

**The Trade in Services Agreement (TiSA)**

**How Will TiSA Affect Your Services?**

**Introducing a set of tables that assess whether TiSA could expand trade rules and sector commitments that limit a government’s ability to regulate or provide public services.**

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**Preface – Why this document?**

Public Services International (PSI) believes that the web of trade agreements in existence today is largely incompatible with full and effective functioning of quality public services. At the heart of this, trade agreements define all activity of value as market-based transactions in tradable commodities. The commodity mindset undermines public services that are designed to fulfill social needs or remedy market failures. Thus, the most effective way to protect public services is not to enter into these agreements.

Citizens are often told by governments that services in their country have already been liberalized so there is nothing to worry about in TiSA, the Trade in Services Agreement. This is rarely the case. Understanding exactly where the threats lie in trade agreements is necessary to defend against them. This document has been commissioned by PSI in partnership with Our World Is Not For Sale (OWINFS) and Friedrich Ebert Stiftung (FES) to help people understand where the current threats are in the Trade in Services Agreement.

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PSI’s recent publications provide essential economic, legal and political context for understanding TiSA:

* Scott Sinclair and Hadrian Mertins-Kirkwood, *TISA versus Public Service* (2014), available [here](http://www.world-psi.org/en/psi-special-report-tisa-versus-public-services).
* Ellen Gould, *The Really Good Friends of Transnational Corporations Agreement* (2014), available [here](http://www.world-psi.org/en/psi-special-report-really-good-friends-transnational-corporations-agreement).
* Analysis of TiSA text and annexes, listed in part 6, page 17.

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**Glossary**

**DR –** Domestic regulation. TiSA has a proposed annex on domestic regulation. It includes over 20 trade rules that apply to measures that “relate to” qualification requirements and procedures, technical standards and licensing requirements, among others. Among them are requirements that domestic regulations must be “objective” and “no more burdensome than necessary to ensure the quality of a service.” A measure might violate these rules even if it is not discriminatory (complies with national treatment) and not a quantitative limit on services (complies with market access).

**FTA** – Free Trade Agreement. An FTA is a treaty that governs trade relations between two or more countries. Other terms with the same meaning include Economic Partnership Agreement (EU), Regional Trade Agreement (UNCTAD and WTO), and Preferential Trade Agreement (WTO).

**GATS** – General Agreement on Trade and Services. The GATS is the multilateral agreement on trade in services to which all WTO members are parties. It is a positive list agreement.

**MA** – Market access. Market access is an obligation that allow for foreign exporters of services, or foreign service providers or foreign investors, to access the market of an importing country. The obligation consists of six trade rules that prohibit various types of quantitative limits on services (e.g., monopolies, quotas, etc.).

**MFN** – Most-favored nation treatment. MFN is a trade rule that requires a government to treat foreign services and foreign service suppliers from another member country, no less favorably that it treats those from its most-favored trading partner (i.e., it prohibits discrimination based on country of origin).

**Modes** – In GATS and other treaties, countries schedule their commitments on services according to both sectors and modes of delivering a service for each sector that is committed. There are four modes of service delivery:

**Mode 1** – Cross-border delivery of a service. The service supplier performs the service on one country and the consumer receives it in another. Example – An architect in Panama sends a blueprint to a construction company in Mexico.

**Mode 2** – Service consumed abroad. The consumer travels to another country to consume the service. Example – An individual consumer in the United States travels to Mexico to undergo cosmetic surgery.

**Mode 3** – Commercial presence. A company delivers a service in the same country where it is located. The service would be *international* trade if a foreign investor owns the company providing the service (i.e., it is a subsidiary). Example – A bank in Mexico makes loans to Mexican construction companies. The Mexican bank is owned by a U.S. bank holding company.

**Mode 4** – Movement of natural persons. Services are supplied by nationals of one member of a trade agreement in the territory of another, requiring the physical presence of the service provider in the host country. Example – A nurse from South Africa travels to the United States and works in a U.S. hospital.

**NT** – National treatment. National treatment is a trade rule that requires a government to treat service suppliers no less favorably that it treats its own service suppliers (i.e., no discrimination against foreign suppliers).

**Negative list** – A presumption that all sectors are covered by TiSA’s national treatment rule unless a country schedules its “negative-list” decision to exclude a sector from the agreement. If a sector is not listed, the agreement DOES apply.

**Positive list** – A schedule that shows the specific sectors in which a country commitments to follow specific trade rules (national treatment, market access or additional commitments), and for each rule, the modes of supply to which the commitment applies. If a sector is not listed, the agreement DOES NOT apply.

**TiSA** – Trade in Services Agreement. A coalition of highly developed countries is leading TiSA negotiations outside of the WTO in hopes of later incorporating TiSA commitments and trade rules into the framework of GATS within the WTO.

**How Will TiSA Affect Your Services?**

1. **What is TiSA?**

	1. **A treaty for half of global GDP**
	The Trade in Services Agreement (TiSA) is a proposed trade treaty between 23 participants and 50 countries counting EU members (as of mid-2016) that seeks to further liberalize international trade in services. The participating countries account for 75 percent of the 44 trillion-dollar service economy (USD), which means that TiSA would cover about 51 percent of global GDP. (USTR 2016). TiSA is designed to expand upon the trade commitments and rules of the WTO’s General Agreement on Trade in Services (GATS) and smaller agreements on services. Business coalitions are highly critical of developing countries as “lacking ambition” in their GATS commitments. They are also frustrated that a decade of GATS negotiations on domestic regulation have produced a stalemate. As a result, the U.S. Coalition of Service Industries and the European Services Forum are pushing governments to negotiate TiSA—outside of the WTO—as a vehicle for achieving business objectives. (Gould 2014)
	2. **TiSA timeline**
	In February 2016, TiSA negotiators set the end of 2016 as a deadline for completing the agreement—a goal that would require them to overcome major differences within the core text and triage 13 or more annexes down to as few as six. Remaining annexes would become part of a “built-in agenda” for ongoing negotiations. (Inside U.S. Trade, 28 January 2016).
	3. **Layer cake**

