Corporate Accountability under the Prospective Trade in Services Agreement: The Global Game Changer

Nicholas Torres

Follow this and additional works at: https://scholarlycommons.law.emory.edu/ecgar-perspectives

Recommended Citation
Nicholas Torres, Corporate Accountability under the Prospective Trade in Services Agreement: The Global Game Changer, 3 Emory Corp. Governance & Accountability Rev. Perspectives 2074 (2016). Available at: https://scholarlycommons.law.emory.edu/ecgar-perspectives/30

This Perspective is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Corporate Governance and Accountability Review Perspectives by an authorized administrator of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.
CORPORATE ACCOUNTABILITY UNDER THE PROSPECTIVE TRADE IN SERVICES AGREEMENT: THE GLOBAL GAME CHANGER

The Senate just put the interest of powerful multinational corporations, drug companies and Wall Street ahead of the needs of American workers. If this disastrous trade agreement is approved, it will throw Americans out of work while companies continue moving operations and good-paying jobs to low-wage countries overseas.

—U.S. Senator Bernie Sanders

INTRODUCTION

This Perspective examines the prospective Trade in Services Agreement ("TiSA"), which is presently under negotiation. The TiSA has yet to be released to the general public, but it is presently a major point of controversy. Its terms are expected to heavily favor multinational corporations operating within the borders of the twenty-three economies presently participating in the TiSA negotiations.

TiSA has been a hotly debated political issue because its provisions seemingly grant large corporations unprecedented power to deregulate financial markets worldwide. Moreover, it appears to limit the participating governments’ ability to write their own laws and regulations. Thus, the issue becomes how to hold multinational corporations accountable, not only to their governments but also to the twenty-three economies presently negotiating the TiSA as well.

Presidential candidate, Bernie Sanders, has used his campaign to draw attention to this issue. He asserts that multinational corporations have too much

---

1 The draft of the currently on-going Trade in Services Agreement negotiations has not been released to the general public of any of the countries participating. This article is largely based on the leaked provisions, which WikiLeaks has obtained and posted on their website.
3 Id.
5 Id.
6 See id.
influence in drafting the TiSA, which will ultimately hurt the working class, as they have an invested interest in relocating millions of jobs overseas. While Sanders stresses the impact the TiSA will have on the American job market, it has the potential to affect many more areas of the American economy. This Perspective will analyze one specific provision of the proposed TiSA, the Domestic Regulation Provision, which has been leaked to WikiLeaks. Unfortunately, the negotiations of TiSA have been kept essentially confidential, notwithstanding the fact that it would place constraints on domestic safeguards, including financial regulations on governments, which should be subject to public scrutiny. This confidentiality is surprising considering TiSA does not deal with any matters of homeland security, which might merit restrictions on the public’s accessibility.

In addition to giving a framework of TiSA and analyzing its Domestic Regulation Provision, this Perspective will propose suggestions on how to hold corporate organizations accountable while facilitating international commerce under the proposed provisions of the TiSA.

TRADE IN SERVICES AGREEMENT FRAMEWORK

In April 2013, negotiations for TiSA began. TiSA focuses on service industries but it ties in other regulatory rules binding all parties to the agreement. There are currently twenty-three economies negotiating the agreement, but if one economy is added from each European Union country

---

7 See generally, Bernie Sanders on Trade, FEELTHEBERN.ORG, http://feelthebern.org/bernie-sanders-on-trade/ (last visited Mar. 20, 2016) (stating that the “trade” agreements are written by multinational corporations).
8 Id.
9 Id.
11 See generally Muaz Khalil, TTIP, TiSA Explained | Wikileaks | Jeremy Corbyn | Bernie Sanders | JulianAssange, YOUTUBE (Aug. 27, 2015), https://www.youtube.com/watch?v=EriEOWHPqcU (explaining how difficult it is for members of the European Parliament to get access to the proposed terms for the Transatlantic Trade and Investment Partnership while large corporations have less restrictions).
12 See generally Robert Weissman, Leaked Text Shows Trade Agreement Threat to Deregulate Financial Services, PUBLIC CITIZEN (July 2, 2015), https://www.citizen.org/documents/press-release-tisa-leak-july-2015.pdf (stating that the only reason people are aware of the negotiations of the TiSA is because drafts of the agreement have been leaked).
individually (twenty-eight), the number actually increases to fifty. These fifty nations constitute seventy-five percent of the world’s services market.

Drafts of the proposed TiSA are not available to the general public while the terms of TiSA are being negotiated. The negotiating terms are withheld from the public for five years after the deal is finalized or abandoned. Even members of the European Parliament face extensive restrictions to accessing key documents of the ongoing trade agreements. However, Wikileaks released draft texts on the proposed TiSA, which reveal its general structure. The main provisions consist of the following four areas of service: (1) Financial Services; (2) Telecommunications Services; (3) Electronic Commerce; and (4) Maritime Transport. The basic provisions of what is called the “core text” of the TiSA are identical to the General Agreement on Trade in Services (“GATS”) in the World Trade Organization (“WTO”).

The following text will examine the Annex on Domestic Regulation provision under close scrutiny to determine possible areas susceptible to corporate abuse.

