The TISA Annex on Domestic Regulation – Analysis of the 23 April 2015 Draft

The initiative to establish a Trade in Services Agreement originated with dissatisfaction over the services negotiations within the WTO. TISA is intended to be a very ambitious agreement, with members opening up far more services to foreign competition than they had through the WTO or their bilateral agreements. Corporate lobbyists have also stated that in addition to market opening, they want very significant levels of deregulation achieved through TISA. Walmart, for example, has told the US Trade Representative that TISA should eliminate "restrictions on store size, number, or geographic location" and "merchandize restrictions (audio visual, tobacco, food, pharmaceuticals, cosmetics etc.)."

The instrument to achieve this sweeping deregulation is TISA's Annex on Domestic Regulation that would match commitments to open services markets with binding constraints on how governments are permitted to regulate these services. The current draft reveals that many delegations are still insisting on provisions that would have the maximum deregulatory effect. Rather than opposing far-reaching proposals outright as they did with the February 2015 draft¹, other delegations have shifted their positions so they now are "considering" them. However, even if only those provisions were adopted where there is currently consensus among TISA delegations, the Annex would place profound restrictions on the right to regulate.

Given the significant changes to regulatory systems that TISA would impose, the public and elected officials of TISA members should have been alerted and engaged in discussion of the Annex. The regulation of oil and gas pipelines, logging roads, mine tailings ponds, hospitals, and alcohol and tobacco advertising are just some of the sensitive areas where regulatory authority would be circumscribed by TISA.

In terms of public services like health care, education and water supply, TISA would act as a one-two punch. Under TISA, governments are expected to expand their commitments to allow privatized delivery of services such as higher education. Article 1 of the draft states that application of the Annex will be triggered when these commitments are made. By making commitments, not only would governments open up services to private service providers, but also severely restrict their authority to regulate these providers.

The Annex is not dealing with a narrow subset of services regulations. Its scope has been defined so broadly that not only are services regulations governed by the Annex, but as well any measure "relating" to services regulations (Article 1). Some delegations are insisting that the Annex apply to "technical standards". The Annex defines technical standards (Article 3(d)) in a way that would capture not only regulation of services but as well of goods if a standard specifies the equipment that must be used in supplying a service. Canada and the US previously had opposed inclusion of technical standards in the scope of the Annex, but in the April 2015 draft they are now "considering" this.

¹ An in-depth analysis of this draft, "Preliminary Analysis of Leaked TISA Annex on Domestic Regulation", is available online at: https://wikileaks.org/tisa/domestic/analysis/Analysis-TiSA-Domestic-Regulation-Annex.pdf

Despite the public stake in the TISA negotiations, TISA members have imposed an extreme level of secrecy so that draft texts – and the different positions governments have adopted - are not supposed to see the light of day until five years after the end of negotiations. When the secret texts have been leaked, some commentators have tried to discount their significance. For example, the claim has been made that TISA does not restrict the right to regulate and is only about ensuring transparency and non-discrimination.² Elected officials may be lulled into believing that TISA will not impact their authority as long as their regulations are publicly available and do not treat foreign providers of services any differently than local ones.

In fact, the TISA Annex on Domestic Regulation currently contains over twenty grounds for challenging completely non-discriminatory, transparent regulations. The Annex would apply when governments have already committed to eliminate regulations that either directly or even indirectly discriminate. And even if domestic regulators believe they have already reformed their regulations in ways that would comply with the Annex, their understanding of terms like "objective" or "reasonable" could be very different from that of trade panels.

The Annex would bind regulators in a straitjacket, severely constraining their options even though they are not in any way discriminating against foreign service providers. TISA governments, particularly at the sub-national level, routinely make use of existing regulatory tools that appear to violate the Annex as well as crafting new regulations that do not fit with its regulatory prescriptions.