TiSA is designed to operate as the top layer of several agreements on trade in services:

* + 1. ***GATS*** – The bottom layer, the baseline, is the WTO’s General Agreement on Trade in Services (GATS).
		2. ***FTAs*** – The middle layer is composed of regional and bilateral trade agreements. These include so-called free trade agreements (FTAs), regional trade agreements (RTAs), and economic partnership agreements (EPAs).
		3. ***TiSA –*** The top layer is TiSA. It expands coverage and adds rules on top of the lower layers. It also requires countries to provide the most favorable treatment from a lower layer to all TiSA countries. (TiSA Core Art. on Most-Favored-Nation Treatment). Once it is completed, participating countries could unilaterally incorporate TiSA commitments and annexes into their WTO commitments. (EC, TiSA Modular Approach, 2012). The components of TiSA are summarized below in section 4. These include (a) a core text, (b) schedules for positive-list or negative-list commitments, (c) a schedule for MFN reservations, and (d) as many as 13 annexes that limit government regulation in areas of greatest interest to business.

**Three layers**

**GATS – Positive list commitments**

**FTAs – Negative- list reservations (U.S. FTAs)**

**TiSA – Negative-list reservations on NT;
positive-list commitments for MA**

 **Plus new sector rules**

 **Plus new rules on domestic regulation**

 **Plus most favorable treatment**

* 1. **This document**This document has two purposes. First, it provides an overview of the three layers of trade agreements on services—GATS, FTA chapters, and TiSA—and how they relate to each other. Second, it introduces a series of tables that show how TiSA might expand trade rules and sector commitments beyond the status quo:

		1. ***The baseline set by the WTO / GATS*** (Part 2, introducing Table 1) shows the baseline GATS commitments in public service subsectors for selected countries.
		2. ***How FTAs expand upon GATS*** (Part 3, introducing Table 2) shows how several selected FTAs expand upon the GATS commitments for these countries.
		3. ***How TiSA expands upon GATS and FTAs*** (Part 4, introducing Table 3) compares these countries in terms of their GATS and FTA commitments. Its purpose is to show where TiSA could expand coverage of public services. It does this by highlighting the public services in jeopardy of further liberalization under the TiSA if they are not specifically excluded in the TISA schedules.

Part 5 is a summary and part 6 outlines an on-line library of TiSA documents and other literature. The sources cited in this paper are available in this library.

1. **Baseline set by the WTO / GATS**The WTO’s General Agreement on Trade in Services (“GATS”) sets a baseline of commitments” to follow trade rules in agreed-upon sectors. The rules include market access (which prohibits a variety of quantitative limits) and national treatment (which prohibits discrimination). These are described below in section 2.b.
	1. **Coverage**
		1. **Measures that affect trade in services**
		GATS applies to “measures that affect trade in services.” (GATS art. I). It defines *measure* broadly to include laws, regulations and other government policies. (GATS art. XXVIII(a)).
		2. **Government authority exclusion**
		GATS does not apply to “services supplied in the exercise of governmental authority.” But this phrase excludes only services that are “supplied neither on a commercial basis, nor in competition with one or more service suppliers.” (GATS art. I). For example, GATS applies to a service whenever there is a user fee—e.g., postage stamps, water rates and transit fares (commercial basis). It also applies whenever a service is provided in the private sector—e.g., schools, libraries, and hospitals in a mixed public/private economy (competition). (WTO, Background note: Energy Services, 1998). It is difficult to think of a service that is excluded; it would have to be a free service that is not supplied in the private sector.
		3. **Government procurement**GATS does not apply to procurement to the extent that services are “for governmental purposes.” GATS *does* apply to government procurement if it is “with a view to commercial resale or with a view to use in the supply of services for commercial sale.” (GATS art. XIII). For example, GATS applies to procurement of various services that are needed to provide water or electricity that is sold to the general public.
		4. **Commitments**
		GATS is often described as a *positive-list agreement*, meaning that certain of its rules, named market access (GATS art. XVI) and national treatment (GATS art. XVII), apply only to sectors that a country agrees to list in its “schedule of commitments.” Countries may also schedule limits on their commitments – by listing specific laws or categories of laws they want to exclude from coverage. (GATS art. XX). These are also known as *reservations*.
	2. **Rules that apply to sector commitments**GATS applies the following rules in sectors where governments make a commitment to follow the rule (except where they have scheduled a limit on their commitment).
		1. **National treatment**
		The national treatment rule requires governments to provide treatment to foreign services and service suppliers that is “no less favorable” than it provides to domestic “like” services and services suppliers. (GATS art. XVII). National treatment would prohibit public funding of public services if doing so “modifies the conditions of competition” to the disadvantage of a foreign-owned service supplier. (GATS art. XVII) The national treatment rule is a threat to public services where there is a tradition of financial support to public but not private service suppliers (utilities, hospitals, universities, libraries, etc.).
		2. **Market access**
		The market access rule does not increase market access in the sense of removing a tariff on goods. Rather, the rule limits the ability of governments to regulate by prohibiting six types of quantitative limits on the supply of services. (GATS Art. XVI) Briefly, the rule prohibits numerical limits such as quotas, monopolies, or economic needs tests on:
			1. The number of service suppliers. This includes prohibitions or “zero quotas” on services—as well as economic needs tests (e.g., the need for hospital beds), number of employees, the form of legal organization (e.g., a nonprofit organization) or the participation of foreign capital. The WTO Appellate Body ruled that an absolute ban on a service is a “zero quota” and therefore inconsistent with the prohibition on quotas. (U.S. – Internet Gambling).
			2. The total value of service transactions.
			3. The number of service operations or output (e.g., need for hospital beds, taxicabs, or bank branches).
			4. The number of natural persons employed in a sector or by a service supplier.
			5. The type of legal entity or joint venture (e.g., nonprofit suppliers).
			6. Participation of foreign capital (e.g., a maximum percentage).

