

7.

**TiSA AND
FINANCIAL
SERVICES**

TISA's rules on financial services are designed to advance the interests of the same global finance industry players whose greed and recklessness was responsible for the global financial crisis (GFC) and others before it. They want guaranteed rights to supply banking, insurance, investment and other financial services across the border and to prevent or restrict regulations that make those operations more difficult or less profitable. Governments signing on to TISA would be expected to lock in their current levels of financial deregulation and liberalisation, promise never to regulate new and potentially toxic financial products and services, and disable themselves from taking precautionary measures to prevent another crisis.

Future growth of on-line and cross-border trade in financial products and services, especially through self-regulated and privately owned exchanges or in the shadow banking system, poses increased systemic risks of financial stability, regulatory avoidance, money laundering and tax evasion. Their workforce becomes utterly dispensable through a dynamic cycle of offshoring, automation and centralisation. As de-territorialised banks, credit cards and payment platforms like PayPal and Poli arrange settlements between each other they have the potential to form a proxy central banking system beyond the control of state regulators.

Nothing has been learned from successive crises. Leaked documents show the EU has made requests for more liberalisation of financial services to twelve countries, including most of TISA's developing country participants.¹ The potential economic, social and political risks extend beyond the parties negotiating TISA. As with the GFC,² a disproportionate burden of another financial crisis would fall on developing countries, even when they had no role in making the rules that heightened those risks. Additionally, those countries face the prospect that TISA's new financial services rules could be exported back to the WTO.

Box 7.1 Objectives for financial services in TISA

TISA's rules aim to require governments to take a minimalist approach to regulating the finance industry and remove obstacles to its seamless global operations to guarantee:

- no limits on the size of financial institutions (too big to fail);
- unrestricted rights to supply services from outside the country (offshore call centres and tax havens);
- institutions can't be stopped from performing multiple activities (eg banks that take deposits from retail customers can also trade on their own account);
- foreign investment can be made through branches (that are regulated from their parent state) rather than subsidiaries (regulated by the host country);
- financial data can be held offshore (making them subject to foreign privacy and consumer protection laws, and inaccessible to financial regulators in an emergency);
- unrestricted rights to transfer funds electronically across the border (increasing risks of hot money flows or a run on a currency);

1 TISA, Bilateral market access request by the European Union, June 2016, to Chile, Costa Rica, Hong Kong, Mauritius, Mexico, Pakistan, Peru, South Korea, Switzerland, Taiwan, Turkey, the US. https://wikileaks.org/tisa/document/20160701_TiSA_Bilateral-Market-Access-Request/

2 *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, 21 September 2009 (Stiglitz Commission), p.12

- electronic payment operators can transfer money in and out of countries to pay for services (as cross-border e-commerce grows, so will the dominance of PayPal, Visa and Poli);
- state monopolies can't use that status to support their non-monopoly activities (eg a state monopoly on disaster insurance must ensure its other insurance activities don't benefit from that);
- state-owned banks, insurers and fund managers must operate on a purely commercial basis;
- financial traders can't be required to conduct their business visibly, through public exchanges, rather than invisibly by over-the-counter operations (using the shadow banking system that allows them to evade public scrutiny);
- new 'innovative' financial products and services can't be regulated if they can be sold inside the country (but innovative products are *designed* to avoid the existing regulations);
- credit rating agencies or financial advisers can't be regulated (even though they failed monumentally during the global financial crisis);
- unrestricted inflows and outflows of capital (even the IMF now recognises that precautionary capital controls and emergency measures are legitimate ways to stabilise currencies and economies);
- managers or senior officers, or a majority of directors, can come from any country (requiring them to be nationals helps to ensure local knowledge and effective legal accountability); and
- the activities of hedge funds can't be regulated (speculation in food, energy, currency); etc.

