BOSTON UNIVERSITY
Pardee School of Global Studies
Pardee Center for the Study of the Longer-Range Future
Center for Finance, Law & Policy

JULY 2014
ISSUE 003

GEGI Exchange
A Global Economic Governance Initiative policy brief

Leaked TISA Financial Services Text:
A glimpse into the future of services liberalization

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The Global Economic Governance Initiative is a project of Boston University's Pardee School of Global Studies, the Pardee Center for the Study of the Longer-Range Future and the Center for Finance, Law and Policy. GEGI was founded in 2008 to advance policy-relevant knowledge about economic governance for financial stability, human development, and the environment.

News of the leaked draft text of the financial services annex of the Trade in Services Agreement (TISA) has enlivened critics and given them opportunity to discuss the substantive shortcomings of the agreement. This brief addresses how the leaked text could impact host state regulation of foreign direct investment (FDI). The TISA negotiations are attempting to make progress in services liberalization outside of the stalled WTO proceedings. Proponents recognize potential importance of such an agreement in today's services-driven economy. However, services liberalization has not resulted in the same consistent growth as liberalizing goods trade did in the mid-20th century.

Here I discuss four key provisions in the leaked draft text that threaten to destabilize the global economy by exceeding the scope and coverage of the existing services liberalization as applied to FDI. First, by extending the "right of establishment" to foreign financial service providers, they would be granted almost automatic entry into any host state that is a party to the agreement. Second, by establishing automatic coverage of any "new financial service, host states may not protect themselves from new, untested financial services in the future. Third, by prohibiting even non-discriminatory measures, foreign financial services providers receive special protection from any regulatory measures that may affect them, even if they affect national providers similarly. Finally, under the guise of "transparency", this new draft text gives foreign providers political power in the host state to shape future financial services regulation.

The world is abuzz with news of the leaked draft text of the financial services annex of the Trade in Services Agreement (TISA). Up until recently, no results of the negotiations had been made public, so naturally, critics of the agreement are taking this opportunity to discuss the perceived shortcomings of draft text. Here I address the concerns that arise specifically in the context of the establishment of foreign companies on host country soil or foreign direct investment (FDI).

Traditionally covered as both Mode 3 (commercial presence) in the General Agreement on Trade in Services (GATS), and as individual investment measures in the Agreement on Trade-Related Investment Measures (TRIMS), FDI coverage within trade agreements has garnered a substantial amount of criticism over the years (e.g., ActionAid 2008, Muchlinski and Gomez-Palacio 2008). Outside of the WTO, investment treaties have increasingly constrained government regulation of foreign investments and investors and allowed investor protection to encroach on state sovereignty through investor-state dispute resolution clauses (Thrasher and Gallagher 2010). These agreements commonly target provisions that countries have historically relied on to build up industry, protect trade and current account balances and support native cultures and people groups.

The TISA negotiations are an attempt to move services liberalization forward outside of the WTO, where negotiations have been at a virtual standstill since the beginning of the Doha Round in 2001. Proponents of the agreement are quick to recognize the potential importance of this effort. The negotiations currently involve 50 state participants that account for 70 percent of the world's trade in services (Coalition of Services Industries 2014). Samuel A. Di Piazza, Chairman of the Institutional Clients Group at Citi, points out that in today's economy, "[s]ervices are the enabler for all economic activity" (Coalition of Services Industries 2013). Di Piazza speaks out strongly in favor of a market-based, rather than government-based, global economy, pointing out that these market principles are "a proven formula for the creation of wealth and its most efficient means of distribution" (Coalition of Services Industries 2013).

Except that it is not that simple. In fact, while liberalization in goods trade has brought about much of the promised growth since the advent of the General Agreement on Tariffs and Trade, the same cannot be said of services and investment liberalization. Countries that have liberalized both FDI and foreign portfolio investment have been more likely to encounter financial crises than economic growth (Thrasher and Gallagher 2014). There are four key ways in which the leaked TISA text promises to threaten stable economic growth by exceeding the scope and coverage of the existing global liberalization of FDI in financial services: right of establishment, automatic "new financial service" coverage, prohibition on non-discriminatory measures, and transparency requirements.