Looking at a concrete example, the City of Vancouver recently introduced regulations for the marijuana dispensaries that have proliferated within in its jurisdiction. Such dispensaries are now more common in the city than Starbucks and multi-outlet franchises have even been established. This is an issue for other Canadian and US municipalities where the sale of marijuana has been permitted. In the absence of enforceable federal legislation that could address the problems Vancouver is experiencing with retail sales of marijuana, the city has established a new licensing system. The provisions of this system would appear to violate a number of articles on which TISA negotiators have already largely reached consensus according to the most recent draft of the Annex³.

• Annex Article 5(a) - Obligation for regulatory criteria to be "objective" and "transparent".

The City of Vancouver's new marijuana licensing system includes provisions that allow public opinion to be considered in licensing decisions, with the number of complaints from neighbours being weighed as part of the application review process.

In general, all local government zoning, building permit, and business licensing decisions that give weight to public opinion could be considered to be based on non-objective

² See, for example, the claims made by Edward Alden on the Council on Foreign Relations site:

http://blogs.cfr.org/renewing-america/2015/06/03/wikileaks-and-trade-a-healthy-dose-of-sunshine/

³ The Annex would be triggered if Canada's TISA commitments for retail distribution do not have a product exclusion covering marijuana.

regulatory criteria in violation of Article 5(a) of the TISA Annex. It is common for alcohol licensing procedures to take into account concerns from neighbours, and their concerns could be defined as "non-objective" criteria for rejecting a license.⁴

Vancouver's new regulations could also violate the requirement for "transparent" regulatory criteria, since the City has conferred discretionary authority on its Chief License Inspector. Under the regulations the Inspector may require fulfillment not only of specific conditions stipulated in the licensing application, but as well "other conditions as the Chief Licence Inspector may require to ensure that the business does not have a negative impact on the public, the neighbourhood or other businesses in the vicinity."

The US negotiators appear to be concerned about how a dispute panel might interpret Article 5(a). They have proposed a footnote suggesting that objective and transparent criteria includes not just competence to supply a service but health and environmental impacts as well: "Footnote 3. US propose: Parties understand that objective and transparent criteria may include, inter alia, criteria such as competence, ability to supply a service, or potential health or environmental impacts of an authorization decision decision, and that competent authorities may assess the weight to be given to such criteria."

This footnote suggests the enormity of the stakes involved, when it is feasible that dispute panels may discount all but exclusively commercial considerations in deciding whether regulatory criteria are objective and transparent. Through its footnote, the US also reveals its concern that the simple act of regulators using their judgment to weigh competing considerations could violate TISA's objectivity standard.

• Annex Article 5(b) Obligation for procedures and decisions of authorities to be "impartial with respect to all applicants."

Vancouver's new marijuana licensing system is a two-tier one, biased towards non-profit "compassion clubs" over commercial operations. The latter automatically are assigned demerit points on their application for a license and have to pay thirty times as much for a license.

Biases in any regulatory decisions and procedures that favour non-profits, minorityowned or small businesses could be challenged through the Annex as not impartial to all applicants.

• Annex Article 6(f)) Obligation to ensure licensing fees are limited to what is "reasonable" and "do not in themselves restrict the supply of the service".

Vancouver is imposing marijuana dispensary licensing fees of 30,000 for commercial operators. While City officials claim this fee only covers the cost of administration, it is the highest fee charged for any business license – a cost that consequently could be

⁴ See, for example, the Suffolk Council's guide to "Making Objections to Premises License Applications", http://www.suffolkcoastal.gov.uk/yourdistrict/licensing/alcohol/yoursay/objections/

judged "unreasonable". In addition, the City's mayor is on record as saying the licenses are intended to curtail the proliferation of dispensaries. Existing operators have said they will have to shut down because of the high licensing fee, so the supply of the service will end up being restricted.

Any amount charged for a license could be considered a restriction on the unlimited supply of a service, especially with licensing fees for operations like casinos reaching into the millions.⁵

In addition, Vancouver's new marijuana licensing regulations require applications for multiple permits and impose a three-stage review process, which could violate the Annex obligation that "procedures do not in themselves unduly impede fulfilment of requirements" (Article 5(c)).