The financial industry lobby

Architects of the GATS

The US financial services industry were the original architects of trade in services agreements. In the 1970s, they developed a plan to rebrand the expansion of transnational financial services as 'trade'. According to the former director of the WTO's services division: *'Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement'*.³ While the lobby was led from Wall Street, it encompassed the major insurance and banking institutions, investment banks, and providers of financial services like funds managers, credit-rating agencies and even the news agency Reuters. They were later joined by the e-finance and electronic payments industry, which includes credit, stored value and loyalty cards, ATM management, and payment systems operators like PayPal.

When the GATS was being concluded in 1994 the US insisted that negotiations on financial services were extended until countries had agreed to a raft of rules, schedules, annexes, known collectively as the Financial Services Agreement.⁴ The most far-reaching was part was the voluntary Understanding on Financial Services which many, but not all, the TISA parties have adopted.⁵

Attempts by the financial services lobby to push the boundaries of the Financial Services Agreement during the GATS 2000 negotiations and the Doha round failed. The US and EU developed new templates for more extensive obligations through their free trade agreements (FTAs). The TPP and

3 David Hartridge, 'What the General Agreement on Trade in Services (GATS) Can Do', speech to the Clifford Chance Conference on 'Opening Markets for Banking Worldwide: The WTO General Agreement on Trade in Services', London, January 1997

4 What is commonly called the Financial Services Agreement is a composite of texts: the GATS sets the framework for rules that govern services transactions between a consumer of one country and a supplier of another; the Annex on Financial Services applies to all WTO Members; schedules of commitments specify which financial services each country has committed to the key rules in (i) and (ii), and any limitations on those commitments; and a voluntary Understanding on Commitments in Financial Services sets more extensive rules and has an ambivalent legal status in the WTO.

5 Current TISA negotiating parties who are not parties to the Understanding are: Chile, Costa Rica, Hong Kong, Israel, Korea, Mauritius, Pakistan, Panama, Peru, Taiwan. Those who are also not parties to US or EU FTAs that contain some such rules are Hong Kong, Mauritius, Pakistan and Taiwan.

TiSA became the vehicles to consolidate those gains, and bind governments to maintain a highly liberalised, deregulated, self-regulated (or at best lightly-regulated) financial regime. US Treasury Secretary Jack Lew said: ‘We bargained very hard in TPP to get terms that are very favorable generally to U.S. financial institutions on a global basis’.⁶ A comparison of TiSA with the TPP shows the US has made new demands, for example holding financial data offshore, while the EU has surrendered new protections for regulators it had included in its agreements with Canada, Vietnam and Cariforum countries, notably abandoning the stronger defence for prudential measures.

Team TiSA’s finance arm

Team TiSA has become the new flagbearer. Its members include the first and third largest US banks (JP Morgan Chase and Citigroup),⁷ most of the largest US insurance firms and numerous industry lobbies, plus both Visa and Mastercard. TiSA’s Annex on Financial Services reflects the wish list of US industry demands, conveyed publicly through a consultation on TiSA that the US Trade Representative (USTR) conducted in 2012 and the US International Trade Commission inquiry into the role of digital trade in the US and global economies in 2013.

The insurance industry lobby has been especially aggressive in its demands for TiSA. The **US Chamber of Commerce** pushed for the right to transfer policy holder and employee data across the border, non-discriminatory access to countries’ markets for all forms of insurance, and ‘level playing field’ for government-affiliated and private insurers.⁸ The **American Insurance Association** was even more aggressive, wanting TiSA to guarantee:

100 percent market access for the insurance suppliers of signatories in the markets of other signatories, including freedom from discriminatory treatment, the absence of quantitative restraints and investment restrictions, the freedom to choose the form of legal entity through which they operate in a given jurisdiction, and the ability to provide insurance on a cross-border basis. The [T]iSA should include strong disciplines on behind-the-border measures that indirectly restrict or limit market access, including state-owned enterprises, and discriminatory measures and regulatory schemes that operate as disguised trade restrictions. The [T]iSA should clarify that prudential measures must be nondiscriminatory and no more restrictive than necessary to achieve prudential objectives.⁹

The **US Securities Industry and Financial Markets Association** urged the USTR to ensure there was prior consultation on draft regulation and a strong investment chapter with investor-state enforcement.¹⁰

The finance industry’s digital agenda

The core demand in the 2013 US inquiry into digital trade was to ‘free’ the industry from localisation rules for data, local presence, and regulation of new products, subject to ‘appropriate’ prudential supervision.

