

This Document Contains TiSA – U.S. CONFIDENTIAL Information
MODIFIED HANDLING AUTHORIZED*

Limited

Trade in Services Agreement (TiSA)
Annex on [Electronic Commerce]

Derived From: Classification Guidance
Dated September 16, 2013
Reason: 1.4(b)
Declassify on: Five years from entry
into force of the TiSA
agreement.

* This document must be protected from unauthorized disclosure, but may be mailed or transmitted over unclassified e-mail or fax, discussed over unsecured phone lines, and stored on unclassified computer systems. It must be stored in a locked or secured building, room, or container.

Limited

Limited

Article 1: General Provisions

1. **[CH propose; AU/CA/CL/EU/PE oppose:** Parties confirm that those provisions are without prejudice to their rights or obligations under bilateral or multilateral agreements, including the WTO Agreement and the exceptions contained in the General Agreement on Trade in Services (GATS).]

[AU/CL/CO/EU/JP/KR/NZ/NO/PE propose: This section shall apply to measures adopted or maintained by a Party affecting trade in services by electronic means.]

2. **[AU/CA/CL/EU/PE oppose: [JP propose:** This [Chapter] is] **[JP/KR/CH propose:** without prejudice to the policy objectives and legislation of] **[JP propose:** each Party] **[KR/CH propose:** the Parties] **[JP/KR/CH propose:** in areas such as the protection of intellectual property] **[KR/CH propose:.] [JP propose:** and] **[JP/KR/CH propose:** the protection of privacy] **[CH propose:** and of the confidentiality of personal and commercial data, the protection of consumers and **[JP oppose:** the protection and promotion of the diversity of cultural expressions (including through public funding and assistance) and fiscal measures]] **[JP/KR propose:,** including that of health information and of the confidentiality of personal and commercial data.]

[CO would like to clarify why health information is not included in personal and commercial data.]

3. **[AU/EU/MX/PE oppose: [CO propose:** This Chapter is] **[JP propose:** It is] **[CO/JP propose:** not intended to] **[CH/KR propose:** Those provisions do not] **[CO/JP/KR/CH propose:** apply to financial services.]]

Limited

Article 2: [CA/PE/US propose: Movement of Information] [JP/MX/CH propose: Cross-Border Information Flows]

[**KR:** Regarding the article on movement of information, Korea is of the view that any movement of information arising from the actions of a service supplier must be based on “informed consent.” Informed consent refers to the idea that individuals supplying their personal information to service suppliers have full protection and recourse under the law in regards to the usage of their personal information provided to service suppliers. This should be appropriately reflected in the language of the article.

HK: The movement of information should be without prejudice to the domestic regime for the protection of personal data and be based on informed consent.]

1. [CA/TW/CO/JP/MX/US propose: No Party may prevent a service supplier of another Party [CO/JP propose: or consumers of those suppliers,] [CA/CO/JP/TW/US propose: from transferring, [accessing, processing or storing] information, including personal information, within or outside the Party’s territory, where such activity is carried out in connection with the conduct of the service supplier’s business.]
2. [US propose: PLACEHOLDER for financial institutions.]
3. [CH propose; CO oppose: Parties should have measures to protect consumers engaging in electronic commerce from fraudulent and deceptive commercial practices.]
4. [CH propose; CO oppose: Parties should enhance their enforcement capacity to ensure that the applicable laws and regulations concerning the protection of data and privacy are complied with.]
5. [CH propose; CO/US oppose: Parties should not prevent foreign suppliers of electronic commerce or customers of such suppliers, from electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored abroad].

Limited

Article 3: Online Consumer Protection

[CH prefers using “electronic commerce” rather than “online commercial activities.”]

1. [AU/CA/CL/TW/CO/EU/HK/IS/IL/JP/KR/LI/MX/NZ/NO/PA/PE **propose:** The Parties recognise the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities] [CO/JP/MX **propose:**, as well as measures conducive to the development of consumer confidence.] when they engage in electronic commerce.]

2. [AU/CA/CL/TW/CO/EU/HK/IS/IL/JP/KR/LI/MX/NZ/NO/PA/PE **propose:** To this end, each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that [may cause harm] [cause harm or potential harm] to consumers engaged in [CO **propose:** electronic commerce] [AU/CL/JP/KR/NZ/PE **propose:** online commercial activities.]

