

APPENDIX 9

TiSA ANNEX ON DOMESTIC REGULATION

A number of countries have been trying for years to secure ‘disciplines’ on government regulation of technical standards, qualifications requirements and procedures, and licensing requirements and procedures in the GATS. They are now attempting to advance their demands through TiSA, in both the core text and an Annex on Domestic Regulation. New Zealand, Australia, Hong Kong and Switzerland are the main proponents. The US, Canada and the EU oppose some of their worst aspects, but not all.

The leaked annex from November 2016 shows there have been severe cuts to the original proposals, but the rules would still put additional handcuffs on TiSA governments’ right to regulate.

The scope of regulatory ‘disciplines’

The annex targets three kinds of regulation:

- **Technical standards.** Technical standards are ‘measures that lay down the characteristics of a service or the manner in which it is supplied’.¹ They exist for virtually every kind of service that affects people’s everyday lives, including health and safety codes, consumer protections, town planning and zoning, bank opening hours and universal service requirements for postal delivery, and more technical requirements for construction, infrastructure, mortgage lending or broadband.
- **Qualification requirements and procedures** refer to substantive requirements that show the competence of a real person to supply a service, and which they need to demonstrate before they are authorised to supply that service (eg. a specified degree or diploma from an accredited body), as well as the procedural rules to show they comply with those requirements (eg. proof of a period in practice or continuing education and training, accreditation by a professional board or body, payment of related fees). This clearly covers traditional professions and specialists, such as engineers or lawyers and people who require occupational skills training or apprenticeships, such as telecom technicians and electricians. Government may introduce new qualification requirements in response to market failures or poor practices, such as for financial advisers.
- **Licensing requirements and procedures.** Many services require the company and/or personnel operating a service to hold a licence that authorises them to provide the service: banks, transport operators (bus, ferry, taxi, rail, ports, airports), utilities and networks (telecoms, satellites, ISPs), importers and customs agents, foreign exchange dealers, security firms, and personnel agencies, among others. As with qualifications, the ‘disciplines’ in the annex apply to the criteria for a licence and the procedures to gain that licence.

¹ TiSA, Article 3(e), Annex on Domestic Regulation, dated 15 November 2016

The handcuffs on government regulation

A number of countries² want to impose a multi-layered test that would require governments to take the most light-handed approach reasonably available to achieve the goal of the regulation.³ This mirrors the framework of the WTO negotiations,⁴ and would mean that *existing and future* regulations must:

- not pose ‘unnecessary’ barriers to trade in services; this invites claims that a government could have taken a less restrictive approach to achieve its policy goal or that the evidence it relied on was flawed;
- be based on ‘objective and transparent’ criteria, such as the competence and ability to supply the service. That opens to challenge any regulations that apply ‘subjective’ criteria, such as broad environmental, social, and regional development considerations, concerns of the local community or indigenous rights, or that allow significant discretion to the authorising body.
- be the ‘least burdensome necessary’ to achieve ‘quality’. This is again invites claims that a less burdensome alternative was reasonably available to achieve the narrow goal of ‘quality’; and
- licensing and qualification procedures must not themselves restrict the supply of the service; for example, imposing procedural requirements that only some applicants could satisfy.

Canada and the US are opposed.

Potential challenges to administrators

General rules that ‘affect’ services transactions must also be *administered* in a ‘reasonable, objective and impartial’ way, which are all contestable concepts:

- **‘Administration’** spans assessing the authenticity of qualifications, self-reporting requirements on financial firms, decisions on whether to grant a resource consent or licence to operate a service, assessment of compliance with consumer protection laws, and taking disciplinary action and imposing penalties for breaches of regulations.
- Almost any administrative decision could be challenged as **‘unreasonable’** by another TISA government on behalf of an unhappy foreign business.
- **‘Objective’** requires the interpretation of general criteria and the weighting given to them to be public, clear and explicit, and based on strong evidence, with no discretionary elements or implicit judgement calls.
- An **‘impartial’** decision implies commercial and market considerations. Recognition of local cultural, social or development factors, for example, could be cited as evidence of bias. Equally, administration conducted by a state entity that is also a service supplier could be challenged as not impartial.

This applies to all regulation of general application, not just the three categories discussed above. The equivalent provision on administration in the GATS only applies in ‘sectors where commitments are undertaken’. Australia and Japan want it to apply to all services in TiSA. Again, even if it only applies to countries’ schedules the more extensive commitments in TiSA would broaden its potential impact.

As in the GATS, governments must provide for prompt review of administrative decisions, as soon as practicable.

Implications of the annex

The obligations in the annex, except for those on transparency, apply only to services for which the government has taken a market access or national treatment commitments in TiSA, and subject to

2 Colombia, Switzerland, Chile, Hong Kong, South Korea, Mauritius, Mexico, New Zealand, Peru

3 TiSA, Article 3, Annex on Domestic Regulation, dated 15 November 2016

4 GATS 1994, Article VI.4

any reservations it has listed.⁵ However, those commitments in TiSA are extensive and these rules could severely restrict the policy space and regulatory sovereignty of every TiSA party. There is no place in a country's schedule to limit the application of the disciplines themselves, and governments rarely consider them when deciding on their market access and national treatment commitments.

Cumulatively these constraints on domestic regulation could have a serious chilling effect on regulators, administrative bodies and decision makers, making them overly cautious to avoid public embarrassment and long costly legal challenges. Ultimately, they restrict the sovereign right and responsibility of governments to regulate in the national interest.

Agreeing to these disciplines in TiSA would also create a worrying precedent for the ongoing GATS negotiations, even if they applied only to new regulation. Countries in the global South would face a high risk that new regulations, for example adopted when they decide to privatise a service, would be challenged as unnecessarily burdensome on commercial interests. Likewise, the rules would inhibit re-regulation when deregulation failed. Even rich countries that face regulatory failures through excessive deregulation and need to re-regulate would face severe constraints. If the disciplines apply to existing regulations as well, the administrative burden would be unbearable for many countries and the interference with regulatory sovereignty would be intolerable.

⁵ TiSA, Article 1, Annex on Domestic Regulation, dated 15 November 2016. New Zealand is the only country that wants the rules to apply to all services.