The Annex on Domestic Regulation

The most important provision, which raises concerns of corporate accountability, is the Domestic Regulation provision. The proposed terms on regulation are sweeping in scope—they restrict the governments’ ability to use any “law, regulation, rule, procedure, decision, administrative action or any other form,” which may harm corporate businesses. The purpose of the TiSA

---

14 See generally Participant List, supra note 3. The participant list includes the following countries: Australia, Canada, Chile, Colombia, Costa Rica, Hong Kong, China, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, The Republic of Korea, Switzerland, Chinese Taipei, Turkey, The United States, and The European Union. The European Union consists of twenty-eight countries.


17 Id.

18 Khalil, supra note 12 (explaining how difficult it is for members of the European Parliament to get access to the proposed terms for the Transatlantic Trade and Investment Partnership whereas large corporations have less restrictions).

19 James, supra note 17.

20 Id.


is to establish universal rules that can better address international commerce hurdles.\textsuperscript{23} However, its provisions raise concerns about corporate domination over sovereign countries and their citizens.\textsuperscript{24}

It is important to keep in mind that the U.S.’s goal is to promote U.S. foreign policy abroad, and proactively write the rules of international commerce before rising powers—China, Brazil, India, or Russia—write the rules of international commerce in their respective regions. That goal appears to be the rationale for why China, Brazil, India, and Russia have been excluded from major “trade” agreements such as TiSA.\textsuperscript{25}

The Domestic Regulation provision proposes pro-corporation regulations, which limit how governments can manage their public laws.\textsuperscript{26} Sanders argues that multinational corporations have played an active role in negotiating and drafting the proposed provisions.\textsuperscript{27} The rationale behind the Domestic Regulation provision is to prevent governments from discriminating against foreign corporations.\textsuperscript{28} The TiSA proposes to limit a government’s ability to enact regulation on service sectors at the national, provincial or local level.\textsuperscript{29} The agreement has “standstill” clauses to prevent governments from creating regulations adverse to foreign corporations.\textsuperscript{30} Although the premise of universal rules for the global market are to ensure all players are playing by the same rules is understandable, curbing the governments’ ability to adopt regulations may grant multinational corporations too much leverage. For

---

\textsuperscript{23} The Trade In Services Agreement (TISA), COALITION OF SERV. OF INDUS. (July 2015), https://servicescoalition.org/negotiations/trade-in-services-agreement.

\textsuperscript{24} David Dayen, The Scariest Trade Deal Nobody’s Talking About Just Suffered a Big Leak, NEW REPUBLIC (JUNE 4, 2015) https://newrepublic.com/article/121967/whats-really-going-trade-services-agreement.

\textsuperscript{25} See Gary Hershorn, TiSA WikiLeaked: Winners & Losers of Multinational Trade Deal, RT (July 2, 2015) https://www.rt.com/news/271138-wikileaks-tisa-leak-documents/ (all the BRICS countries—Brazil, Russia, India, China, and South Africa—have been excluded from the TISA negotiations); see also OFF. OF THE U.S. TRADE REP., OVERVIEW OF THE TRANS PACIFIC PARTNERSHIP, , https://ustr.gov/tpp/overview-of-the-TPP (last visited Apr. 3, 2016) (stating that the TPP involves “11 other like-minded countries Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam”); see also OFF. OF THE U.S. TRADE REP., TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (T-TIP), HTTPS://USTR.GOV/TTIP (last visited Apr. 3, 2016) (stating “[t]he Transatlantic Trade and Investment Partnership (T-TIP) is an ambitious, comprehensive, and high-standard trade and investment agreement being negotiated between the United States and the European Union”). Thus, the BRIC countries are not involved in any of the three major trade negotiations: TTIP, TTP, or TiSA.

\textsuperscript{26} David Dayen, supra note 25; see also Trade in Services Agreement, supra note 11.

\textsuperscript{27} See Bernie Sanders on Trade, supra note 8.

\textsuperscript{28} David Dayen, supra note 25.

\textsuperscript{29} Id.

\textsuperscript{30} Id.
instance, governments may not be able to ban fracking, tighten safety controls on airlines, or refuse accreditation to schools and universities.\(^{31}\)

**CONCLUSIONS**

These negotiations should be open to the public and available for comment, not just within the U.S. for U.S.’s nationals but also within the countries currently participating in the negotiations. Although a negotiation of this size and magnitude would not feasibly reach an agreement if all fifty countries gave consideration to the opinion of the populace, secrecy is not the answer.

TiSA is currently being negotiated and it may become a reality.\(^{32}\) Ideally, TiSA should include at least one of the major BRIC countries—Russia, China, Brazil, or India—in order to bring more diversity to the provisions, which could potentially even out the landslide of corporate power by bringing more leverage to the table. China has already filed an application to join the negotiations.\(^{33}\) Hopefully, the TiSA negotiating members grant China’s request to join the negotiations. The TiSA appears to grant the corporate world an unparalleled amount of power. The global economy has arrived, and if the TiSA is signed into power, corporate governance will certainly become a major issue. The time has come to make sure we not only hold corporations accountable within the U.S. but also in the other participating nations in the TiSA negotiations.

**Nicholas L. Torres**

---

\(^{31}\) *Id.*  
\(^{32}\) *Off. of the U.S. Trade Rep., supra note 14.*  

* Emory University School of Law, J.D. Candidate, 2017; Editing Member, *Emory Corporate Governance and Accountability Review;* Competitor, *National Transactional LawMeets Moot Court Competition;* B.A. Political Science, University of Buffalo. I would like to thank Nicole Fukuoka for her comments and edits, which assisted me greatly.