3. [CO **propose:** Under non-discriminatory terms and conditions, each Party shall grant consumers engaged in electronic commerce with its own service suppliers, access to existing consumer protection mechanisms provided by their respective national consumer protection authorities.]

4. [AU/CL/CO/JP/MX/NZ/PE **propose:** The Parties] [AU/CL/JP/MX/NZ/PE **propose:** recognise the importance of] [CO **propose:** shall endeavour to promote the] cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to [AU/CL/NZ/PE **propose:** cross-border] electronic commerce in order to enhance consumer [welfare] [MX **propose:** confidence].]

5. [CO/MX **propose:** The Parties shall, in accordance with its laws and regulations, allow persons to mutually determine the appropriate methods for resolving disputes arising from their electronic commerce transactions. Such methods may include, but are not limited to, online dispute resolution mechanisms.]

Limited

Article 4: Personal Information Protection

1. [AU/CA/CL/TW/CO/IL/JP/KR/MX/NZ/NO/PA/PE **propose:** The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.]

2. [AU/CA/CL/TW/CO/IL/KR/MX/NZ/NO/PA/PE **propose:** To this end, each Party shall adopt or maintain a domestic legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of these personal information protection frameworks, each Party should take into account principles and guidelines of relevant international bodies.]

[CA **propose:** Each Party shall ensure that its domestic legal framework for the protection of personal information of users of electronic commerce is applied on a non-discriminatory basis.]

3. [AU/CA/CL/TW/CO/IL/JP/KR/MX/NZ/NO/PA/PE **propose:** Each Party should publish information on the personal information protections it provides to users of electronic commerce, including:

- (a) how individuals can pursue remedies; and
- (b) how business can comply with any legal requirements.]

Limited

Article 5: Unsolicited Commercial Electronic [AU/CO/NZ propose: Messages] [EU propose; NO considering: Communications]

1. [AU/CA/CL/CO/CR/EU/IL/JP/KR/MX/NZ/NO/PE propose: Each Party shall [TW/TR propose: endeavour to] adopt or maintain measures regarding unsolicited commercial electronic [messages] [EU propose: communications] that:]

- (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to stop such messages; or [EU/NO propose; AU oppose: and]
- (b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages; [EU/NO oppose: or
- (c) otherwise provide for the minimization of unsolicited commercial electronic messages.]]

2. [AU/CA/CL/CO/IL/JP/KR/NZ/NO/PE propose: Each Party shall [TW/TR propose: endeavour to] provide recourse against suppliers of unsolicited commercial electronic messages who do not comply with its measures implemented pursuant to paragraph 1.]

3. [AU/CA/CL/CO/CR/EU/IL/KR/JP/NZ/NO/PE propose: The Parties shall endeavour to cooperate in cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.]

Limited

Article 6: [JP propose; CO oppose: Transfer or Access to Source Code

1. No Party may require the transfer of, or access to, source code of software owned by a person of another Party, as a condition of providing services related to such software in its territory.
2. For purposes of this Article, software subject to paragraph 1 is limited to mass-market software, and does not include software used for critical infrastructure.]

Article 7: [CO propose: Interoperability]

[**CO propose:** Each Party shall endeavor to promote the interoperability between their governmental online procedures and services supplied by electronic means.]

Article 8: Open Networks, Network Access and Use

1. [**AU/CA/CL/CO/IL/JP/NO/PE/US propose:** Each Party recognizes that consumers in its territory, subject to applicable laws, and regulations, should be able to:
 - (a) access and use services and applications of their choice available on the Internet, subject to reasonable network management;
 - (b) connect their choice of devices to the Internet, provided that such devices do not harm the network; and
 - (c) have access to information on network management practices of their Internet access service suppliers.]
2. [**KR oppose: [CO/CH propose:** Parties, preferably through relevant regulators, should promote the ability of consumers legitimately to access, share and distribute information as well as running applications and using services of their choice.] [**CO/JP propose:** Each Party shall endeavour not to] [**TR propose:** Without prejudice to the applicable legislation,] [**CH propose:** Parties should not] [**CO/JP/CH propose:** restrict the ability] [**JP propose:** of service suppliers to supply services] [**CO/CH propose:** to supply services] [**CO/JP/CH propose:** over the Internet] [**CH propose:** including] [**CO/JP/CH propose:** on a cross-border and technologically neutral basis, and] [**JP propose:** shall endeavour to] [**CO/CH propose:** should] [**CO/JP/CH propose:** promote the interoperability of services and technologies, where appropriate.] [**JP propose:** Each Party shall endeavour to ensure that internet access providers avoid unreasonable discrimination in transmitting lawful network traffic.]]

