The Trade in Services Agreement is an environmental hazard

An assessment of the environmental impact of the leaked Annex on Environmental Services in the context of TiSA as a whole[1]

Trade negotiators from the United States and 22 other World Trade Organization members including the European Union are seeking to craft a Trade in Services Agreement that will cover a variety of environmental services and otherwise impact environmental and climate policy. The TiSA negotiations are an end-run on the WTO process as a "single undertaking," and exclude emerging economic powers such as China, India, and Brazil.[2]

TiSA negotiations focus on lowering regulatory "barriers" to international trade in services. Such "barriers" include environmental protections, such as those related to water, energy, sanitation and transportation among many others. In the alleged interest of making trade easier, environmental regulations are at risk of being "harmonized down" to the lowest common denominator, and public services of an environmentally- sensitive nature are in danger of being privatized.[3]

Based on the model of past U.S. trade agreements, statements by officials, and leaked documents outlining the objectives for TiSA negotiations, it appears that the goal of TiSA negotiations is to

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[1] This preliminary assessment was prepared by Bill Waren, Senior Trade Analyst, Friends of the Earth U.S.; 202.222.0796;wwaren@foe.org.

[2] [2] The TiSA negotiations are driven by global services corporations and a US –EU led coalition of developed countries frustrated by the failure of the WTO Doha Round of negotiations to meet their demands as a result of the independence of developing countries and emerging economic powers like Brazil and India. Corporate domination of the TiSA talks disadvantages developing and emerging economies. It promises to shrink the policy space for governments seeking a more sustainable and environmentally sensitive path to economic development. Scott Sinclair, Hadrian Mertins-Kirkwood, TiSA versus Public Services, Public Services International, April 2014, pp.5-7. http://www.world-psi.org/sites/default/files/en_tisa_versus_public_services_final_web.pdf TiSA makes no provision for the special needs of developing countries. The core text of TiSA contains none of the special development provisions for poorer countries contained in the WTO GATS agreement. Jane Kelsey, Analysis TiSA: The Leaked Core Text, p.3, WikiLeaks, https://wikileaks.org/tisa/core/analysis/Analysis-TiSA-Core-Text.pdf; WikiLeaks, TiSA - Trade in Services Agreement – Core Text. https://wikileaks.org/tisa/core/; WikiLeaks, Trade in Services Agreement (TiSA) Core Text (April 2015), released July 1, 2015. P.7. https://wikileaks.org/tisa/core/TiSA-Core-Text.pdf

[3] Problems with the "commoditization of the commons" could arise. The essential nature of water and sanitation for human health and survival, for example, sets this area apart from other sectors. The human right to water and sanitation, recognized by the United Nations General Assembly in July 2010, means that extra care must be taken before water policy in any form is subject to TiSA obligations. United Nations, The Human Right to Water and Sanitation, Media Brief, 2010, http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf.

grant transnational corporations and trade bureaucrats expanded "rights" to challenge the policies of democratic governments before international tribunals biased in favor global capital.[4] The focus is on environmental regulations and public services that allegedly interfere with free market efficiency, rather than traditional trade issues such as lowering tariffs. The goal is to go beyond World Trade Organization provisions that already threaten to vitiate environmental protections.

The leaked text of the Annex on Environmental Services for the Trade in Services Agreement confirms many of these fears about the agreement's potential use to roll back regulatory safeguards related to the environment and to inhibit the promulgation of new environmental measures to protect people and the planet.

Key concerns posed by TiSA Annex on Environmental Services

The scope of environmental regulations covered and put at risk by TiSA appears to be wide. Article (1) (a) provides that: "This Annex applies to measures by Parties affecting trade in environmental services. For the purposes of this Annex, environmental services means services classified under CPC Prov. 94 (sewage and refuse disposal, sanitation and other environmental protection services)." The wide open language here is "other environmental protection services."

In terms of coverage, the leaked Annex on Environmental Services may be only the tip of the iceberg. The leaked text on environmental services deals only with the application of the United Nations Central Product Classification provision 94 on sewage and refuse disposal, sanitation, and other environmental protection services. The leaked Annex on Environmental Services explicitly does not apply to either UN CPC Provision 18000 related to measures affecting the collection, purification, and distribution of water for private and industrial use (Article 1b) or more generally to regulatory measures related to public utilities supplying environmental services (Article 1c).

