

5.

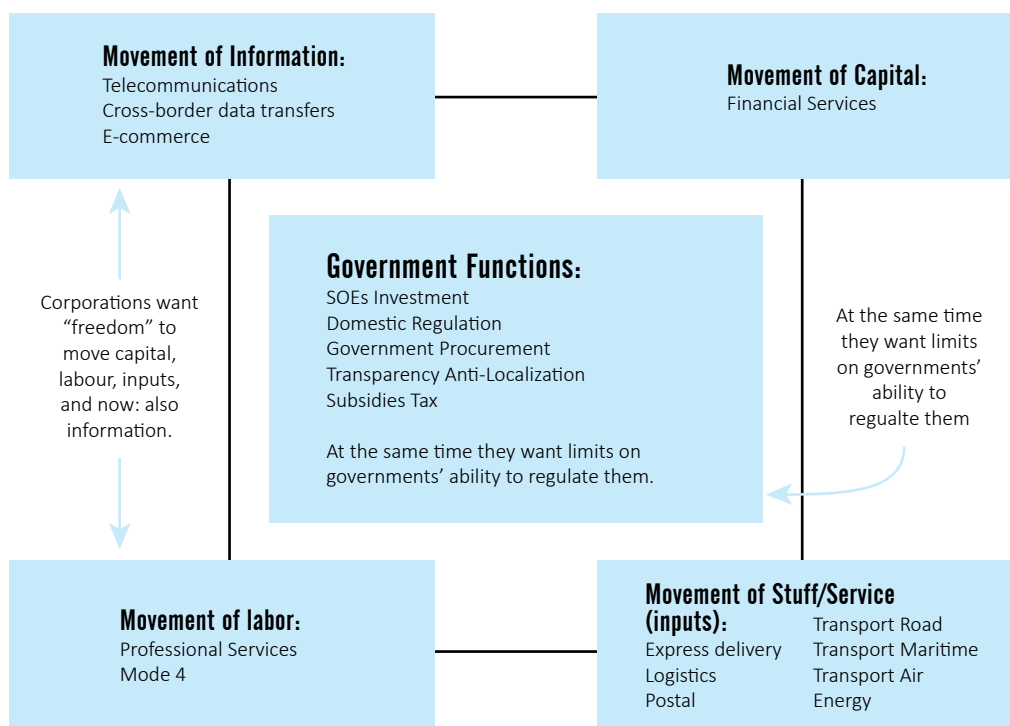
AN OVERVIEW OF TISA

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

How TiSA liberates global capitalism

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

Figure 5.1: Corporate Demands for TiSA: To Limit Functions of Government and to Ensure Complete Freedom of Movement across Borders¹

