TRADE IN SERVICES AGREEMENT (TiSA)

Small Group Non Paper

Article 1: General Provisions

4. The obligations under Article 2, (Movement of Information), [6 (Source Code)], 8 (Location of Computing Facilities, and XX (Nondiscriminatory Treatment) shall not apply to the terms, limitations, conditions and qualifications, which are set out in Party's Schedule.

Parties to reflect on which articles in the Electronic Commerce Annex to include in Article 1, paragraph 4.

Article 2: Movement of Information

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.

2. No Party may prevent a service supplier of another Party from transferring **[AU/CA/NZ oppose:** or processing] information, including personal information, into and out of a Party's territory where such activity is carried out for the conduct of the service supplier's business.

Parties to reflect on whether/how to capture in TiSA the understanding that processing incidental or necessary to the transfer of data is covered by this article.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or disguised a restriction on trade and do not impose restrictions on transfers of information greater than are required to achieve the objective.

Article 6: Transfer or Access to Source Code

1. No Party may, [in connection with] [as a condition for] the supply of a service by a service supplier in its territory, require the transfer of, or access to, source code of software owned by a person of another Party.

2. For the purposes of this Article, software subject to paragraph 1 is limited to [mass-market] software and does not include software used for [critical infrastructure].

Parties should consult on brackets in paragraphs 1 and 2.

3. Nothing in this Article shall be construed to prevent:

(a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts;

(b) a Party from requiring the modification of source code of software necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement;

(c) a person of a Party from licensing its software on a free and open source basis; or

4. This Article shall not apply to a requirement imposed 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.

Parties to consult on paragraph 4 which is based on the Localisation Annex, Article 3.5(b).

Article 8: Location of Computing Facilities

1. The Parties recognize that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. Party may require a service supplier, as a condition for supplying a service in its territory, to use or locate computing facilities in the Party's territory.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or disguised a restriction on trade and do not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

4. **[CO/MU propose:** For greater certainty, nothing in paragraph 2 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.]

Parties to consult on the proposal by Colombia and Mauritius. This paragraph aims to address the inconsistency that might arise from this obligation and the flexibility included in Art. X.3.4. (Performance Requirements – Localization Annex). The concern comes from the lack of certainty on which annexes should prevail in the event of inconsistency, and the need to preserve this same flexibility which is included in the Performance Requirements commitments from most International Investment Agreements.

Article 10: Customs Duties

1. No Party shall impose customs duties, on electronic transmissions, including content transmitted electronically.

2. For greater certainty, nothing in paragraph 1 prevents a Party from imposing internal taxes, fees or other charges on electronic transmissions, including content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

3. This Article should not be understood to reflect a Party's view on whether electronic transmissions including content transmitted electronically should be categorized as a service or a good.

Article 14: Definitions

computing facilities means computer servers and storage devices for the processing or storage of information for commercial use;

customs duties includes any customs or import duty and a charge of any kind imposed in

connection with the importation of a good, including any form of surtax or surcharge in connection with such importation, but does not include any:

(a) charge equivalent to an internal tax imposed consistently with Article III:2 of GATT 1994, in respect of like, directly competitive, or substitutable goods of the Party, or in respect of goods from which the imported good has been manufactured or produced in whole or in part;

(b) antidumping or countervailing duty; or

(c) fee or other charge in connection with importation commensurate with the cost of services rendered;

Article XX: Nondiscriminatory Treatment

1. No Party shall, in connection with the supply of a service through an electronic transmission, accord less favourable treatment to content transmitted electronically than it accords to other like content transmitted electronically on the basis that such content is created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or where the author, performer, producer, developer or owner is a person of another Party.[1]

2. This article does not apply to digitized representations of financial instruments, including money.

3. This Article should not be understood to reflect a Party's view on whether electronic transmissions including content transmitted electronically should be categorized as a service or a good.

4. The Parties understand that paragraph 1 does not apply to subsidies or grants provided by a Party including government-supported loans, guarantees and insurance.

Inclusion of Para. 4 to be decided after conclusion of Article 1, para 5(b)

5. This Article shall not apply to broadcasting.

[1] For greater certainty, to the extent that content of a non-Party is "like content transmitted electronically," it will qualify as "other like content transmitted electronically" for the purposes of paragraph 1 of this Article.