According to **Citigroup**, an initiator of the original GATS and one of the six co-chairs of Team TiSA, the ‘primary goal of any regulatory scheme concerning cross border data processing should be the establishment of global interoperability of national legal and regulatory requirements applicable to cross border data transfers and data processing.’¹¹ In other words, a uniform regime that is designed to serve the needs of the major financial institutions.

Citigroup’s submission described data processing as the foundation of global operations of the finance sector, covering ‘a wide array of activities and operations on the digital continuum including collection, access, use, transfer, disclosure, storage, retention and back up operations, such as disaster recovery.’ Having to comply with the laws and requirements of different jurisdictions prevented it from centralising its operations in large global mainframes.

6 ‘Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue’, *Inside US Trade*, 11 February 2016

7 <http://www.bankrate.com/banking/americas-top-10-biggest-banks/#slide=1>

8 <https://www.regulations.gov/document?D=USTR-2013-0001-0018>

9 <https://www.regulations.gov/document?D=USTR-2013-0001-0013>

10 <https://www.regulations.gov/document?D=USTR-2013-0001-0032>

11 https://www.uscib.org/docs/Citi_TC_030713.pdf, p.6

In particular, requirements for domestic processing of personal information denied customers, especially multinationals and businesses, the benefits of improved service quality. Costs of infrastructure, staffing and legal advice diverted funds from innovation and new initiatives, and could cause financial institutions to exit a country. Some countries took a different approach, dictating the content of contracts for outsourced activities or requiring approval from a banking regulator for outsourcing arrangements. That, according to Citigroup, showed there was no need for local data requirements – an early indicator of what the industry may argue are less burdensome ways for a government to achieve a ‘legitimate policy objective’.

Citigroup objected, in particular, that the EU’s Draft General Data Protection Regulation imposed restrictions on conduct outside the EU. It was concerned that other countries might follow suit, creating uncertainty for the industry and imposing costly and inefficient obligations to comply with different local rules on financial reporting requirements, anti-money laundering etc.

Another member of Team TiSA and the Coalition of Services Industries, **CIGNA insurance**, wanted to replace national regulation with global rules that are designed for globalised financial institutions:

*as the world’s economies become more interdependent, and as businesses and individuals become more globally mobile, it becomes essential that local regulations not impede the development of the global health policies required by these individuals and the businesses they support to promote global business and trade.*¹²

CIGNA attacked a broad range of localisation requirements as impeding its ability to provide efficient, personalised health insurance and cover for a multinational’s employees anywhere in the world: local data processing, local authorisation of firms and health insurance plans, restrictions on data transfers, caps on foreign investment, and requirements to have a local presence. Most important was the free movement of data across borders. At a minimum, Cigna wanted TiSA to facilitate the supply of health insurance by guaranteeing the right of financial institutions to transfer data into and out of the territory for processing, and to process claims offshore.

In addition, parties should schedule commitments on health insurance in all four modes of supplying services, and clarify whether it is classified as life or non-life insurance. Cross-border market access commitments should cover, at least: supply to foreigners residing in a TiSA country; non-discriminatory laws, licensing, procedures and tax treatment; no restrictions on ownership and the legal form in which they invest; equal access to provider networks; and similar tax treatment. Visas for corporate personnel should not be linked to them taking local health insurance cover.