It is possible for governments to make commitments in a sector to national treatment without market access—or market access without national treatment. And conversely, the absence of a commitment on market access has no bearing on whether there is or should be a commitment on national treatment.

* + 1. **Additional commitments**

The GATS also enables countries to negotiate additional commitments that limit the way they regulate or provide services, including measures regarding qualifications, standards or licensing matters not subject to scheduling under the National Treatment and Market Access rules (GATS art. XVIII). For example, the schedule of the United States includes additional commitments to ensure that major suppliers provide access to, interconnection to, and use of “public ... transport networks and services” and other “essential facilities” on terms, conditions and cost-oriented rates that are reasonable. These and other additional commitments can profoundly alter the affordability and accountability of public services to which they apply. (U.S. Schedule, Supplement 2, Telecommunications, **¶** 2).

* + 1. **Monopolies**

Countries must ensure that a monopoly in its territory complies with specific commitments, and in addition, (1) “shall ensure that such a supplier does not abuse its monopoly position” when it provides services covered by a specific commitment outside of its monopoly service area; and (2) if a government grants monopoly rights for services covered by a specific commitment, it must negotiate compensatory adjustments in its schedule of GATS commitments. (GATS Art. VIII). The rule prohibits one public monopoly from using its resources to the advantage of another public monopoly (e.g., neighboring utilities).

* 1. **Schedules of commitments**
		1. **The list of sectors**

Countries schedule their GATS commitments based on a WTO classification outline of 12 general sectors and 120 subsectors. The comparison tables cover 39 of the subsectors, which are most but not all of the categories of public services. In other words, the GATS provides for a reasonably high degree of precision for making or limiting commitments to comply with trade rules on services. About 25 percent of the subsectors pertain to public services. In theory, the sectors are mutually exclusive. But in practice, there is a great deal of overlap, which makes it very difficult for a negotiator to protect a given sector. For example, a country might avoid making a commitment on hospital services. But another sector commitment—e.g., supply services of personnel—would apply to some if not all of the services *within* a hospital.

* + 1. **Modes of supply**
		The precision of GATS commitments is greater than the ability to target any of the 120 subsectors. Within each subsector, commitments are made (or limited or not made) for each of four modes of supply: cross-border supply; consumption abroad; commercial presence; and movement of natural persons. Of these, commercial presence (mode 3) most directly affects public services because it applies to services behind the border that are supplied by a domestic company. It is foreign investment and ownership that triggers mode 3 coverage, not cross-border trade in the service.
		2. **What a GATS commitment looks like**The following example is from Mexico’s schedule of commitments; it appears under the general sector of “Construction Services.”

		

The subsector in this excerpt covers measures that affect construction of urban development works (e.g., infrastructure). There is a mix of commitments and non-commitments for the various modes; these terms are explained below for Table 1. There are no additional commitments in this excerpt.

* 1. **Table 1 – GATS / WTO schedule**
	The first stage of understanding how TiSA might affect your country’s public services is to know your country’s sector commitments under GATS. For selected countries, Table 1 shows GATS commitments for public service sectors exactly as they appear in the WTO schedule. Table 1 can be downloaded [here](https://www.dropbox.com/sh/b8c0dg1cdo4ebn8/AAAHQSHTIfhh0nckpaKhGpsAa?dl=0) –
		+ 1. In English and Spanish for Argentina, Chile, Colombia, Costa Rica, Mexico, Panama and Peru.
			2. In English for Mauritius, Pakistan, Turkey and South Korea.

**Table 1 excerpt – Mexico
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* + 1. ***The left-hand column*** shows commitments by sector and subsector, in this case, “Business Services, Other, Building-Cleaning Services.” If a subsector in the WTO classification list is excluded from this column, it means that there are no commitments in that subsector.
		2. ***The middle column*** is for market access commitments; ***the right column*** is for national treatment commitments. There is no commitment under a particular rule if that cell is blank. If there is a blank cell in table 1, we have inserted “[no commitment],” a comment that does not appear in the original GATS schedule. Commitments are entered for each of four modes of delivering a service:
			1. ***Mode 1*** is cross-border delivery, where the *service* crosses a border. A train crosses the border; an architect sends a blueprint from one country to another; goods are shipped from one country to another.
			2. ***Mode 2*** is consumption abroad, where a *consumer* crosses a border. A patient visits a doctor in another country; a tourist stays at a hotel in another country.
			3. ***Mode 3*** is commercial presence, which cross-border investment, not trade. A corporation establishes a subsidiary (or acquires one) to build highways, operate schools, deliver health services, provide water services, etc., in another country.
			4. ***Mode 4*** is movement of natural person, where the service supplier crosses a border. A nurse, teacher, or construction worker relocates from one country to another in order provide that service, often with licensing or accreditation to deliver that service.
		3. ***The entries for modes*** have unique, technical meanings:
			1. ***“Unbound”*** means that there is no commitment. The country is free to adopt and enforce any measure, without risking a trade violation.
			2. ***“None”*** means that there is a commitment, but there is no limit on the commitment. “None” answers the question of whether there is a limit on the commitment.
			3. ***Reference to measures*** (e.g., laws, regulations, etc.) including summaries operate as limits on the commitment (also known as a reservation). In other words, the commitment to market access or national treatment applies to all measures except the listed measures. In the example above, Mexico’s entry for mode 3 means that there is a commitment in this mode, but Mexico limits its commitment with the law summarized in the entry (“foreign investment only up to 49 percent of the registered capital”).
1. **How the FTAs expand upon GATS**
	1. **Coverage**

