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**TRADE IN SERVICES AGREEMENT  
(TiSA)**

**Localization Provisions**

**~~October~~ November 2016**

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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**

No Party may require a service supplier of another Party to establish or maintain a commercial presence, or to be resident, 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**

~~[CH considering:—~~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/CA/CH/CL/CO/CR/IL/JP/MU/MX/KR/PA/PE/US propose; PK considering; EU/HK/IS/NO/NZ oppose: 2. A Party may require that a majority [AU propose: or less] 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 that own or control that juridical person to exercise control over that juridical person.]

***AU note:** Australia's proposal for "or less" would clarify that a minority requirement on boards of directors 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.*

[EU/HK/IS/LI/NO/TR propose; IS/NZ considering; AU/CA/CL/CO/IL/MU/KR/PE 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/TW propose; CO/MU considering; CA/CH/CL/EU/IL/KR/PE 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/CL/CO/EU/IL/IS/JP/KR/LI/MU/MX/NO/NZ/PE/TR/TW/US propose; CH/CR/HK/PA/PK considering: 1. No Party may, in connection with the supply of a service by a service supplier<sup>1</sup> [CA propose: of a Party or a non Party] [US oppose: through commercial presence], impose or enforce any requirement or enforce any commitment or undertaking:~~

- ~~(a) — [CR/HK/PA/PE/PK considering: to achieve a given level or percentage of domestic content;]~~
- ~~(b) — [CR/HK/MU/PA/PE/PK considering: to purchase, use or accord a preference to goods produced [CA/EU/NO propose; AU/CL/CR/CO/IL/MU/MX/PE/TR oppose: or services provided] in its territory, or to purchase goods [CA/EU/NO propose; AU/CL/CR/CO/IL/MU/MX/PE/TR oppose: or services] from persons in its territory;]~~
- ~~(c) — [CR/HK/PA/PE considering: to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;] [CL/IL/KR/MX/PA considering:<sup>2</sup>] [MU propose:<sup>3</sup>]~~
- ~~(d) — [AU/CO/CR/EU/HK/IL/KR/LI/MX/NO/NZ/PA/PE/PK/TR/TW considering:
  - ~~(i) — to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party<sup>4</sup>; or~~
  - ~~(ii) — that prevents the purchase or use of particular technology in its territory;]~~~~

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<sup>1</sup> [CA propose: For the purposes of this article trade in services as defined in paragraph 1(2) also includes the supply of a service by a service supplier of a non Party, through commercial presence in the territory of any Party.]

<sup>2</sup> [; /CR/IL/KR/MX/PA considering: For greater certainty, nothing in para. 1 shall be construed to prevent a Party from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its territory.]

<sup>3</sup> [MU/PK propose: For greater certainty, para. X.3.(c) shall not be construed to impede the transfer and dissemination of technology or production processes.]

<sup>4</sup> 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.

- (e) ~~[AU/CL/CR/HK/IL/JP/KR/MX/NZ/PA/PE/PK/TR/TW/US considering: to export a given level or percentage of [PA/PE/PK/TR oppose: goods or] services;]~~
- (f) ~~[AU/CR/HK/IL/KR/IS/MX/PA/PE/PK/NZ/TR considering: 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;]~~
- (g) ~~[CR/IL/NO/PA/PE/PK/NZ/TR considering: to restrict sales of services in its territory that such [a service supplier, though its] [commercial presence] produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;]~~
- (h) ~~[CR/IL/JP/NO/NZ/PA/PE/PK/TR/TW considering: to supply exclusively from the territory of the Party a service provided by such commercial presence to a specific regional or world market;] or~~

**Note** Parties will reflect on the references to “produces” and/or “volume” in (f), and (g), in light of the deletion of the references to “goods” in (e), (g), and (h).

- (i) ~~[CA/JP/US propose; CA/EU considering; AU/CL/CO/CR/KR/PA oppose: to adopt:~~

- (i) ~~— a given rate or amount of royalty under a license contract;<sup>5</sup> or~~
- (ii) ~~— a given duration of the term of a license contract,~~

~~in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future license contract freely entered into between the service supplier and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with the license contract by an exercise of non judicial governmental authority of the Party. For greater certainty, paragraph I(i) does not apply when the licence contract is concluded between the service supplier and a Party.]~~

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:~~

<sup>5</sup> ~~[JP propose: A “license contract” referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.]~~

- (a) ~~[AU/CA/CL/CO/EU/IL/IS/JP/KR/LI/MU/MX/NO/NZ/TR/US propose; CR/PE/PK considering: to achieve a given level or percentage of domestic content;~~
- (b) ~~[AU/CA/CL/CO/EU/IL/IS/JP/KR/LI/MU/MX/NO/NZ/TR/US propose; CR/LI/PE/PK considering: to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;]~~
- (c) ~~[CA/CL/CO/EU/JP/MU/NO propose; AU/CR/IS/LI/PE/PK/NZ/TR considering: 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;] or~~
- (d) ~~[AU/CA/CL/CO/JP/MU/NO propose; AU/CR/EU/IL/IS/LI/PA/PE/PK/NZ/TR considering: to restrict sales of services 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.]~~