In an attack on the EU’s privacy rules, CIGNA made the quite remarkable claim that the U.S. Health Insurance Portability and Accountability Act (“HIPAA”) is ‘arguably more robust in protecting an individual’s personal health data’ than EU law: ‘It is, therefore, of great concern to Cigna that the EU has yet to recognize the robust nature of U.S. privacy legislation and its enforcement regime’.¹³

Freedom of Information documents show Cigna followed a similar submission to the USTR in 2013 with a personal meeting to press its cause.

The European finance lobby

The EU finance industry has made equally aggressive demands. **Insurance Europe**, which accounts for 95 percent of insurance premium income, wanted a standstill on existing market access and local preferences, with minimum standards for new commitments to apply across the board for all sectors of financial services.¹⁴ These standards included no localisation requirements, no caps on foreign equity and full access to public and private distribution networks. It argued for a ‘level playing field’ with state-owned entities including postal financial services, even when they were fulfilling their universal service requirements. All restrictions on insurance activities and local requirements should be removed. In addition, all TiSA parties should sign up to the Understanding on Financial Services

12 CIGNA Insurance submission to US ITC Inquiry into the role of digital trade in the US and Global Economies, 2013

13 CIGNA Insurance submission to US ITC Inquiry into the role of digital trade in the US and Global Economies, 2013

14 Insurance Europe position on the Trade in Services Agreement, position paper, Brussels, 10 June 2013, [https://www.insuranceeurope.eu/sites/default/files/attachments/Position%20on%20the%20Trade%20in%20International%20Services%20Agreement%20\(TISA\).pdf](https://www.insuranceeurope.eu/sites/default/files/attachments/Position%20on%20the%20Trade%20in%20International%20Services%20Agreement%20(TISA).pdf)

and guarantee the industry's right to comment on any new regulatory policies, supported by access to investor-state dispute settlement. As with their American counterparts, they wanted to narrow significantly the scope of the (already ineffectual) prudential exception.

TiSA Rules on Financial Services

TiSA's Annex on Financial Services builds on the Understanding on Financial Services, adding a variety of innovations that reflect the industry's demands.¹⁵ The annex has an extensive definition of financial services, similar to the GATS, which does not rely on the standard W/120 classification document. The long and non-exhaustive list of 'financial services' ranges from insurance and reinsurance to commercial banking, derivatives trading and pension fund management to credit rating agencies and financial advisers.

The proposed rules would increase obligations to schedule commitments on the core market access and non-discrimination rules, and impose far-reaching restrictions on financial regulation, especially for insurance services. There are some exclusions for central banks' non-commercial activities and for a statutory system of social security or public requirement plans or other government-guaranteed entities where there are no competitors.¹⁶ There is also a highly problematic protection for the right of governments to take prudential measures. Appendix 7 provides more technical detail.

Financial stability

A report written for the European Parliament in 2016 on financial services liberalisation under TiSA (the Lang Report) warned of a 'lost opportunity' to address problems with existing rules.¹⁷ Yet successive leaked versions of the financial services annex show TiSA would go further than the GATS and the TPP. If the current texts were adopted, TiSA would set a new base that requires more liberalisation commitments, imposes new restrictions on requirements to transfer or store financial data locally and to disclose source code, tightens domestic regulation, and provides more opportunities for the finance industry to lobby against new regulations.

Before and after the global financial crisis there have been many calls to revisit the model of deregulation and liberalisation of global financial markets embodied in the GATS Financial Services Agreement. Countries like Ecuador and Barbados tried unsuccessfully to tighten the WTO's rules on financial services and suppliers in the late 2000s.¹⁸ The US Congress managed to introduce some degree of re-regulation through what was known as the Dodd-Frank law in 2010¹⁹ (which the Trump administration is now winding back). Prominent member of the US Senate Banking Committee Senator Elizabeth Warren warned the USTR in December 2014 that

the Trans Pacific Partnership (TPP) could make it harder for Congress and regulatory agencies to prevent future financial crises. With millions of families still struggling to recover from the last financial crisis and the Great Recession that followed, we cannot afford a trade deal that undermines the government's ability to protect the American economy.