Bilateral and multilateral trade agreements expand upon GATS commitments and further liberalize trade between parties. These agreements go by different names including: a Free Trade Agreement (FTA), an Economic Partnership Agreement (EPA), or a Regional Trade Agreement (RTA). This paper uses FTA as a generic term that includes EPAs and RTAs as well. EU agreements seek to expand coverage through positive-list schedules of commitments similar to that in GATS (e.g., the EU-Colombia-Peru Trade Agreement, Art. 114, Annex VII). The U.S. and Canadian FTAs seek to expand coverage with a negative-list approach, which covers all sectors except for measures that are explicitly listed or reserved (e.g., U.S. Peru FTA, Annex II). The following graph shows the number of service commitments in each major sector for each of three types of agreements: the GATS, Regional Trade Agreements (RTAs or FTAs), and U.S. RTAs (FTAs). As the graph shows, U.S. FTAs cover more sectors than other regional agreements and far more than GATS.

**Developing Country Service Commitments:**

**Much greater in US RTAs than GATS** (UNCTAD 2014, fig. 6 at 11)



* 1. **Rules that apply to sector commitments**Going beyond market access and national treatment, some FTAs have stronger limits on domestic regulation of services. For example, the Trans-Pacific Strategic Economic Partnership (Brunei, Chile, New Zealand, Singapore) provides that certain types of domestic regulation must be “not more burdensome than *necessary to ensure the quality of the service*.” (Art. 12.10.2(b)) Several U.S. FTAs require parties to “endeavor to ensure … that measures are … not more burdensome than necessary to ensure the quality of the service.” (E.g., U.S.-Peru FTA, Art. 11.7.2)
	2. **Table 2 – Comparing a country’s FTAs**
	The second stage of understanding how TiSA might affect your country’s public services is to know how much your country’s FTAs expand upon its commitments under GATS. For each of several countries, Table 2 compares commitments for public service sectors in GATS for mode 3 (commercial presence in the country, otherwise referred to as corporate subsidiaries or simply “investment”) and several other trade agreements of that country: the U.S. FTA (Free Trade Agreement), the EU EPA (Economic Partnership Agreement), the EFTA (European Free Trade Association), and Canada FTA. Note that some of these bilateral agreements may be in the form of regional trade agreements under different titles (e.g., Dominican Republic – Central America FTA (DR-CAFTA)). Table 2 can be downloaded [here](https://www.dropbox.com/sh/b8c0dg1cdo4ebn8/AAAHQSHTIfhh0nckpaKhGpsAa?dl=0) –
		+ 1. In English and Spanish for Argentina, Chile, Colombia, Costa Rica, Mexico, Panama and Peru.
			2. In English for Mauritius, Pakistan, Turkey and South Korea.
			 **Table 2 excerpt – Mexico**
			****
		1. ***The “Service Sector” column*** shows the sectors and subsectors of commitments that are compared in each row of the chart.
			1. Subsector headings reflect WTO categories (called the “W/120 list”) that countries use in their schedule of GATS commitments. The WTO list of services is available [here](https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc).
			2. Numbers at end of headings (e.g., “Higher Education Services 923”) refer to United Nations Provisional Central Product Classification (CPCprov) codes that are noted in the country’s schedule of GATS commitments.
		2. ***The “Trade Agreements” columns***show whether there is a commitment, and if so, whether there is a reservation or limit on that commitment.
			1. An asterisk (\*) notes a reservation (limit on commitment).
			2. The reservation is quoted below the table for each sector.
			3. “0” means there is no commitment.
			4. MA means there is a market access commitment
			5. NT means there is national treatment commitment.
1. **How TiSA expands upon FTAs and GATS**

TiSA expands coverage of service sectors and creates new rules that limit governments’ ability to provide and regulate services. Like GATS and FTA chapters on services, TiSA applies to measures that affect trade in services at all levels of government, national and subnational. Subnational governments (states, provinces, counties, cities) are direct providers of public services, and in federal systems, states or provinces are sometimes the lead regulators of a service (e.g., energy services, water supply, waste management, education, etc.)

* 1. **Coverage**TiSA engages five tactics to expand coverage beyond FTAs and GATS.

		1. ***Positive list*** – The TiSA article on market access uses a positive-list approach. The TiSA objective is to expand sector commitments or to shrink reservations where commitments now exist. Countries may choose not to commit a sector.
		2. ***Negative list*** – Unlike GATS, the TiSA article on national treatment uses the negative-list approach of U.S. FTAs. TiSA would automatically apply the national treatment rule to all measures that affect trade in services unless a country schedules a reservation, which it can do in one of two ways:
			1. To protect the right to regulate in the future, a government may reserve a sector, subsector or activity. (Art. II-2.4, Part I-A of the schedule)
			2. To protect an existing measure. In this case, a reserved measure must “stand still,” and it can only be amended in the direction of compliance with national treatment (the ratchet). See below for more explanation of standstill and ratchet. (Art. II-2.1, Part I-B or Part II of the schedule)

There is a major debate among TiSA negotiators over how new or evolving services should be covered. It is conceivable that regulation of a new service might be protected (from trade disputes) because the regulation or the sector is already covered by a reservation. But it is the U.S. position that all new services are automatically covered by TiSA. Opposing that, EU negotiators are insisting on a right to reserve unknown types of services that have yet to be invented. At this writing, it is too soon to predict how the negative-list approach to national treatment will work with respect to services that do not exist yet. (Inside U.S. Trade, 22 April 2016)

TiSA's rigid approach to national treatment raises questions about what it means to prohibit governments from “changing the conditions of competition” to the detriment of foreign suppliers. Even the EU’s more cautious approach (reserve the right to regulate new services) does not anticipate the need to regulate an existing service that becomes urgent due to extraneous events. Think about the impact of climate change. It is not possible to promote renewable energy services without changing the conditions of competition between renewables and fossil fuels. Many countries provide only the former, and many provide only the latter.