Limited

Article 9: [JP/CH/US propose: Local Infrastructure] [JP propose: and Local Presence] [KR propose:¹]

1. **[CO/US propose:** No Party may require a service supplier, as a condition for supplying a service or investing in its territory, to:

- (a) use computing facilities located in the Party's territory;
- (b) use computer processing or storage services supplied from within the Party's territory; or
- (c) otherwise store or process data in its territory.]

[CO propose: However, nothing in paragraph 1 should prevent a Party from conditioning the receipt or continue receipt of an advantage on compliance with the requirement to use, establish, or expand computing facilities in its territory, including those needed for the processing or storage of data.]

[KR: Regarding paragraph 1(local infrastructure), Korea has reservations in accepting the current language, taking into account our telecommunications regulatory framework. Korea is open to discussion on limiting or defining the scope of application of this provision.]

2. **[US propose; KR/CO oppose:** This article shall only apply to cross-border financial service suppliers to the extent cross-border financial services are covered by a Party's specific commitments.]

[JP would like to clarify the meaning of paragraph 2.] **[KR:** Regarding paragraph 2, Korea believes that this can be addressed in the Annex on Financial Services. Korea suggests the deletion of this paragraph, and at the same time supports the Swiss/Japanese proposal to carve out financial services from this Annex, as in the General Provisions Article III.X.]

3. **[KR oppose: [JP propose:** No Party shall] **[CH propose:** Parties should not] **[JP/CH propose:** require] **[JP propose:** ICT service suppliers] **[CH propose:** suppliers of electronic commerce] **[JP/CH propose:** to use] **[CH propose:** or establish any] **[JP/CH propose:** local infrastructure as a condition for] **[JP propose:** supplying] **[CH propose:** the supply of] **[JP/CH propose:** services.]

4. **[KR oppose: [JP propose:** No Party shall require ICT service suppliers to establish a local presence as a condition for the cross-border supply of services.]]

¹ **[KR propose:** Article 9 does not apply with respect to suppliers of public telecommunication networks or services.]

Limited

[**JP** would like to delete paragraph 4 of this article if local presence is to be set out in TiSA’s core text.] [**KR** has reservations on the article of Local Presence (paragraph 4 of Article 9, which is proposed by Japan).]

5. [**KR oppose: [JP propose: No Party shall,]** [**CH propose: In addition, Parties should not**] [**JP/CH propose: give priority or preferential treatment to**] [**JP propose: its own suppliers of services**] [**CH propose: national suppliers of electronic commerce**] [**JP/CH propose: in the use of local infrastructure,**] [**JP propose: national**] [**CH propose: terrestrial**] [**JP/CH propose: spectrum**] [**JP propose:,**] [**JP/CH propose: or orbital resources.**]]

[**CO** would like to exclude matters related to government procurement from this provision.]

Limited

Article 10: Electronic Authentication and Electronic Signatures

1. [AU/CA/TW/CO/EU/IS/KR/MX/NO/PA/PE/TR/US **propose:** Except where otherwise provided for in its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.]

[JP would like to clarify the meaning of “except where otherwise provided for in its laws” in paragraph 1.]

2. [AU/CA/TW/CO/EU/IS/JP/KR/MX/PE/TR/US **propose:** No Party may adopt or maintain measures for electronic authentication that would:

- (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
- (b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication.]

3. [AU/CA/TW/CO/EU/IS/JP/KR/MX/PE/TR/US **propose:** Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meet certain performance standards or be certified by an authority accredited in accordance with the Party’s law.]

Article 11: [AU/CO/EU/IS/NO/PE/CH/TW **propose: Customs Duties on Electronic Deliveries**

1. [EU/NO **propose:** The Parties agree that a delivery transmitted by electronic means shall not be subject to customs duties, [TW **oppose:** fees or charges].] [CO/CR/JP/PE **propose:** No Party may impose customs duties, [TW **oppose:** fees or charges] on electronic transmissions.]