Moreover, the Annex is silent on the very large number of other UN CPC provisions that are potentially relevant to services affecting environmental policy. The United Nations Central Product Classification system, which is used in making WTO commitments under the General Agreement on Trade in Services, provides a good measure of the breadth of trade in services related to the environment, including categories on: "real estate services," "support services," "leasing or rental services," "electricity, town gas, steam, hot water," "wholesale trade services," retail trade services," "construction services," passenger transport services," "freight transport services," "electricity, gas, and water distribution," "research and development services," "other professional, technical, and business services," "support services for agriculture, hunting,

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[4] Debi Barker & Jerry Mander. *Invisible Government. The World Trade Organization: Global Government for the New Millennium?* San Francisco: International Forum on Globalization, October 1999."Mechanisms of WTO Governance," pp. 7 - 10. http://www.ifg.org/aboutwto.html; World Trade Organization, What's wrong with the WTO?WTO processes favor big business and rich countries, http://users.speakeasy.net/~peterc/wtow/wto-biz.htm

forestry, fishing, mining, utilities," "public administration services and other services provided to a community as a whole, compulsory social security services," and "other services."[5]

The rules constraining government regulations in commitments on "National Treatment," "Market Access," and "Most Favored Nation obligations incorporate sweeping restrictions on the capacity of democratic governments to protect the environment. Article (3) of the Annex dealing with scheduling of National Treatment commitments for Environmental Services provides that: "With respect to measures affecting trade in services as defined in Article I-1(2) (a) through (c), no Party may set out a condition or qualification affecting the supply of an environmental service in Section A of Part 1 of its Schedule." In other words, the National Treatment rule prohibits discrimination in favor of domestic suppliers of services, even if there is an unintentional change in the conditions of competition that does not formally discriminate. Nor may there be a local preference necessary to meet important environmental or climate policy goals. For example, preferences may not be given to local suppliers of clean energy services in order to assist in the local transition from a carbon-based economy to one based on renewables.[6]

Article (4)(b) of the Annex on Scheduling of Market Access Commitments for Environmental Services provides that: **"** Any terms, limitations and conditions on market access affecting the supply of environmental services shall be those measures that a Party maintains on the date this Agreement takes effect, or the continuation or prompt renewal of any such measures." In other words, this is a "standstill" provision that is likely to preclude or inhibit future environmental initiatives. More generally, Market Access rules prohibit quantitative limits on service suppliers such as monopolies and limits on the number of suppliers of the volume of service.

Article (6) of the Annex on Most-Favored-Nation Treatment Exemptions for Environmental Services provides that: "With respect to measures affecting trade in services as defined in Article I-1(2) (a) through (d), no Party may take an exemption to Article [X] (Most-Favoured-Nation Treatment) for the supply of each environmental service classified under CPC Prov. 94." Although the parties to the TiSA negotiations have not yet agreed on final language for the "Most Favored Nation"rule, MFN provisions generally provide that countries cannot normally discriminate between their trading partners. Granting favorable treatment to one country requires as a general matter that the same favorable treatment must be provided to other countries, thus lowering regulation and access to the lowest common denominator.

The exception to protect governments' right to regulate the supply of environmental services is largely toothless. Article (2) of the leaked Annex on Environmental Services on the Right to Regulate provides that: **"**Parties recognize the right to regulate, and to introduce new regulations, on the supply of environmental services within their territories in order to meet public policy

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[5] UN Central Product Classification http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=25; *See generally*, World Trade Organization, Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions. https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm

