Fee Waiver Program”. Online at: <http://www.myfloridalicense.com/dbpr/VeteransServices.html>

- paragraph 6(g), indicate the time frame for processing of an application, or provide a “normal” or “indicative” time-frame;
- paragraph 6(h), begin processing an application without “undue delays”;
- paragraph 6(i), reach a final decision on an application in a “reasonable time-frame”;
- paragraph 6(j), provide applicants information on the status of their application “without undue delay”;
- paragraph 6(k), inform applicants of decisions within a “reasonable period of time”;
- paragraph 6(l), identify and allow a “reasonable time-frame” for applicants to remedy deficiencies;
- paragraph 6(m), inform applicants “without undue delay” if their application is rejected;
- paragraph 6(o), ensure that a decision is implemented “without undue delay”.

What constitutes an “undue” delay or a “reasonable” time-frame? Do public hearings and environmental assessments “unduly impede” the regulatory process, cause “undue delays”, and mean decisions are not made in a “reasonable time-frame”?

The answer to these questions obviously differ depending on the interests involved. For example, Europeans who are concerned about fracking would want their governments to give priority to thorough regulatory assessments whereas companies like Chevron, which has shale interests in Poland, Romania, and other European countries, are interested in getting licensing approvals as soon as possible. From a corporate perspective, moratoria on fracking, such as the ones imposed by Romania and Germany, quite obviously cause “undue” delays, do not afford “reasonable time-frames” for regulatory decisions and thus would be clear violations of the TiSA annex on domestic regulation.

- Restrictions on fees, paragraph 6(f) – Almost all TiSA members advocate that the annex should require authorization fees to be limited to what is “reasonable” and to what does not restrict the supply of the service. Since any fee restricts the supply of a service more than having no fees would, this provision would create pressures on governments to lower fees to the maximum extent possible. New Zealand and Peru are going further and advocating that fees be limited to only what would cover the administrative costs involved in processing an application.

If licensing fees are restricted in the way that TiSA members are advocating, how will governments - particularly at the local level – cope with the loss of revenue? Business license revenue can play a significant part in paying for a range of city services. California’s City of Santa Ana, for example, states on its website that “business license revenue is used to pay for Police, Fire, and Safety expenses as well as other general operating costs of the City”.<sup>8</sup>

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<sup>8</sup> City of Santa Ana, “Business License FAQ”. Online at: [http://www.ci.santa-ana.ca.us/finance/business/business\\_license\\_faq.asp](http://www.ci.santa-ana.ca.us/finance/business/business_license_faq.asp)

## **New Zealand Advocates Horizontal Necessity Test**

The most surprising change revealed in the October 10, 2015 leaked draft from previous versions of TiSA's Annex on Domestic Regulation is the new deregulatory position New Zealand is championing – that regardless of whether TiSA commitments of a service have been made regulations over all services will have to be “no more burdensome than necessary to ensure the quality of the service” and “based on objective and transparent criteria, such as competence and the ability to supply the service”(paragraphs 2 and 4).

This idea was originally considered sixteen years ago at the WTO, but ultimately rejected. However now, in the view of the current New Zealand government, a “necessity test” should be imposed on the regulation of even the most sensitive services. Under New Zealand's proposals, qualifications for teachers in both public and private schools, hospital standards, and licenses for toxic waste disposal are just some of the regulations that would have be reduced to the very low standard of being no more burdensome than necessary.

New Zealand's position on the Annex could conflict with regulations that fulfill obligations under the Treaty of Waitangi with the Maori. For example, qualification standards for New Zealand nurses require them to be able to “demonstrate ability to apply the principles of the Treaty of Waitangi/Te Tiriti O Waitangi to nursing practice”<sup>9</sup>, a criterion that could be argued is more burdensome than necessary to ensure the quality of the service. Under New Zealand's proposal for an across-the-board imposition of a necessity test, nursing qualifications would be subjected to this test even if New Zealand did not make any commitment for the nursing sector.

New Zealand is also advocating that the necessity test should be applied regardless of the “terms, limitations, conditions, or qualifications” governments have placed on their commitments. One implication of this position is that if New Zealand gets what it wants, it would end up not being able to schedule a horizontal limitation in order to shield obligations it has to the Maori from a challenge.

## **Deregulation Objectives Revealed in Bilateral Negotiating Strategies**

Even if New Zealand's extremely radical position is not adopted, and a necessity test and/or other TiSA provisions are only applied where commitments are made, this would still entail extensive deregulation across a wide range of sectors because the agreement is being structured to extract the broadest number of commitments possible. Countries are expected make commitments beyond their

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9 Nursing Council of New Zealand, “Guidelines for Cultural Safety, the Treaty of Waitangi and Maori Health in Nursing Education and Practice”. Online at: [www.nursingcouncil.org.nz/index.php/content/download/721/2871/file/Guidelines%20for%20cultural%20safety,%20the%20Treaty%20of%20Waitangi,%20and%20Maori%20health%20in%20nursing%20education%20and%20practice.pdf](http://www.nursingcouncil.org.nz/index.php/content/download/721/2871/file/Guidelines%20for%20cultural%20safety,%20the%20Treaty%20of%20Waitangi,%20and%20Maori%20health%20in%20nursing%20education%20and%20practice.pdf)

most far reaching FTA and anything they have offered in the WTO negotiations on services.