The Lang report prepared for the European Parliament observed that in the absence of TPP and TTIP, 'TiSA remains the only avenue outside the WTO in which new generation rules for transatlantic financial services are being developed'.²⁰ Instead, the opportunity to fix problems that were exposed by the global financial crisis has been squandered.

15 TiSA, Annex on Financial Services, dated November 2016

16 TiSA, Article X.1.2(b) and (c), and 1.3, Annex on Financial Services, dated November 2016

17 Andrew Lang and Leonie Amarasekera, *Financial services liberalisation and TiSA: implications for EU Free Trade Agreements*, 26 July 2016 (Lang Report)

18 eg. *Unintended Consequences of Remedial Measures taken to correct the Global Financial Crisis: Possible Implications for WTO Compliance* WTO DOC JOB/SERV/38 (2011) (Communication from Barbados).

19 Formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, 124 Stat. 1376–2223

20 Lang Report, p.8

Capital controls

Even the IMF and its research economists now recognise that capital controls can be legitimate tools of financial stabilisation.²¹ Numerous countries have successfully adopted them as pre-emptive measures. Yet nothing has been done in TiSA to amend the GATS provisions that prevent the adoption of capital controls as a precautionary measure and impose narrow conditions on their use even in emergencies.²²

Prudential measures

When financial markets or major institutions collapse, economies are plunged into crisis and people's lives are shattered. Financial regulators use prudential measures to safeguard their financial system and financial institutions. The GATS contained a circular and potentially self-cancelling defence for prudential provisions: measures taken for prudential reasons must not be used as a means of avoiding the country's commitments or obligations under the GATS!²³

TiSA has imported that wording unchanged, even though the EU has adopted a new approach that partly addresses the deficiencies. The Lang report diplomatically observed that some safeguards and exceptions positions in TiSA 'may not reflect current best practice (compared, for example, to the prudential carveout in CETA). Where that is the case, TiSA may have an impact on the effective legal protection provided by enhanced exceptions contained in FTAs to which TiSA members are parties.'²⁴ The European Parliament was more forthright, expressing a strong view that no new commitment [should] be made in TiSA 'that could jeopardise EU financial regulation by forcing the EU to turn back on its enhanced regulatory framework for the financial sector or by preventing the EU from using the law to tackle excessive risk-taking by financial institutions'.²⁵ Despite that, the leaked financial services annex from November 2016 shows the European Commission has agreed to the flawed and potentially useless GATS provision in TiSA.²⁶

Financial data

Who controls financial data, where and under what conditions is extremely sensitive. As the Peterson Institute explains, the authority of financial regulators is still essentially territorial, and

*they want to be able to seize data and resources quickly to address abuse or to contain a financial crisis. Each government might therefore rather have global conglomerates keep a minimum amount of capital and certain essential information in its jurisdiction. When an international financial conglomerate fails, each government might rush to seize what it can to make sure that its constituents get paid. Under the circumstances, it is not surprising to see governments worry about their ability to prevent or resolve crises, react to abuses in finance or data privacy—or, on a more sinister note, police their people—when firms can instantly whisk assets and data out of their reach.*²⁷

The TPP did not apply the prohibition on requiring data to be held locally to financial data.²⁸ The US Treasury had insisted on that approach,²⁹ apparently at the request of the Securities and Exchange Commission.³⁰ According to US Treasury Secretary Jack Lew 'we can't give away something that our

21 Most recently Jonathan Ostry, Prakash Loungani and Davide Furceri, 'Neoliberalism: Oversold?', 53(2) *Finance and Development*, June 2016, <http://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm>

22 TiSA, Article I-8, Core Text, dated 14 July 2016

23 GATS, Article 2(a), Annex on Financial Services

24 Lang Report, p.8

25 Resolution A8-0009/2016, para 1(e)(iv) cited in Lang Report, p.13

26 TiSA, Article X.16, Annex on Financial Services, dated November 2016

27 Anna Gelpern, 'Financial Services' in Peterson Institute for International Economics, *Assessing the Trans-Pacific Partnership*, PII Briefing 16-1, February 2016, 99

28 TPP, Annex 11-B, Section B of the financial services chapter said a financial institution must be allowed to *transfer* information in electronic form for the purpose of data processing where that processing is required in its ordinary course of business. But TPP countries could still require that financial data was *stored* locally.