* + 1. ***Coverage of procurement*** – Expanding TiSA coverage affects more than regulation; it also applies to government procurement whenever a service is resold to the public. (TiSA Procurement Article) Public services often consist of a bundle of procured services for which there is a fare or user fee, for example: water, sewer, electricity, transit, hospitals, clinics, universities, museums, nature preserves, and more. By action of market access and national treatment rules, TiSA might greatly expand the access of foreign companies to public purchasing that is managed to achieve far more than efficiency goals, for example: universal access to services that sustain life, universal access to business services, conservation of resources, preservation of culture, job creation economic development, and more.
		2. ***Most-Favoured-Nation treatment*** – TiSA requires parties to extend the terms of their most liberal trade agreement with “any other country” (including non-TiSA parties) to all TiSA parties. (Art. on MFN Treatment) On its face, this version of MFN treatment would automatically expand the commitments of TiSA parties. However, there are at least two pending proposals that would narrow the scope of MFN treatment:
			1. *Forward-looking MFN* – The United States takes the view that MFN applies to future trade agreements only (this is not apparent in the TiSA text), while EU and other countries oppose such an indeterminate commitment. (World Trade Online, 9 July 2016)
			2. *Exclusion of economic integration agreements* – Several countries have proposed a TiSA article that would turn off MFN treatment with respect to more liberal FTAs that have been notified to the WTO as part of “economic integration agreements” that liberalize trade in most sectors. Under this approach MFN treatment under TiSA would parallel MFN treatment under GATS. (See GATS art. V.) The United States opposes this exclusion, while the EU says it opposes MFN altogether unless there is an economic integration article. (World Trade Online, 22 April 2016)

Once it is clear what the scope of MFN treatment is, a country would be able to exclude measures from this rule by listing them in an MFN Annex. (Art. on MFN Treatment, **¶**2) In the U.S. interpretation of MFN, unless a measure is listed in this annex, then TiSA reservations or non-commitments would be superseded by a future bilateral trade agreement that has more liberal rules or sector commitments.

* + 1. ***Standstill and ratchet*** – Reservations from the national treatment rule may only apply to measures currently in effect, not future measures in a subsector (a stand-still mechanism). (Art. II-2.2). In addition, a country may only amend a measure in such a way that it increases compliance with national treatment (a ratchet mechanism, which is a tool that turns in only one direction). To be clear, the ratchet applies specifically when a country protects a measure with a reservation from national treatment. Seven countries have also proposed that the standstill and ratchet mechanism apply to market access (positive list) commitments as well. (Art. II-3)

**Ratchet**

******

* 1. **New rules**
		+ 1. **TiSA annexes generally**In addition to its core text (which sets up the rules for commitments on market access, national treatment and MFN treatment), TiSA includes annexes that cover 9 economic sectors and 4 fundamental functions of government. The number of annexes may shrink or grow. At this time, it is not settled whether TiSA annexes will set rules that apply (a) as additional commitments—only to sectors and measures that are committed under market access and national treatment—or (b) more broadly, as chapters that set rules for entire sectors or government functions, regardless of whether a sector or measure is scheduled as a market access commitment.

			The limited scope of this paper permits only a listing of TiSA annexes, and following that, a thumbnail sketch of two examples—one sector (energy) and one government function (domestic regulation). You can download the English text of all annexes and analysis of most of them [here](https://wikileaks.org/tisa/). Many of the analyses have been translated into Spanish [here](http://ourworldisnotforsale.org/es/reports/3085). Annexes reported as likely to be concluded in 2016 are noted below with a double asterisk (\*\*). (World Trade Online, 28 January 2016).

				1. **Nine sectors covered by TiSA annexes**

Air transport

Competitive delivery services

Electronic commerce\*\*

Energy-related services

Financial services\*\*

International maritime transport services

Professional services

Telecommunication services\*\*

Road freight and logistics

* + - * 1. **Four government functions covered by TiSA annexes**

Domestic regulation\*\*

Government procurement

Movement of natural persons\*\*

Transparency\*\*

* + - 1. **Example of sector: Energy-Related Services Annex**
			The Energy-Related Service (ESR) Annex aims to fundamentally change the approach that many countries, states and provinces use to regulate utilities and extractive industries. Rules in the ERS Annex require technology and source neutrality. In other words, regulations that affect market access or establishment of an enterprise may not favor renewable sources or disfavor fossil fuels. (Art. I; Menotti 2016) Among other things, the ERS Annex requires that countries:
				1. “work to alleviate” barriers to competition, including those from the “dominant position” of regulated utilities (Art. VII); or
				2. permit supply of key services for fracking and operation of coastal petroleum or LNG terminals:

on a cross-border basis, although governments may set limits or conditions on their commitments (Art. III), and

through commercial presence, without limits or conditions. (Art. IV)