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) [does] [, (d), and (i) do] not apply:~~

- (a) ~~when a Party authorizes use of an intellectual property right in accordance with Article 31<sup>6</sup> 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, 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.<sup>7</sup>~~

<sup>6</sup> ~~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).~~

~~{CR/EU/LI/NO/PE/NZ considering: 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.}~~

~~{CA/CL/CO/CR/EU/HK/KR/MX/NO/NZ/PE/TR/TW considering: 7. — [PK propose: Paragraphs 1 and 2] [PK oppose: Paragraph (1)(d)] [JP propose: and (1)(i)] shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on trade in services.}~~

~~{CA/JP/US propose: 8. Paragraph 1(i) shall not apply [if when] the requirement is imposed or the commitment or undertaking is enforced by a [court or tribunal] [as equitable remuneration under the pursuant to that] Party's copyright laws.}~~

~~9. — For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.~~

~~10. — 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.~~

~~{EU propose: 11. — This article is without prejudice to the WTO commitments of a Party.}}~~

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**CHAIR'S LANDING ZONE PROPOSAL:**

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~~The Parties recognise that a patent does not necessarily confer market power.}~~

**Article X.3: Local Content and Other Performance Requirements**

1. No Party may, in connection with the supply of a service by a service supplier through commercial presence, impose or enforce any requirement of enforce any commitment or undertaking.<sup>8 9</sup>

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;<sup>10</sup>

[CR considering:

- (d) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party;<sup>11</sup> or
- (ii) that prevents the purchase or use of particular technology in its territory;]
- (e) to export a given level or percentage of services;
- (f) 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;
- (g) to restrict sales of services 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;

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<sup>8</sup> For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from imposing or enforcing a requirement or enforcing a commitment or undertaking to train or employ workers in its territory, provided that such training or employment does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.

<sup>9</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

<sup>10</sup> For greater certainty, nothing in paragraph 1(c) shall be construed to prevent the transfer of a particular technology or production process, where such transfer is not a requirement imposed or enforced by a Party or a commitment or undertaking enforced by a Party.

<sup>11</sup> 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.

(h) to supply exclusively from the territory of the Party a service provided by such commercial presence to a specific regional or world market; or

(i) ~~to adopt:~~

(i) ~~a given rate or amount of royalty under a license contract;<sup>12</sup> or~~

(ii) ~~a given duration of the term of a license contract.~~

~~in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future license contract freely entered into between the service supplier and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that license contract by an exercise of non judicial governmental authority of the Party. For greater certainty, paragraph 1(i) does not apply when the license contract is concluded between the service supplier and a Party.]<sup>\*</sup>~~

*<sup>\*</sup> Proponents of (i) to consult with Parties to determine whether there is a possible path for inclusion of this discipline in TiSA.*

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) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the value of exports or to the amount of foreign exchange inflows associated with a commercial presence; or

(d) to restrict sales of services 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.

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.

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<sup>12</sup> [A “license contract” referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.]

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) ~~and~~; (d) ~~and (i)~~ not apply:

(a) when a Party authorizes use of an intellectual property right in accordance with Article 31<sup>13</sup> 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, 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.<sup>14</sup>

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.

[CR considering: 7. Paragraph (1)(d) [and (1)(i)] shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public [welfare]\*\* objectives, [such as public health, safety, and the environment,] provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on trade in services.]

*\*\* Parties agree on the objective of this paragraph, but will reflect on and further discuss whether to replace or elaborate upon use of the term "welfare", including in light of language used in any similar exception(s) agreed to in other areas of the Agreement.*

[8. ~~Paragraph 1(i) shall not apply [if] [when] the requirement is imposed or the commitment or undertaking is enforced by a [court or] tribunal [as equitable remuneration under the] [pursuant to that] Party's copyright laws.~~]

<sup>13</sup> 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).

<sup>14</sup> The Parties recognise that a patent does not necessarily confer market power.

89. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

409. 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.

[11. — This article is without prejudice to the WTO commitments of a Party.]\*\*\*

\*\*\* *EU to reflect and clarify the need for, and function of, this paragraph, in light of text proposed for inclusion in Article 21 of the current Institutional Provisions text.*

#### **Article X.4: Scheduling of Localisation Commitments**

1. Articles X.1, X.2, 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 condition or qualification 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, or 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.

**Note** – *With respect to paragraph 3, it is not the intention of Parties that a measure or sector listed in Section A or Section B of a Party's schedule (for example, as a reservation solely against National Treatment) creates a reservation against all of the obligations in this Annex. This issue will need to be resolved alongside the approach to scheduling in Part II of the Agreement.*

**X.5: Exceptions**

~~[US~~ **AU 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.]

<p><i><b>Note</b> – Parties share an understanding that the obligations in this Annex are not intended to apply to government procurement.</i></p>
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**[AU/CA/CL/CO/IL/MU/MX/NZ propose; CR/KR/PE considering; EU/JP/NO/PA/US oppose:** 2. Articles X.1, **[CA/NZ oppose: X.2]** and **[NZ considering: X.3]** do not apply to financial services.