

Analysis of the TiSA “Annex on Transparency” (version dated 14 September 2016) November 2016

Summary

Better and more comprehensive transparency - these are core demands of civil society organizations in the debate surrounding free trade agreements. Yet, TiSA, along with CETA and TTIP, is an example of how free trade agreements are negotiated behind closed doors. Greenpeace is in possession of a negotiation text on transparency, dated September 14th 2016. According to negotiators, there appears to be a new (secret) text ready.¹ Despite, this we want to publish this text from September, as it clearly shows the differences between the negotiating partners. We believe that the text can contribute to the public debate, along with the troublesome content that we expected to find in the final text as well.

The transparency proposed within the TiSA Agreement, which applies only to the parties but also to *interested persons*, is welcomed. However, given the secretive nature of the TiSA negotiations so far, Greenpeace concludes that the negotiations not only make a mockery of transparency, it abuses the very principle of transparency. **Transparency in TiSA is asymmetrical in favoring large corporations that are financially strong and well established, while ordinary citizens lack opportunities and the access to actually make use of transparency.** Transparency, as proposed in TiSA, allows for corporations to be informed early of planned measures and provided with opportunities for exerting their influence and alter or block new regulation. At the same time, opportunities for TiSA signatories to provide transparency on their own terms are restricted.

Similar regulations on transparency are also found in CETA, currently being voted on in the European Parliament. Generally it must be ensured that transparency in trade agreements also applies to civil society - not only on the paper but also in reality. There is a need for a new global trade system that is not based on exploitation but instead serves humanity, the international understanding and the environment. **Greenpeace is calling for an abandonment of the old system as a first step in developing this new trade system. This means terminating all free trade agreements such as TiSA, CETA, TTIP and TPP and turning away from the failed neoliberal free trade paradigm that unilaterally favors the interests of multinational corporations and foreign investors.**

The significance of the annex on transparency

The annex on transparency is two pages long. It will be binding for all sections of the agreement. Other sections of the agreement -such as annexes on financial services and domestic regulatory measures - will contain additional and more specific statements on transparency. Earlier versions of the transparency annex have already been leaked and analyzed.² Jane Kelsey, professor of law in New Zealand, introduced her analysis of the 2015 version by noting that it was deeply ironic that governments involved with TiSA were committing themselves to transparency at the same time they were negotiating the agreement under exceptional conditions of secrecy.³

¹ See http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155095.pdf

² See <https://wikileaks.org/tisa/>

³ “There is a deep irony whenever governments make commitments to ‘transparency’ in contemporary pro-corporate treaties that are negotiated under conditions of extraordinary secrecy. TiSA is one of the most extreme examples, with the parties pledging to keep the documents secret for five years after a final agreement comes into force or the negotiations are formally abandoned. Some governments are already releasing their own and

What is the annex about?

The TiSA annex specifies the regulations and conditions of transparency that parties to TiSA have agreed upon. For all those matters that the TiSA Agreement applies to, the signatories of TiSA want to mutually inform each other of laws, regulations, procedures and administrative rulings of general applications. However, the regulations and conditions of transparency apply not only to signatory countries but also to interested persons in these countries. The annex does not define who these interested persons are (paragraph 1). The term “person” is however defined in an introductory passage in the core text.⁴ It encompasses juridical persons who theoretically can be anyone such as cleaning personnel, non-governmental organizations, representatives of associations, and corporations in the service sector. The question which then arises is: who, outside of well-funded lobby groups, has the time or capacity to become familiar with the complex TiSA agreement and make use of transparency regulations? The declared intention of the annex is that laws and directives are made available in advance to interested parties and signatories, allowing them to evaluate whether and to what extent their interests might be affected by these legal measures. Not only are interested persons and signatories to be informed; they also have the right to comment on the proposed measures (subparagraph 2a). Furthermore, their comments are to be considered by the signatories (subparagraph 2c), and the signatories are encouraged to explain the purpose and rationale of the proposed law or directive (paragraph 4). There should be reasonable time between the publication of the text of a law or regulation and the date on which compliance with the law or regulation must be observed (paragraph 5). To ensure that the exchange of information and the processing of queries go smoothly, the parties to TiSA are to designate national contact points (paragraph 6) who respond to requests for information and other inquiries from providers of services and interested persons.

Does everyone want the same thing?

The most recent version contains contradictions regarding the degree of intervention posed by the transparency requirement. The United States in particular, which proposed the text, but also Australia, Canada and the EU, wants the transparency regulation to apply to all state measures, while some countries such as Switzerland want to limit the transparency requirement to laws and regulations only, and the requirement should apply only if it is also covered by relevant national laws and regulations. Switzerland is also demanding that the obligation to publish information for interested persons and signatories should be complied with only if this is consistent with a government’s priorities and capacities. In short, the question is whether the parties to TiSA would still have the “**right to regulate**” national measures or whether this would be limited by the TiSA Agreement, binding under international law.