The above are just some examples of how the Annex could empty the regulatory toolbox to deal with problems like the one the City of Vancouver is facing with unlicensed marijuana distributors. But the Annex could have even more extreme impacts. A number of delegations are insisting on a TISA provision that would enable challenges of regulations simply on the basis that they are deemed to be **"unnecessarily" burdensome** (Article 4). It would grant TISA dispute panels the authority to impose a "necessity test" and judge whether, in their view, governments could have used other means to achieve their objectives that were less onerous to business.

The constitutional rights of states and provinces to regulate within their jurisdiction is threatened by trade negotiations on services regulation in general, and by necessity tests in particular. Article 5(f) of the Annex stipulates that "to the extent practicable", applicants should only have to approach one authority. The US initially opposed this obligation, perhaps to protect the constitutional authority of its state governments, but now is considering it with an attached footnote: "Footnote 4. US propose: For greater certainty, a Party may require multiple applications where a service is within the substantive competence or territorial jurisdiction of multiple competent authorities."

At the WTO services negotiations, mere differences in requirements among states is on the list of examples of unacceptable regulatory barriers: "sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states."⁶ Division of powers as set out in constitutions could not serve as a defence in the event that sub-national regulatory differences were challenged under TISA as unnecessarily burdensome.

Imposition of the necessity test through TISA would create pressures to harmonize not only among sub-national governments but among all TISA members. The current draft of Article 4 states that in determining whether or not a TISA member's regulation is unnecessarily burdensome, panels will take account of **"international standards of**

⁵ MGM recently paid \$85 million in licensing fees to open a casino in Massachusetts.

http://www.masslive.com/news/index.ssf/2014/11/mgm_springfield_pays_85_millio.html

⁶ WTO Secretariat, "Examples of Measures to Be Addressed by Disciplines under GATS Article VI.4", 12 July 2002.

relevant international organizations applied by that Party." Governments could be pressured to adopt international standards rather than run the risk that their own could be ruled unnecessarily burdensome.

The necessity test was removed from draft regulatory disciplines at the WTO services negotiations because of objections from a number of delegations. The TISA Annex, however, is being used as another opportunity to force it through. Canada and the US are currently signalling their opposition, but the extreme secrecy of the TISA negotiations – with delegations having to be accountable for the positions they are adopting - means that the necessity test may find its way into the final draft of the Annex.

Ironically, despite the secrecy shrouding the TISA negotiations, both the Annex and the core text of the agreement impose transparency obligations on governments. The strongest of these transparency obligations is contained in a separate chapter of the agreement that applies to laws and administrative as well as regulations and procedures.

The transparency chapter not only requires existing measures to be published, but in addition could impose obligations to publish measures in advance of their adoption and **"provide interested persons and other Parties a reasonable opportunity to comment on such proposed measures."** Since the last draft of the transparency chapter, the US and twelve other delegations continue to propose that this be an obligation – "each Party *shall* provide, etc..." and be implemented "to the extent possible", which could mean that if a country is capable of fulfilling these obligations, then it must. The EU and some other delegations still are taking the position that publishing measures in advance and providing opportunities to comment on them should not be a firm obligation, and that the wording should instead be "each Party *may*..." do this.

A thorough analysis of the problems with TISA's chapter on transparency was done on the previous leaked draft. Chief among the problems identified is the undemocratic influence the chapter grants to commercial interests: "'Transparency' in this TISA text means ensuring that commercial interests, especially but not only transnational corporations, can access and influence government decisions that affect their interests – rights and opportunities that may not be available to local businesses or to national citizens. They may want to stop or change government decisions they don't like, or rally to support those that are being challenged."⁷

⁷ https://wikileaks.org/tisa/transparency/01-2015/analysis/page-1.html