29 Article 14.13.2 of the TPP says no 'covered person' shall be required to locate or use local computing facilities in the territory as a condition for conducting business in that territory. But 'covered person' does not include a 'financial institution' or a 'cross-border financial service supplier of a Party'.

30 'Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue', *Inside US Trade*, 11 February 2016

financial regulators need here in the US [because] prudential regulators need access to information in a timely way, particularly in a crisis. ... Prudential regulators need to be guaranteed access to “timely and appropriate” information and there were times during the financial crisis they “were cut off”.³¹

Wall Street lobbyists condemned this as ‘data protectionism’ and ‘forced data localisation’ and demanded it was covered by the TPP, even after the agreement was signed.³² Their supporters in the US Congress demanded the ban on data localisation be extended to financial data as a condition of their much-needed support for the deal.³³ The USTR insisted the TPP text could not be reopened, but said the ban would be inserted into TiSA, which would bind eight TPP countries and many others.³⁴

The US proposed a TiSA provision in July 2016 that would prohibit countries from restricting cross-border data flows.³⁵ The wording was subject to extreme secrecy and did not appear in the leaked financial services text dated that month. The sensitivity went beyond the concerns of financial regulators; it also raised the spectre of privacy and the potential for sale and misuse of personal financial information. By the November 2016 leaked text nothing had been agreed. This is discussed in more detail in Appendix 7.

What TiSA means for UNI’s finance sector workers

- TiSA aims to lock the door against future regulation of the financial sector, despite repeated financial crises that have devastated economies, jobs and households, especially in the global South – some governments might even have to roll back the regulations they adopted following the global financial crisis.
- The finance sector would become even more high-risk, high-profit, globally mobile and unstable, as it maximises returns for shareholders and executives and minimises the costs of its workforce by cutting wages, de-unionising, contracting out and offshoring work.
- State-owned banks and insurers, especially in the global South, would face intense pressure to privatise or compete on private sector terms, with massive impacts on the public-sector workforce.
- Facilitating online technologies would shift work to back offices that foster short-term contracting and casualisation, and intense work pressures.
- Offshoring would increase, with call centres, online chat rooms and web-based transactions forcing workers to compete under labour conditions of the country in which they work, and eroding unionisation and collective bargaining.
- Gender impacts would intensify as women are clustered in low paid, insecure contract work.
- As workplaces become automated and anonymous, working conditions would deteriorate and electronic surveillance of performance would increase.
- Competition among workers and pay based on performance targets and financial incentives would intensify stress and increase pressure to take short cuts on ethical and regulatory requirements.

31 House Appropriations Subcommittee on Treasury Budget with Secretary Lew, 16 March 2016, <http://www.sifma.org/members/hearings.aspx?id=8589959275>; and House Financial Services Committee on International Financial System with Sec. Lew, 22 March 2016, <http://www.sifma.org/members/hearings.aspx?id=8589959428>.

32 ‘Lew: Treasury Working with Companies, Regulators on TPP Financial Data Issue’, *Inside US Trade*, 11 February 2016

33 For the standard argument see Nigel Cory and Robert Atkinson, ‘Financial Data does not Need or Deserve Special Treatment in Trade Agreements’, Information Technology and Innovation Foundation, April 2016, www2.itif.org/2016-financial-data-trade-deals.pdf

34 The non-TiSA countries would be asked to agree in a side-letter.

35 Rachel Fefer, ‘Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress’, Congressional Research Service, 3 January 2017, p.13