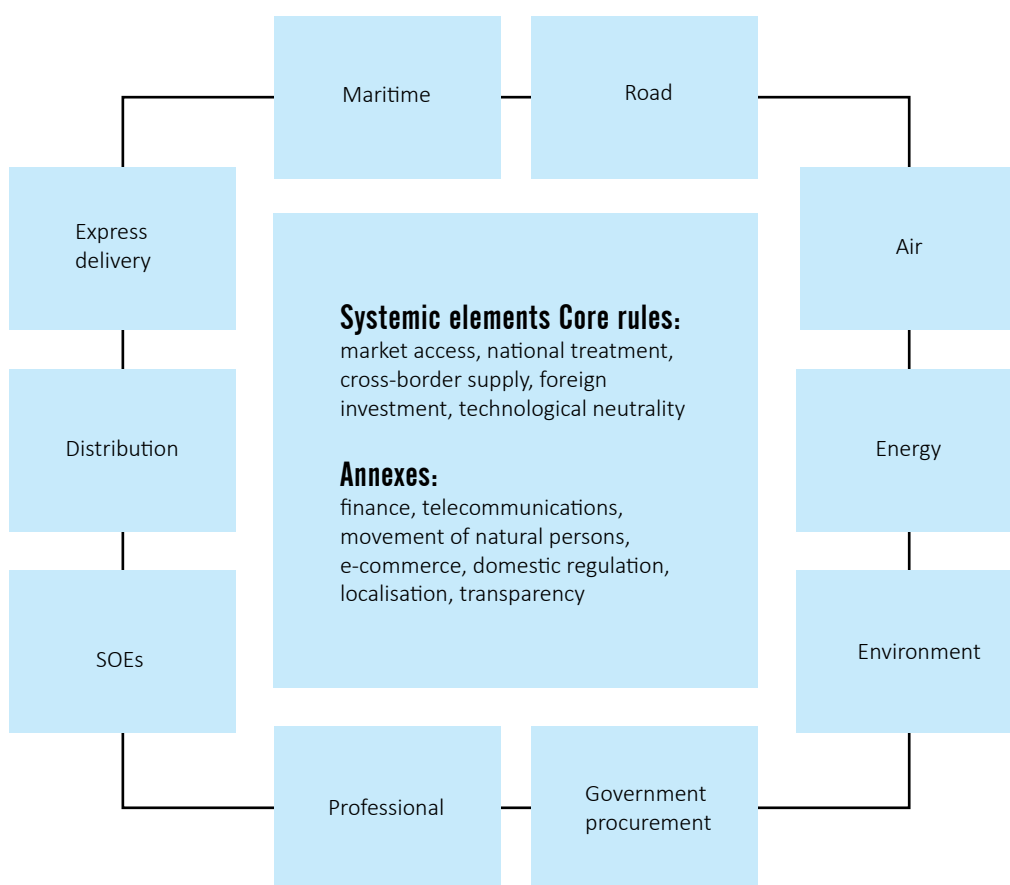


¹ Figure is adapted from a version by Deborah James, Director of International Programmes, Centre for Economic Policy Research, Washington DC

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

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

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



Handcuffs on future regulation

Team TiSA's goal of a 21st century agreement means the new rules and commitments must be flexible and extensive enough to accommodate the changing structures of capitalism and the *modus operandi* of powerful corporations for decades ahead. They complain that the GATS is rigid and its schedules and classifications are obsolete. To some extent that is true. When the GATS was drafted, the Worldwide Web was in its infancy. No-one could have predicted the way the Internet has developed and how it would change international commerce- or the concerns that has generated over information flows, privacy, financial stability, and national security. It is equally impossible to predict now what

technologies might emerge in the future, for example by harnessing artificial intelligence in currently unimaginable ways. Yet Team TiSA and the most aggressive of the TiSA parties want governments to promise *never* to regulate services that do not yet exist or new technologies that change the way the services they have committed to TiSA's rules are delivered.

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

Defining trade in services

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

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

Core rules

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

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

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

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

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

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

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

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

Schedules of countries' commitments

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

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

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

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

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

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

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

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

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

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

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

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

Domestic regulation disciplines

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

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

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

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

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

proponents⁸ are now trying to advance their demands through TiSA, in both the core text and an Annex on Domestic Regulation. The US, Canada and the EU oppose some of their worst aspects, but not all. These proposals are detailed in Appendix 9. These rules could have significant impacts on all services of importance to UNI, and need to be read alongside the annexes that impose further restrictions on specific sectors, such as financial services, telecoms and e-commerce.

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

E-commerce, technology and data

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

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

Prohibiting localisation requirements

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

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

8 Principally New Zealand, Australia, Hong Kong and Switzerland

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

10 *US – Gambling*, para 6.285

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

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

Empowering corporations to lobby

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

Public services

No public services carve out

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

Subsidies

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

Universal service obligations (USO)

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

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

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

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

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

State-owned Enterprises (SOEs)

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

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

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

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

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

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

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

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

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

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

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

21 The threshold was set at 200 million IMF special drawing rights (about US\$376 million) from the date the agreement comes into force and adjusted 3 yearly.

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

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

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

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

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

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

Social rights and privacy

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

*Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.*²⁵

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

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

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

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

25 US – Internet Gambling, para 6.316

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

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

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

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

National security

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

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

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

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

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

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