[6] This hypothetical reflects the facts, but not the trade law issues raised in the notorious WTO case related to the Ontario feed-in tariff to promote renewable energy. *See*, International Centre for Trade and Sustainable Development, WTO Appellate Body rules against Canada in renewable energy case, 27 May 2013. http://www.ictsd.org/bridges-news/biores/news/wto-appellate-body-rules-against-canada-in-renewable-energy-case-0

objectives."[7] This sounds like an assurance that if legislators and regulators seeking to protect the environment merely provide procedural transparency by making regulations available to the public and do not intentionally discriminate against foreign service suppliers, then effective environmental safeguards can be promulgated and enforced. While it is true that they cannot stop the regulatory process or preempt a domestic regulatory measure in the ways domestic courts can, international trade tribunals are empowered to impose retaliatory trade sanctions against a country that violate obligations under the National Treatment, Market Access or Most Favored Nation rules that, as noted above, go far beyond mere prohibitions on intentional discrimination or transparency of process. Tribunals can authorize plaintiff countries to impose higher tariffs on goods exported by the defendant- country or even deny international intellectual property protections for firms in that country, thereby creating a powerful incentive to repeal the offending regulatory measure. Moreover the TISA Annex on Domestic Regulation is likely to provide multiple grounds for sanctioning non-discriminatory regulations promulgated or enacted in a transparent process.[8]

Key environmental concerns posed by TiSA as a whole[9]

Provide more certainty in exclusion of environmental measures from coverage. In assessing the environmental impact of a particular chapter, the first question is whether a specific environmental measure (law, regulation, or enforcement action) is covered – in other words, whether the rules and obligations of that chapter apply at all to the environmental measures in question. There are three ways the environment could be covered by a trade chapter: a positive list of commitments, a negative list of commitments, or as proposed for TiSA, a hybrid system. [10]

A negative list approach means that the "default position" is that all government measures in all economic sectors are covered under TiSA, unless a specific reservation is listed for a specific sector or government measure. By contrast, under a positive list approach, such as that generally

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[7] This language in some ways reflects the disputed "right to regulate" language in the disputed Domestic Regulation provision of the TiSA Core text: [Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service.]"WikiLeaks, Trade in Services Agreement (TiSA) Core Text (April 2015), released July 1, 2015. P.7. https://wikileaks.org/tisa/core/TiSA-Core-Text.pdf

[8] According to Deborah James at the Center for Economic and Policy research: "the government's "right to regulate" does not mean the right to choose *how* to regulate in the national interest. It is a misleading and meaningless provision. And, according to the text, it is still bracketed because the U.S. opposes it. This is a crux of the matter. If the agreement were "almost all" about transparency and non-discrimination, there would be no need for a chapter disciplining the domestic regulation of countries." Setting the Record Straight on the TISA Leak, CEPR Blog, June 10 2015. http://cepr.net/blogs/cepr-blog/setting-the-record-straight-on-the-tisa-leak?highlight=WyJ0aXNhIiwidGlzYSdzIl0=

[9] *See generally*, Jane Kelsey, Analysis TiSA: The Leaked Core Text, WikiLeaks, https://wikileaks.org/tisa/core/analysis/Analysis-TiSA-Core-Text.pdf; WikiLeaks, TiSA - Trade in Services Agreement – Core Text. https://wikileaks.org/tisa/core/; WikiLeaks, Trade in Services Agreement (TiSA) Core Text (April 2015), released July 1, 2015. P.7. https://wikileaks.org/tisa/core/TiSA-Core-Text.pdf.

[10] One must also look at the definitions section of the chapter to see if a specific measure is covered by definition: for example the definition of "investment" in an investment chapter.

used under the WTO services agreement (GATS), specific economic sectors or government measures in most circumstances are voluntarily listed on a national schedule. [11]

A hybrid system has been proposed for TiSA. A positive list approach will apply to Market Access commitments, while a negative list approach will apply to National Treatment obligations. When limitations apply to both Market Access and National Treatment a negative list approach will be taken. "Standstill" and "Ratchet" clauses are particularly hazardous. Standstill clauses could hamstring efforts to adopt new and improved regulations in the future. Ratchet clauses might bar efforts to reregulate.

This hybrid system is fraught with danger. The positive list approach ought to have been used in TiSA, especially with respect to environmental and climate measures. Only a positive list of commitments provides reasonable certainty about which green policies are covered and which are not. It also provides far more policy space for the adoption of new measures and amendments to existing environmental policies. Finally, it is just more practical: it is a monumental task to list every measure conceivably subject to inappropriate trade agreement litigation on a negative list.