Rights of Establishment

"Each Party shall grant financial service suppliers of any other Party the right to establish or expand within its territory, including through the acquisition of existing enterprises . . . a commercial presence" (X.7).

Subject, of course, to conditions and limitations in the parties' schedules, the European Union and United States propose that each party must allow foreign financial companies onto their soil and allow them to acquire and expand their companies with minimal restriction. Panama proposes furthermore that host countries may not impose numerical restrictions on the number of foreign financial establishments.

Unpacking that provision, it does allow host countries to enforce terms and conditions for authorizing those foreign financial service providers. However, ultimately, the right to establish, on equal footing with host state nationals, is upheld.

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Rights of establishment are key because, rather than permitting countries to limit which types and quantities of service providers they admit, they owe a legal duty to private foreign companies before they even arrive. Indeed, as discussed below under the non-discriminatory measures article (X.15), foreign financial service suppliers may have even greater rights of establishment than nationals under this agreement.

Automatic National Treatment on "New Financial Services"

"Each Party shall permit financial service suppliers of any other Party established in its territory to offer in its territory any new financial service" (X.10).

Additional proposals suggest that the article would be limited by a commitment to national treatment ("any new financial service that a party would permit its own like financial service suppliers to supply . . ." (US/Panama proposal)). It also would grant to the host state the freedom to "determine the institutional and juridical form" of the new financial service supplier.

Despite these caveats, this provision creates a great deal of uncertainty for countries signing on to this agreement. Given the previously discussed "right of establishment" host states must already allow foreign entities onto their soil, but here, they must also blindly bind future policy makers to allow any newly available financial services, regardless of policy implications. Professor Jane Kelsey, Faculty of Law at the University of Auckland, points out that the 2008 Financial Crisis was due in part to novel financial products such as Credit Default Swaps (CDS) ("naked" insurance that amounted to "bets on whether insured assets owned by someone else would fail) (Kelsey 2014). In light of the role of CDS's and other financial products in the Crisis, anticipatorily binding policies that would regulate or prohibit future inventions of that kind, could increase global economic instability.

Non-Discriminatory Measures

"Each Party shall endeavor to remove or to limit any significant adverse effects on financial service suppliers of any other Party of . . . measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Party to operate, complete or enter the Party's market" (X.5, emphasis added).

This is a startling provision that seems to prohibit certain measures, even though they are also applied to national services suppliers and therefore, not in violation of national treatment. In practice, this grants foreign financial service suppliers greater rights than national suppliers, allowing them to petition their government to bring a complaint against the host state for measures that adversely affect them in any way. When viewed in light of the aforementioned right of establishment, this provision could give multinational financial corporations the power to influence behind-the-border regulation in all TISA countries even where they do not yet have a commercial presence. Additionally, when combined with the following provision protecting transparency, these articles provide unprecedented rights for companies operating on foreign soil.

Transparency

"Each Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Party proposes . . . to allow opportunity for such persons to comment on the measure" (X.16 [EU]). "At the time it adopts a final regulation, a Party should, to the extent practicable, address in writing substantive comments received from [such] interested persons" (X.16 [US]).

These two proposals reach far beyond the traditional transparency requirements of making regulations and rulings available to affected people. The EU proposal provides foreign financial service suppliers the right to comment, along with national interested parties, on regulatory measures proposed by the host government. The US proposal goes further to demand that final regulations address the substantive comments received from those service suppliers. If combined, these provisions could give foreign financial service suppliers even more power than nationals in quasi-legislative matters of the host state. Allowing foreign investors such direct access a host state's domestic regulation, would greatly increase the political power of these foreign financial service suppliers worldwide.

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Trends

The trend is clear. As TISA marches forward foreign financial service suppliers (and perhaps other service suppliers) gain increasing power and influence in matter of domestic concern. They are granted access to the host state, future rights to provide any newly invented financial service, special protection from measures that affect them adversely, even if they affect national suppliers equally, and a voice in shaping future financial services regulation. If the TISA draft text enters into effect for the 50 negotiating members, most of the global trade in services will be subject to these provisions and more pressure will be placed on non-members to conform to these liberalizing standards. Public criticism has been helpful in highlighting the troubling aspects of this agreement, but concerned citizens in affected countries must do more to keep this agreement, as it stands, from establishing a new standard in financial services liberalization.

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