Leaked negotiating strategy documents from the EU<sup>10</sup> compare TiSA offers with a country's "best" FTA service commitments and set thresholds for the numbers of services that have to be committed. These documents also reveal that the deregulatory ambitions of corporations are being directly fed into the market access negotiations.

For example, the leaked European Union strategy for dealing with Turkey in the negotiations highlights the concerns of "major European retailers such as METRO and TESCO" about Turkey's new retail regulations.

If Turkey succumbs to EU demands and commits its retail sector to TiSA's national treatment and market access rules, the Annex will be triggered under Article 1. By making commitments, TiSA members are not only opening up services to foreign providers but also agreeing to deregulate under the terms of the Annex, so the ramifications of these commitments become significantly greater and harder to predict.

Turkey's distribution sector as a whole is a particular target of European negotiators and listed under: "Offensive points: Key market access requests that remain to be offered by Turkey." The EU criticizes Turkey for trying to preserve "broad policy space" in the TiSA negotiations and says that this effort to preserve policy space "defeats the purpose of any hybrid approach and negative list on NT[National Treatment]". At a November 2014 meeting, EU negotiators shamed Turkey as presenting one of the worst offers of any TiSA member – an indication of the intense pressure developing countries face when they choose to participate in services negotiations outside of the WTO.

Turkey's new Law on the Regulation of Retail Trade is a good example of the kind of measure that would be unlikely to survive a challenge taken under TiSA's Annex on Domestic Regulation. This law would clearly be covered by the very broad scope of the Annex as a measure "relating to licensing requirements and procedures...affecting trade in services" [Article 1, Scope & Definitions] European Commission officials investigated and found the legislation did not conflict with the EU-Turkey Customs Union – so it passed the test of whether it was a trade violation in the normal understanding of the term. But nonetheless the EU TiSA strategy is to pursue complaints about Turkey's regulations through TiSA because of "the high stakes for the European companies concerned."

The EU strategy document complains that the new Turkish retail regulations involve "excessive interference and cumbersome registration processes in establishing retail businesses." The Annex as currently drafted would offer strong grounds for a EU challenge against Turkey's law:

- Paragraph 4 –Licensing requirements and procedures for retail services would have to be

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10 European Union, "TiSA - market access negotiations by country - Turkey", 25 January 2015. Online at: <https://wikileaks.org/tisa/market-turkey/>

European Union, TiSA - market access negotiations by country – Israel", 25 January 2015. Online at: <https://wikileaks.org/tisa/market-israel/page-1.html>

“no more burdensome than necessary to ensure the quality of the service.” Thus far, only Canada and the US are objecting to the proposed insertion of a necessity test into TiSA.

- Paragraph 5(c) –Regulatory procedures could not “in themselves unduly impede fulfillment of requirements”. This TiSA provision seems tailor-made to support a EU complaint about Turkey’s “cumbersome registration process.” Yet despite knowing of Turkey’s vulnerability to a challenge on exactly these grounds, Turkish negotiators are backing 5(c).
- Paragraph 6(i) – The EU might also challenge Turkish retail procedures if applications on the basis that they are not processed “within a reasonable time frame.” Turkey is one of the proponents of this Annex provision.

The new Turkish Law on the Regulation of Retail Trade could fall foul of the TiSA Annex in a variety of other ways.

- Requirement to provide space for non-commercial uses is “more burdensome than necessary”. A licensing requirement for shopping malls in Turkey is that they allocate space for non-commercial uses – social and cultural activities, emergency medical, baby care, playgrounds, and prayer rooms. This requirement could be ruled to be a violation of the Annex because it is “more burdensome than necessary”, not based on the “ability to supply the service” (Article 4), and not related to “the service being regulated” (5(a)) Despite incorporating public, non-commercial requirements into its regulation of commercial shopping malls, Turkey is one of the countries advocating that the only regulatory criteria to be permitted under TiSA are ones that are “related to the service being regulated.”
- Requirement for “sufficient” playgrounds . The space to be allocated for playgrounds has to be “sufficient”, a requirement that could be judged not “not based on objective and transparent criteria” because “sufficient” is not defined in the regulations. (Articles 4 and 5((a))

With TiSA’s transparency requirements, Turkey’s retail regulations might never have been implemented in the first place. Obligated by these provisions to allow foreign interests to comment on proposed retail regulations, Turkey might have got warnings that it was risking a complaint under the Annex on Domestic Regulation. TiSA’s transparency provisions and its Annex on Domestic Regulation could thus work together to dissuade governments from introducing new regulations.