Effective environmental exceptions are necessary. TiSA includes a weak exception and defense for environmental measures based on the WTO model.[12] More effective across-the-board exceptions should be included in TiSA to better ensure that environmental laws, regulations, and enforcement actions are not undermined and it should be applied across the board to all relevant provisions.

The World Trade Organization GATT article XX exception[13] related to trade in goods and the GATS article XIV[14] exception for trade in services are frequently lauded by trade ministries as models for environmental exceptions in other free trade agreements. However, they do not apply

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[11] See generally, Organization of American States, Foreign Trade Information System, Dictionary of Trade Terms, 2013, http://www.sice.oas.org/dictionary/SV_e.asp.

[12] Jane Kelsey, Analysis TiSA: The Leaked Core Text, p.2, WikiLeaks, https://wikileaks.org/tisa/core/analysis/Analysis-TiSA-Core-Text.pdf; WikiLeaks, TiSA - Trade in Services Agreement – Core Text Article 1 -9. https://wikileaks.org/tisa/core/; WikiLeaks, Trade in Services Agreement (TiSA) Core Text (April 2015), released July 1, 2015. P.7. https://wikileaks.org/tisa/core/TiSA-Core-Text.pdf.

[13] GATT article XX provides an exception to the overall agreement on trade in products "**necessary** to protect human, animal or plant life or health" and "related to conservation of exhaustible natural resources" (provided that they are linked to domestic resource conservation measures). The article XX "necessity" test can be hard to meet. Alternative regulatory schemes for addressing environmental problems in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts give to economic regulations. In addition to that, the "chapeau" or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **"means of arbitrary or unjustifiable discrimination**," or a "**disguised restriction** on international trade." Terms of art such as "unjustifiable discrimination" and "disguised restriction" are vague and subjective.

[14] GATS article XIV excuses conflict with services chapter trade rules if a necessity test is met and the purpose of the government measure is to protect public morals, to protect human or animal health, to protect privacy or prevent fraud, or to safeguard essential security interests. Significantly, the exception does not cover natural resources, plant or other life forms, and the climate in general.

to several important WTO agreements and are stingy in carving out policy space in the GATT and GATS for essential government action related to climate, natural resources, public health, and other environmental policies. Public Citizen reports that these provisions have proved to be a successful defense in trade litigation only one time in 40 cases.[15]

A comprehensive carve out for public services is needed. TiSA contains a largely useless carve out for public services that applies only in the rare circumstance where a free service is provided through a public monopoly.[16] TiSA as a whole appears to encourage privatization of public services related to the environment based on broad ideological criteria. This ignores appropriate distinctions between what economists call public goods, such as transportation and public utility systems, and true private goods. In particular, given the experience with some existing trade agreements, in cases where the privatization of public services (such as water services) has gone badly wrong, it could hinder governments from returning service provision to the public sector.

Direct provision of services by government, rather than privatization is often appropriate given the mixed public-private or even the monopolistic character of some services, such as electric and water utilities. In the same way, the cost of serious environmental externalities, in the case of some private services, argues for government intervention, rather than "leaving it to the market to decide."[17]

Regulatory review provisions in TiSA should be dropped. The parties to TiSA negotiations have not yet agreed on regulatory review provisions but the proposals under discussion have nothing to do with trade and everything to do with setting up institutions and procedures to effect deregulation.[18] Multinational corporations are demanding that the TiSA include regulatory review provisions. Their goal is to undercut sensible environmental safeguards, and some TiSA negotiators are apparently willing to do their bidding.

Among other negative consequences, these regulatory review provisions would likely encourage the inappropriate use of business-friendly, cost benefit analysis that would hamstring environmental regulations. The process inherently gives disproportionate weight to quantitative data and economic costs, while diminishing the perceived importance of qualitative benefits such as saving lives, maintaining the equilibrium of the global eco-system, and protecting wild places.[19] Cost-benefit analysis is at odds with a fundamental principle of environmental

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[15] Public Citizen, Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception, August 2015. https://www.citizen.org/documents/general-exception.pdf

[16] TiSA Core Text, article 1.3 (b),(c) https://wikileaks.org/tisa/core/

[17] Sinclair, Mertins-Kirkwood, *supra*, p 17.