* + - 1. **Example of government function: Domestic Regulation (DR) Annex**TiSA’s domestic regulation annex applies more than 20 rules to any domestic regulation that merely “relates to” a domestic regulation “affecting trade in services with respect to which a Party has undertaken a commitment,” which in turn, includes negative-list commitments. Some of the proposed rules carry over from a decade of negotiations in the WTO Working Party on Domestic Regulation that ended in a stalemate—in part because some of the rules are a radical departure from regulatory practice in most countries. In particular, it would conflict with common regulations that aim to minimize the adverse impact of services on health, environment or economy of communities. Here are just two examples:

				1. ***Necessity test***. Art. 4 of the DR annex converts language of GATS aimed at guiding future negotiations into a mandate: countries must ensure that certain regulations are “not more burdensome than necessary to ensure the quality of the service.” (GATS art. VI:4(b)) In the WTO negotiations, Brazil, Canada, and the United States opposed this rule because “the necessity test would be … a vague and unpredictable standard … which would open the door to second-guessing experienced regulators about some of the most sensitive policy choices.” (WTO, WPDR 2011)
				2. ***Objectivity test.*** Not all of the rules in the DR annex are as contested as the necessity test. For example, Art. 5 probably reflects a consensus; it requires measures to be “based on objective and transparent criteria.” Yet, there are at least five interpretations of “objective” in WTO documents, some of which are benign, and some of which conflict with regulatory practice in most countries. (Stumberg 2011). For example, one meaning is “not subjective,” which would conflict with utility regulations that evaluate mergers and facilities based on complex balancing tests with economic, environmental, health, and other criteria. Another interpretation is “relevant to ability to perform a service.” This interpretation would conflict with regulatory criteria that aim to minimize the environmental, health, cultural, or visual impact of a service (e.g., location of pipelines or transmission lines).

Note that while TiSA proponents often assert that TiSA is about preventing “discrimination” (against foreign services corporations), the domestic regulation disciplines limit the way governments at all levels—national and subnational—regulate ALL services, whether they are provided by domestic or foreign companies. TiSA goes far beyond “non-discrimination.”

* 1. **Table 3 – Comparing countries**The third stage of understanding how TiSA might affect your country’s public services is to know where (which sectors) TiSA could expand upon your country’s FTA and GATS commitments. Table 3 compares the service commitments for selected countries. It shows where TiSA could expand commitments by highlighting where current coverage for a specific commitment is nonexistent or limited. In Table 3, the risk posed by TiSA is greatest where the shading is darkest. Table 3 can be downloaded [here](https://www.dropbox.com/sh/b8c0dg1cdo4ebn8/AAAHQSHTIfhh0nckpaKhGpsAa?dl=0) in English and Spanish.

**Table 3 excerpt – comparing 6 countries
**

* + 1. ***Selected countries – sector commitments***
			1. ***MA / NT*** – For each sector, it shows whether a country has market access (MA) or national treatment (NT) commitments in its most expansive trade agreement, which is usually the FTA with the United States.
			2. ***Bold font*** means that the U.S. and EU trade agreements have the same commitment for a particular sector.
		2. ***Shading in table 3***
		In addition, Table 3 uses shading to convey the degree to which TiSA might expand a country’s commitments in a given sector.
			1. ***No shading*** indicates no risk of expanded coverage. It means that full commitments already exist in GATS and the U.S. FTA, so TISA could not expand coverage.
			2. ***Light shading*** indicates some risk of expanded coverage under TiSA. Full commitments already exist in the U.S. FTA without reservations. However, TiSA could expand coverage in relation to GATS (i.e., with respect to trade with countries other than the United States).
			3. ***Medium shading*** indicates moderate risk of expanded coverage under TiSA. Commitments already exist in the U.S. FTA, but with significant reservations. TiSA could expand coverage in relation to both GATS and the U.S. FTA.  TiSA could eliminate the reservations in place in the U.S. FTA, or it could expand coverage where it did not exist before.
			4. ***Dark shading*** indicates high risk of expanded coverage under TiSA. No commitments exist in either GATS or the U.S. FTA for National Treatment. TiSA could expand coverage in relation to both GATS and the U.S. FTA.
1. **Summary**
	1. **Expanded coverage of sectors**

		1. ***National treatment*** – The national treatment rule is a threat to public services where there is a tradition of financial support to public but not private service suppliers (e.g., utilities, hospitals, universities, libraries, etc.). The most visible way that TiSA expands NT coverage—compared to GATS and FTAs—is the “negative list” for National Treatment. The NT rule applies automatically unless a government enters a reservation.
		2. ***Market access*** *–* As market access commitments expand, governments open public services to greater competition. A country might do this proactively in TiSA by committing a sector that is not now committed in its GATS schedule. Depending on how it is drafted, TiSA’s most-favored nation (MFN) rule might mean that a country must give all TiSA parties the same market access it provides under its most “liberal” trade agreement with any (non-TiSA) country.
	2. **New rules that shrink policy space**
	At least 13 annexes have been proposed for TiSA. They provide new rules to limit domestic regulation of services. Some apply to a single sector (e.g., energy), while others (e.g., domestic regulation) apply to all sectors in which country has a commitment. Negotiators have yet to settle on what a “commitment” means for purposes of whether new rules in the annexes apply to a sector. One approach is that an annex applies based on positive-list commitments on market access alone. (E.g., Annex on Domestic Regulation, Art. 1) A much broader approach would apply an annex to measures that affect trade in a sector, regardless of whether there is a commitment. (E.g., Annex on Maritime Transport, Art. 1)

