

TRADE IN SERVICES AGREEMENT (TiSA)

Localization Provisions

June 2016

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Reason: 1.4(b)

Declassify on: Five years from entry into force
of the TiSA agreement

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New Provisions Applicable to All Services

Inclusion in this working document of the following articles from the U.S. proposal for Part III of the core TiSA text is intended to facilitate negotiation and is without prejudice to the final inclusion and arrangement of such articles in the core TiSA text or an annex.

Article X.1: Local Presence

[AU/CA/CO/CR/EU/HK/JP/KR/IS/MX/NO/NZ/PE/US propose; CL/LI/PK considering: No Party may require a service supplier of another Party **[MU oppose:** to establish or maintain a commercial presence, or] to be resident **[AU/JP propose:** or domiciled ¹], in its territory as a condition for the supply of a service as described in Article I-1.2(a), (b), and (d).]

Article X.2: Local Management and Boards of Directors

[AU/CA/CL/CO/EU/HK/IS/JP/KR/MU/MX/NO/NZ/PE/US propose: 1. No Party may require that an establishment supplying services through a commercial presence in its territory appoint to senior management positions natural persons of any particular nationality.]

[AU/CL/CO/JP/ MX/PE/US propose; CA/KR/MU considering; EU/NO oppose: 2. A Party may require that a majority **[AU propose:** or less ²] of the board of directors, or any committee thereof, of a juridical person of another Party established in its territory, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of persons of the other Party to exercise control over **[AU/CA propose:** its] **[AU/CA oppose:** the] juridical person **[AU/CA oppose:** of the other Party.]]

[EU/HK propose; NO considering; AU/CO oppose: 2. No Party may require any member of the board of directors, or any committee thereof, of a juridical person of another Party established in its territory, be of a particular nationality, or resident in the territory of the Party.]

[NZ propose; CO considering; EU oppose: 2. No Party may require that a majority of the board of directors, or any committee thereof, of an establishment supplying services through a commercial presence in its territory, be of a particular nationality, or resident in the territory of the Party.]

Article X.3: Local Content and Other Performance Requirements

[AU/CA/EU/JP/NZ/US propose; CL/KR/MX/NO considering:

1. No Party may, in connection with the supply of a service by a service supplier **[AU/CA/CL/JP/KR/NZ propose:** through commercial presence], impose or enforce any requirement or enforce any commitment or undertaking:
 - (a) **[AU/CA/EU/NZ/US propose:** to achieve a given level or percentage of domestic content;]
 - (b) to purchase, use or accord a preference to goods produced **[CA/EU propose; CO oppose:** or services provided] in its territory, or to purchase goods **[CA/EU propose; CO oppose:** or services] from persons in its territory;

¹ AU can withdraw 'or domiciled' if parties using 'domicile' in their schedules can confirm they understand this to be covered by 'to be resident'.

² AU proposal would clarify that a minority requirement on the BoD that materially impairs control would be inconsistent with this paragraph. We welcome views from TiSA Parties as to whether this addition would help bridge the gaps between the proposals for paragraph 2.

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- (c) to transfer [AU/CA/EU/NZ/US **propose:** a particular] technology [CA/EU **propose:** , a production process] or other proprietary knowledge to a person in its territory; [US **propose;** AU/CA/CO **considering:** or
- (d)
 - (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party³; or
 - (ii) that prevents the purchase or use of particular technology in its territoryso as to afford protection on the basis of nationality to persons of the Party or to technology of the Party or persons of the Party.]

AU support for 1(d) is contingent on the inclusion of the following paragraph, drawing on language proposed in the e-commerce annex:

5bis: Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 1(d) to achieve a legitimate public policy objective, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or disguised a restriction on trade.