Transparency needs a real level playing field

Regulations, not giving a real level playing field and which are beneficial only for corporations, should not be applied to the TiSA Agreement or to CETA. Regulations have to assure that a level playing field exists in reality. While some countries/political unions such as the European Union, Canada and the United States concede new rights to corporations, these same powers block binding regulations on corporate responsibility regarding human rights. Thus even the voluntarily adopted UN Guiding Principles on Business and Human Rights⁵ are implemented only sluggishly at the national level. At the same time, some EU Member States and the United States in particular are blocking the

joint documents; others are hiding behind the secrecy pact and refusing to be held accountable.” Source: Professor Jane Kelsey: Leaked TiSA Transparency Text 22 April 2015; The University of Auckland. See https://www.wikileaks.org/tisa/analysis/Analysis-of-20150422_Annex-on-Transparency/

⁴ “person means either a natural person or a juridical person”. See the TiSA core text under Article I-2: Definitions, subsections j-n at <https://tip-leaks.org/favez/tisa-core-text/>

⁵ See <https://business-humanrights.org/en/un-guiding-principles>

initiative for a legally binding UN treaty on business and human rights. By the same token, the right to take legal action should also be introduced for situations when superordinate international or fundamental human rights are violated.

Greenpeace's assessment

Better and comprehensive transparency is one of the core demands of civil society organizations in the debate surrounding free trade agreements. The demand for transparency has been made vehemently regarding TTIP and CETA. The TiSA text does not meet this demand. The transparency annex does establish “interested persons” as legal entities who should have the same rights to information as the signatories. The definition of interested persons is broad, but another document leaked by Greenpeace reveals who is really meant. During a two-day round of negotiations on 17 and 18 October 2016 in Washington, the Coalition of Service Industries invited negotiators to a reception at the Microsoft Innovation & Policy Center on the evening of the first day, and lunch on the second day was also hosted by stakeholders in business. The Coalition of Service Industries (CSI) includes Microsoft and other well-known American companies such as Google, eBay, Facebook, IBM and Walt Disney, as well as large banks and insurance companies.⁶ CSI is a member of the Global Services Coalition⁷, which held its annual Global Services Summit⁸ the day after negotiations were held in Washington and offered free admission to the negotiators.

Transparency in TiSA is asymmetrical in favoring large corporations that are financially strong and well established, while ordinary citizens lack opportunities and the access to actually make use of transparency. The way in which corporations handle such rights to information and comment can be seen in the United States. Here the “Notice and Comment” process leads to proposed plans being discarded or deferred due to comments from the business sector. According to Pieter de Pous, policy director at the European Environmental Bureau (EEB), more than 7,000 draft laws have been submitted to the United States Congress; presumably only five percent will ever become law.⁹ While the World Trade Organization’s General Agreement on the Trade in Services does not recognize an “interested person” as a legal entity (see GATS Article 3¹⁰), the term is used in several places in the CETA agreement between the EU and Canada.¹¹ Using the example of TiSA’s annex on energy and mining services, Greenpeace in September 2016 drew attention to the environmental impact of TiSA.¹² Accordingly, the United Nations’ guidelines on international agreements relevant to the environment should apply to TiSA. There is actually no comprehensive transparency provided for all members of society in TiSA, which is demonstrated by how its text lacks any reference to the basic principle stated in the UN Rio Declaration of 1992, that environmental issues are best dealt with at the appropriate level with the participation of all citizens concerned.¹³ The transparency annex also makes no reference to other UN guidelines that should also be applied to TiSA, such as UNECE’s Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.¹⁴ There should be transparency not only in the application of trade agreements, but also in their development. The European Ombudsman examined the transparency of negotiations on TTIP and demanded better access to the negotiation

⁶ See <https://servicescoalition.org/about-csi/csi-members>

⁷ See <https://servicescoalition.org/about-csi/global-services-coalition>

⁸ See <https://servicescoalition.org/about-csi/annual-global-services-summit>

⁹ See <http://www.eeb.org/index.cfm/library/better-regulation-ttip-under-the-radar/>

¹⁰ See https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

¹¹ CETA Article 4.6, see <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>

¹² See <https://ttip-leaks.org/> and <http://www.greenpeace.org/eu-unit/en/Publications/2016/Leaked-TiSA-texts-reveal-threats-to-climate/>

¹³ See <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>

¹⁴ See <https://www.unece.org/index.php?id=21464>

documents. Its specific proposals for improvement¹⁵, calling not only for more transparency, but also for the active participation of civil society during the negotiations on free trade agreements, were not introduced into TiSA negotiations nor were they implemented in them by the European Union.

¹⁵ See <http://www.ombudsman.europa.eu/de/cases/decision.faces/de/58668/html.bookmark>