2. For greater clarity, paragraph 1 does not prevent a Party from imposing internal taxes or other internal charges on [EU/NO **propose:** a delivery transmitted by electronic means] [CO/MX/PE **propose:** electronic transmissions], provided that such taxes or charges are imposed in a manner consistent with this Agreement.]

Limited

Article 12: [JP/CH propose: International Cooperation]

1. [CO/JP/NO propose: Each Party shall endeavour to cooperate with the other Parties to increase the level of digital literacy globally and reduce the “digital divide.”]
2. [CO/CH propose: Parties will [CO propose: to the extent possible] exchange information in the area of electronic commerce and telecommunications Services. That may include information on, inter alia:
 - (a) technological developments and research in the area of electronic commerce and telecommunications services;
 - (b) commercial and technical aspects of the supply of electronic commerce and telecommunications Services through all modes of supply;
 - (c) available possibilities for the exchange of electronic commerce and telecom-related technology; and
 - (d) applicable laws and regulations, legislative processes and recent legislative developments; applicable technical standards.]
3. [CO/NO/CH propose: Parties will exchange views on developments related to electronic commerce and telecommunications Services at the international level.]

[CH propose: Promotion

4. Parties affirm their intention to:
 - (a) promote these provisions in order to contribute to the expansion and spread of electronic commerce and telecommunications services;
 - (b) work together and cooperate in international fora to increase the level of digital literacy and to reduce the global digital divide;
 - (c) cooperate with third countries with a view to enhancing national regulatory capacity and to contribute to the spread of electronic commerce and telecommunications Services, which are powerful tools for promoting economic development.]

Limited

Article 13: [CH propose: Review

Parties intend to review these provisions from time to time, with a view to discussing their implementation and use and to further refining and expanding them, as appropriate.]

Article 14

[**US propose:** Nothing in Section III (Electronic Commerce) shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.]

[**CO/JP** would like to clarify the meaning of “essential security interests” in paragraph 1 of this article.] [**KR:** Korea would like to have greater discussion on what is meant by “essential security interests” in this article.]

Limited

Article 15: Definitions

For purposes of this Annex:

[**AU/CO propose: authentication** means the process or act of establishing the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication;]

[**CO propose: electronic commerce** means any cross-border business or commercial transaction conducted by electronic means; including, among others, contracts for distribution services, construction works, consulting services, engineering services and business services.]

[**EU/TR: electronic signature** means data in electronic form which are attached to or logically associated with other electronic data and fulfils the following requirements:

- (i) it is used by a person to agree on the electronic data to which it relates;
- (ii) it is linked to the electronic data to which it relates in such a way that any subsequent alteration in the data is detectable.]

[**AU/CO/NZ propose: personal information** means any information, including data, about an identified or identifiable natural person.]

[Proponents will consult on this definition of personal information.]

[**AU propose: unsolicited commercial electronic** message means an electronic message which is sent for commercial and marketing purposes to an electronic address without the consent of the recipient or against the explicit rejection of the recipient, using an Internet access service supplier and, to the extent provided for under the domestic laws and regulations of each Party, other telecommunications service.]

Limited

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 discussion and is without prejudice to the final inclusion and arrangement of such articles in the core TiSA text or an annex.]

[AU/US propose; CH oppose: Article X.1: Local Presence

Subject to any [AU propose: terms,] conditions, limitations and qualifications set out in its Schedule, no Party may require a service supplier of another Party, as a condition for the cross-border supply [AU propose:²] of a service in its territory, to establish or maintain a [AU/JP propose: representative office or any form of] commercial presence, or to be resident [AU propose: or domiciled] in its territory.]

[AU propose: Article X.2: Local Management and Boards of Directors

1. Subject to any terms, conditions, limitations and qualifications set out in its Schedule, no Party may require:
 - (a) an entity supplying services through a commercial presence engage natural persons of any particular nationality as senior managerial or other essential personnel; or
 - (b) more than a simple majority of the board of directors, or any committee thereof, of an entity supplying services through a commercial presence be of a particular nationality, or resident in the territory of the Party, or a combination thereof.]

² [AU propose: as described in Article I-1:2 (a), (b) and (d) (*Mode 1, 2 and 4*).]

