

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 classifications³

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 category⁵. 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

3 The numbers in the right-hand column cross-reference to the provisional UN Central Product Classification (UNCPProv) <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.

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 2005¹³ 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

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 services²⁰

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 ICANN²⁶, 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 countries³⁸ 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 governments⁴² 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 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 annex⁵⁰ 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 indirectly⁵⁵ 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