**Policy space
for public services & domestic regulation**

**New rules**

**++ Coverage**

1. **Library of TiSA documents and literature**PSI has created on-line folders to provide easy access to documents that you can use to educate yourself about TiSA and other trade agreements that affect your government’s ability to regulate and provide public services.
	1. **Risk that TiSA Could Expand Coverage** – folders available [here](https://www.dropbox.com/sh/b8c0dg1cdo4ebn8/AAAHQSHTIfhh0nckpaKhGpsAa?dl)
		1. **This report** – How will TiSA affect your services?
		2. **Comparison of Selected Countries**: Risk that TiSA Could Expand Coverage (Table 3)
		3. **Argentina** – online in English and Spanish
			1. Argentina, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Argentina – GATS
		4. **Chile** – online in English and Spanish
			1. Chile, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Chile, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Chile – Canada FTA
			4. Chile – EU EPA
			5. Chile – US FTA
			6. Chile – GATS
		5. **Costa Rica** – online in English and Spanish
			1. Costa Rica, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Costa Rica, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Costa Rica – Canada FTA
			4. Costa Rica – EU EPA
			5. Costa Rica – US FTA
			6. Costa Rica – GATS
		6. **Mauritius** – online in English
			1. Mauritius, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Mauritius, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Mauritius – Turkey FTA
		7. **Mexico** – online in English and Spanish
			1. Mexico, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Mexico, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Mexico – Canada FTA
			4. Mexico – EU EPA
			5. Mexico – US FTA
			6. Mexico – GATS
		8. **Pakistan** – online in English
			1. Pakistan, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Pakistan, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Pakistan – Malaysia FTA
			4. Pakistan – China FTA
			5. Pakistan – Sri Lanka FTA
		9. **Panama** – online in English and Spanish
			1. Panama, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Panama, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Panama – Canada FTA
			4. Panama – EU EPA
			5. Panama – US FTA
			6. Panama – GATS
		10. **Peru** – online in English and Spanish
			1. Peru, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Peru, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Peru – Canada FTA
			4. Peru – EU EPA
			5. Peru – US FTA
			6. Peru – GATS
		11. **Turkey** – online in English
			1. Turkey, Table 1 – Public Sector Commitments in the GATS / WTO
			2. Turkey, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. Turkey – Chile FTA
			4. Turkey – Israel FTA
			5. Turkey – Malaysia FTA
			6. Turkey – South Korea FTA
		12. **South Korea** – online in English
			1. South Korea, Table 1 – Public Sector Commitments in the GATS / WTO
			2. South Korea, Table 2 – Comparison of Public Sector Commitments in Selected Trade Agreements
			3. South Korea – Canada FTA
			4. South Korea – EU EPA
			5. South Korea – US FTA
	2. **TiSA documents: Draft text and analysis**
	All are online in English [here](https://wikileaks.org/tisa/); most are online in Spanish [here](http://ourworldisnotforsale.org/es/themes/3085).
		1. **TiSA Core Text**

TiSA Core Text (April 2015)

TiSA Core Text – Analysis by Jane Kelsey (2015)