Limited

[US propose; CH oppose: Article X.3: Local Content

1. Subject to any [AU propose: terms,] conditions, limitations and qualifications set out in its Schedule, no Party may, in connection with the supply of a service by a service supplier, impose or enforce any requirement; enforce any commitment or undertaking; or, in connection with the supply of a service through commercial presence, condition the receipt or continued receipt of an advantage on compliance with any requirement:
 - (a) to purchase, use or accord a preference to:
 - (i) goods produced in its territory, or to purchase goods from persons in its territory;
 - (ii) electronically transmitted content³ based on the territory where it was created, produced, published, contracted for or commissioned, or the nationality of the author, performer, producer, developer, or owner;⁴ or
 - (iii) computing facilities⁵ located in its territory or computer processing or storage services supplied from within its territory; or
 - (b) that a service supplier engaged in the marketing or distribution of goods or electronically transmitted content purchase, use, or make available a specified percentage:
 - (i) of goods of domestic origin; or
 - (ii) of electronically transmitted content that meet the criteria set out in subparagraph (a)(ii).
2. Paragraph 1 does 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.
3. Nothing in paragraph 1 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.]

³ Electronically transmitted content means any content that is digitally encoded and produced for commercial sale or distribution, including a computer program. For greater certainty, electronically transmitted content does not include digitized representations of financial instruments, including money. This definition is without prejudice to whether electronically transmitted content is a good.

⁴ For greater certainty, “territory” and “nationality” includes the territory and nationality of non-Parties.

⁵ “Computing Facilities” means computer servers and storage devices for the processing or storage of information. This does not include facilities used for the supply of public telecommunications services.

Limited

[US propose: Article X.4: Local Technology

1. Subject to any **[AU propose: terms,]** conditions, limitations and qualifications set out in its Schedule, no Party may, in connection with the supply of a service, impose or enforce any requirement or enforce any commitment or undertaking:
 - (a) to transfer a particular technology or other proprietary knowledge to a person in its territory; or
 - (b) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party⁶; or
 - (ii) that prevents the purchase or use of particular technology in its territoryso as to afford protection on the basis of nationality to its own services or services suppliers or to technology of the Party or persons of the Party.

2. Paragraph 1 does not apply:
 - (a) when a Party authorizes use of an intellectual property right in accordance with Article 31 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.]

⁶ 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.

Limited

[AU propose: Article X.5: Scheduling of Localisation Commitments

1. The terms, conditions, limitations and qualifications referred to in Articles X.1-X.4 (Local Presence, Local Management and Boards of Directors, Local Content and Local Technology) shall be set out in Section B of Part I or Part II of each Party's Schedule and shall be limited to measures that a Party maintains on the date this Agreement takes effect, or the continuation or prompt renewal of any such measures.
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.4 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.4.
3. Articles X.1-X.4 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.]

Limited

[US propose: Article X.6: Movement of Information

No Party may prevent a service supplier of another Party from transferring, accessing, processing or storing information, including personal information, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business.]

[US propose: Article X.7: Open Networks, Network Access and Use

Each Party recognizes that consumers in its territory, subject to applicable laws, and regulations, should be able to:

- (a) access and use services and applications of their choice available on the Internet, subject to reasonable network management;
- (b) connect their choice of devices to the Internet, provided that such devices do not harm the network; and
- (c) have access to information on network management practices of their Internet access service suppliers.]

[US propose: Article X.8: Electronic Authentication and Electronic Signatures

1. Except where otherwise provided for in its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.
2. No Party may adopt or maintain measures for electronic authentication that would:
 - (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
 - (b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication.
3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meet certain performance standards or be certified by an authority accredited in accordance with the Party's law.]

Limited

[US propose: X.9: Exceptions

1. For greater certainty, Articles X.3 and X.4 do not apply to any obligation, commitment, undertaking, or requirement other than those set out in those articles.
2. Articles X.3 and X.4 do 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.
3. 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, Articles X.3 and X.4 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.
4. Nothing in [Articles X.1 – X.8] shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.]

[US propose: *The applicability of Articles X.1, X.3, X.4 and X.6 to certain financial services is under consideration.*]

[US propose: *This proposal presumes that government procurement is not within the scope of TiSA.*]