[18] Jane Kelsey, Analysis TiSA: The Leaked Core Text, p.5, WikiLeaks, https://wikileaks.org/tisa/core/analysis/Analysis-TiSA-Core-Text.pdf; WikiLeaks, Trade in Services Agreement (TiSA) Core Text (April 2015), released July 1, 2015. P.7. https://wikileaks.org/tisa/core/TiSA-Core-Text.pdf.

[19] While the appropriate use of cost benefit analysis in civil engineering and other reasonably quantifiable technical decision making processes goes back to at least the 1930s, the most serious abuse of cost-benefit analysis, at least in U.S. environmental policy making, began with Ronald Reagan whose enthusiasm for cost-benefit analysis was

regulation: application of the precautionary principle in the face of an immeasurable environmental risk and "inescapably uncertain outcomes."[20]

If an environmental benefit cannot be measured in dollars and cents, then its value is unfairly discounted.[21] In many circumstances it may be impossible to attribute a price to the intrinsic value of human life, living things and nature itself.[22]

Exclude enforcement through investor-state dispute resolution. The current WTO agreements do not provide for investor- state dispute resolution, and that is as it should be. That said, a primary purpose of international agreements in trade in services is to protect foreign investors, given that a large portion international trade takes place between corporations and their subsidiaries in other countries. The investment expectations of a company trading with its foreign subsidiary can be upset by environmental and other public interest regulation. This would be the rationale for including investor-state dispute resolution in a TiSA deal, especially given that the WTO agreements make no provision for ISDS.

It is unclear whether the U.S. Trade Representative's office or other negotiating parties will seek to include investor-state arbitration in the TiSA, presumably based on the flawed template of the U.S. Model Bilateral Investment Treaty.[23] Under the U.S. model, investors may seek awards of money damages, of unlimited size, in compensation for the cost of complying with environmental and other public interest regulations, including climate change measures. A large portion of suits brought under existing trade agreement investment chapters and bilateral

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inseparable from his anti-environment politics. http://www.slate.com/articles/news_and_politics/chatterbox/2007/10/chris_demuth_hack_extraordinaire.html.

[20] The 1998 Wingspread Statement on the Precautionary Principle provides in part: "When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. Rachel's Environment & Health Weekly #586 February 19, 1998, http://www.psrast.org/precaut.htm

[21] Cost benefit analysis in its pure forms generally involves four steps: (1) identifying and quantifying the costs and benefits of a proposed policy; (2) analyzing risks and probabilities of uncertain consequences; (3) discounting for the "time value of money"; and (4) calculating the "ratio of benefits to costs" in order to make a policy recommendation. *See,* Barry D. Friedman, Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence, University of Pittsburg Press, 1995, p. 45.

[22] Many or most environmental benefits have no market price. As a result, prices are sometimes imputed to qualitative environmental and public welfare benefits using questionable methods such as public opinion research or calculations of the worth of human life based on the discounted value of lost future earnings. Even less objectionable methods of regulatory impact assessment that simply compare quantitative costs to qualitative environmental benefits, without imputing a misleading "price" to that benefit, can be problematic. The cost data may appear reliable even though it is not, while the environmental benefit may appear less concrete because it is rooted in notions of prudence in the face of immeasurable environmental risk, a social responsibility not to despoil nature, or even a non-anthropocentric moral duty to respect nature. *See generally.* Frank Ackerman, Critique of Cost-Benefit Analysis and Alternative Approaches to Decision-Making," A report to Friends of the Earth England, Wales, and Northern Ireland, January 2008.p.7.

[23] 2012 U.S. Model Bilateral Investment Treaty, available at, http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

investment treaties involve challenges to environmental policy, in particular cases related to mining, oil production, and water policy.[24]

[24] The U.S. model would allow foreign investors to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment.[24] Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias. Investor rights are broadly and imprecisely defined in the U.S. Model BIT. They include the designation of expected future profits as a property interest and provide procedural rights that are unavailable under domestic law. Also, the substantive rights such as "expropriation" and especially the "minimum standard of treatment under international law" are vague and have been read broadly and narrowly by different tribunals. The broad readings go considerably beyond the general practice of nations for protecting property rights and due process.