* + 1. **TiSA Annexes**
			1. Air Transport (Apr 2015)
			 Air Transport – Analysis by ITF (2015)
			2. Competitive Delivery (Apr 2015)
			 Competitive Delivery – Analysis by ITF (2015)
			3. Energy-Related Services – Q&A (December 2015)
			 Energy-Related Services – Analysis by Victor Menotti
			4. Environmental Services (December 2015)
			5. Road Freight Transport (July 2015)
			 Road Freight Transport – Analysis by Mac Urata and Sarah Finke (July 2015)
			6. Maritime Transport (April 2015)
			 Maritime Transport – Analysis by Paddy Crumlin (2015)
			7. Electronic Commerce (April 2015)
			 Electronic Commerce – Analysis by Burcu Kilic & Tamir Israel (2015)
			8. Financial Services (April 2015)
			 Financial Services – Analysis by Ben Beachy (2015)
			9. Professional Services (June 2015)
			10. Telecommunications (April 2015)
			 Telecommunications – Analysis (2015)
			11. Transparency (April 2015)
			 Transparency – Analysis (2015)
			12. Domestic Regulation (April 2015)
			 Domestic Regulation – Analysis (2015)
			13. Movement of Natural Persons (April 2015)
			 Movement of Natural Persons – Analysis by Tony Salvador (2015)
			14. Government Procurement (April 2015)
			 Government Procurement – Analysis by Sanya Reid Smith (2015)
	1. **GATS documents** – available [here](https://www.dropbox.com/home/Service%20sector%20tables%20for%20PSI/Library%20of%20TiSA%20documents%20and%20literature)
		1. Text of GATS – English and Spanish
		2. WTO services classification list, W/120 – English
		3. Country schedules of GATS commitments – English and Spanish
		The schedules of GATS commitments forWTO members are available through *Services Database*, World Trade Organization, *available at* <http://tsdb.wto.org/>.
		4. WTO dispute on Internet Gambling – English
		Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (WT/DS285/AB/R) (April 7, 2005) ¶¶ 239 (“[a prohibition on one, several or all means of delivery cross-border services] is a ‘limitation on the number of service suppliers in the form of numerical quotas’ within the meaning of Article VI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that included in mode 1.”).
	2. **PSI reports on TiSA** – available in English and Spanish [here](https://www.dropbox.com/home/Service%20sector%20tables%20for%20PSI/Library%20of%20TiSA%20documents%20and%20literature)
		1. Scott Sinclair and Hadrian Mertins-Kirkwood, *TISA versus Public Service* (2014), also available at <http://www.world-psi.org/en/psi-special-report-tisa-versus-public-services>.
		2. Ellen Gould, *The really good friends of transnational corporations agreement* (2014), also available at <http://www.world-psi.org/en/psi-special-report-really-good-friends-transnational-corporations-agreement>.
	3. **References on trade and public services** – available in English and/or Spanish [here](https://www.dropbox.com/home/Service%20sector%20tables%20for%20PSI/Library%20of%20TiSA%20documents%20and%20literature)
* Rudolf Adlung, *Public Services and the GATS*, 9 Journal of International Economic Law 455 (June 2006).
* Lucas Castiglioni, Tendencias e interrogantes sobre los procesos de integración regional en América Latina y el Caribe, in *Neoliberalismo en América Latina* 283 Luis Rojas Villagra, ed. (2015)
* Comición Europea, A modular approach to the architecture of a plurilateral agreement on services, concept paper (septiembre 2012).
* Antonio Elías, Uruguay en su laberinto: la inserción económica internacional en disputa, *Revista Casa de las Américas* 4 (octubre-diciembre 2015).
* Antonio Elías, La ofensiva del capital impulsa el Libre comercio en América Latina, in *Neoliberalismo en América Latina* 43 Luis Rojas Villagra, ed. (2015).
* Antoni Estevadeordal, El nuevo mapa de acuerdos comerciales en América Latina y el Caribe: la inserción de Europa, España y las Relaciones Económicas Transatlánticas83 (mayo-junio 2015).
* European Commission, A modular approach to the architecture of a plurilateral agreement on services, concept paper (September 2012).
* Rachel Fefer, *Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress,* Congressional Research Service (2016).
* Ellen Gould, *The Good and the Bad News for Local Governments*, Institute for Agriculture and Trade Policy (2002).
* Inside U.S. Trade, *TISA Officials See Hurdles Ahead in Push To Conclude Deal this Year* (28 January 2016).
* Inside U.S. Trade, *Leaked TISA Core Text Shows 'MFN Forward' Fight Still Dragging On* (9 July 2015).
* Inside U.S. Trade, *Old Fault Lines Re-Emerge Ahead Of TISA Deadline For Revised Offers* (22 April 2016).
* Markus Krajewski and Britta Kynast, *Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe,* Hans-Böckler-Stiftung (October 2014).
* Markus Krajewski, *Public services in EU trade and investment agreements*, draft paper for a seminar on “The politics of Globalization and public services: putting EU´s trade and investment agenda in its place,” European Federation of Public Service Unions (14 November 2013).
* Markus Krajewski, Public Services And Trade Liberalization: Mapping The Legal Framework, 6 Journal of International Economic Law 341 (June 2003).
* Jane Kelsey, *Embedding the neoliberal transformation of government services through trade in services agreements*, in Globalisation and the Quest for Social and Environmental Justice, Shawkat Alam, Natalie Klein, and Juliette Overland, eds. (Routledge, Reprint edition, September 2012)
* Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Routledge & Cavendish 2008), available [here](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi1zfK7yKzMAhVINj4KHSdMCQAQFggcMAA&url=http%3A%2F%2Fwww.untag-smd.ac.id%2Ffiles%2FPerpustakaan_Digital_2%2FPOLITICAL%20ECONOMY%20Serving%20whose%20interests%20the%20political%20economy%20of%20international%20trade%20in%20service.pdf&usg=AFQjCNFyAAaqGZkbPGx8dXA_5It4ZW-Nng&sig2=wXnwCf3Ovn195BLvYVvv-A).
* Martin Khor, *Domestic regulation disciplines: some important issues*, Presentation to the WTO Working Party on Domestic Regulation, Draft of Speaking Notes, South Centre (11 April 2011).
* Luis Oscar Moreno Garcia-Cano, y Alberto Plaza Tejera, El futuro de los Acuerdos Comerciales de Servicios, *Tribuna de Economía* 99 (noviembre-diciembre 2009).
* National Conference of State Legislatures, *GATS and Electricity*, interim report of the Working Group on Energy and Trade Policy (2005).
* Joost Pauwelyn, Rein ne Vas Plus? Distinguishing domestic regulation from market access in GATT and GATS , 4 World Trade Review 131–170 (2005).
* Scott Sinclair, *The GATS, South African local governments and water services,* Canadian Centre for Policy Alternative, Briefing Paper, Volume 6, Number 2 (April 2005).
* Robert Stumberg, *Guide to GATS and Domestic Regulation*, Heinrich Boll Stiftung (2010).
* Robert Stumberg, *The WTO, Services and the Environment*, in Handbook on Trade and the Environment, Kevin Gallagher, ed. (2008).
* Michelle Swenarchuk, *From Global to Local: GATS Impact on Canadian Municipalities*, Canadian Centre for Policy Alternatives (2002).
* UNCTAD, *Services, development and trade: The regulatory and institutional dimension*, UN Commission on Trade and Development (2014).
* Elina Viilup, *The Trade in Services Agreement (TISA): An end to negotiations in sight?*, European Parliament, Directorate-General For External Policies, Policy Department (October 2015).
* Erik Wesellius, *Driving the GATS Juggernaut*, Global Policy Forum (2003).
* USTR, *Trade in Services Agreement* (2016), available at [www.ustr.gov](http://www.ustr.gov) (viewed May 3, 2016).
* WTO, Working Party on Domestic Regulation, *Views on the Issue of the Necessity Test in the Disciplines on Domestic Regulation*, Communication from Brazil, Canada and the United States, S/WPDR/W/44 (22 March 2011).
* WTO Council for Trade in Services, *Managing Request-Offer Negotiations Under The Gats: The Case Of Environmental Services,* in Report of the Meeting Held on 27 and 30 June and 1 July 2005, item B at page 8, TN/S/M/15 (15 September 2005).
* WTO Secretariat, *Energy Services: Background Note by the Secretariat*, 3, September 9, 1998 (S/C/W/52) 3.