- (d) [CA/EU **propose:** to export a given level or percentage of goods or services;]
 - (e) [CA/EU **propose:** to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with a commercial presence;]
 - (f) [CA/EU **propose:** to restrict sales of goods or services in its territory that such commercial presence produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;]
 - (g) [CA/EU **propose:** to supply exclusively from the territory of the Party a good produced or a service provided by such commercial presence to a specific regional or world market;]
 - (h) [EU **propose:** to locate the headquarters of that service supplier for a specific region or the world market in its territory;
 - (i) to hire a given number or percentage of its nationals;
 - (j) to achieve a given level or value of research and development in its territory; or
 - (k) to restrict the value or volume of exports or of sales for exports.]
2. No Party may, in connection with the supply of a service by a service supplier through commercial presence, condition the receipt or continued receipt of an advantage on compliance with any requirement:
- (a) [AU/CA/EU/NZ/US **propose:** to achieve a given level or percentage of domestic content; [AU/NZ/US **propose:** or]
 - (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory [CA/EU **propose:** ;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with a commercial presence; [CA **propose:** or]

³ For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

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- (d) to restrict sales of goods of a commercial presence in its territory by relating such sales in any way to the volume or value of its exports or foreign exchange earnings] [EU propose: ; or
 - (e) to restrict the value or volume of exports or of sales for exports].
3. Paragraphs 1 and 2 do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs, or to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
 4. Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with the supply of a service, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
 5. Paragraph 1 (c) [EU propose: does] [JP/US propose: and (d) do] not apply:
 - (a) when a Party authorizes use of an intellectual property right in accordance with Article 31[AU/JP/NZ propose; CA considering: ⁴] of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, [JP propose: paragraph 3 of] Article 39 of the TRIPS Agreement; or
 - (b) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws [NZ propose: ⁵].

[EU propose:

6. Notwithstanding the Article X [Reservations], a Party shall neither impose nor maintain any measure inconsistently with its obligations under the WTO Agreement or under Articles [X,Y,Z - provisions in TiSA that restate those obligations] of this Agreement, even if such measure has been scheduled by that Party in Annex.]

[AU/US propose:

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on trade in services, paragraphs 1 and 2 shall not be construed to prevent a Party from adopting or maintaining a measure related to the conservation of living or non-living exhaustible natural resources.]

[AU/CA/JP/US propose:

7. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
8. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.]]

4 [AU/JP/NZ propose; CA considering: The reference to Article 31 includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN (01)/DEC/2).]

5 [NZ propose: The Parties recognize that a patent does not necessarily confer market power.]

Article X.4: Scheduling of Localization Commitments

NOTE: The "Subject to terms, conditions, limitations ..." language at the beginning of Articles X.1-X.3 has been deleted in favor of addressing scheduling solely in this Article.

[AU/CA/EU/US propose; CH/CO/CR/JP/MX/MU/NO/NZ/PE considering:

1. Articles X.1, X.2, and X.3 (Local Presence, Local Management and Boards of Directors, Local Content and Other Performance Requirements) do not apply to any measure maintained by a Party on the date this agreement takes effect, to the extent that the Party has inscribed a **[AU propose: term,]** condition **[AU propose: , limitation]** or qualification **[CH propose; EU considering: in the NT column]** in Section B of Part I or Part II of its Schedule, or to the continuation or prompt renewal of such a measure.]
2. If a party amends a measure referred to in paragraph 1 in a way that reduces or eliminates the inconsistency of that measure with Articles X.1, X.2, or X.3 as it existed immediately before the amendment, a Party may not subsequently amend that measure in a way that increases the inconsistency with Articles X.1, X.2, or X.3.
3. Articles X.1, X.2, and X.3 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities as set out in Section A of Part I of each Party's Schedule.]

X.5: Exceptions

[US propose; EU oppose:

1. Nothing in [Articles X.1 - X.3] shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.]

[AU/CA/CL/TW/CO/JP/KR/MU/PE/US propose:

2. Articles X.1-X.3 do not apply to government procurement.]

[AU/CA/CO/MU propose; PE considering:

3. Articles X.1 and X.3 do not apply to financial services.]

[CA/CO/MX/US propose: The applicability of Articles X.1, X.2, and X.3 to certain financial services is under consideration.]