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RE: **TISA Leak Reveals 10 Key Threats to Commonsense Financial Regulations**

Since 2013, 51 nations have been conducting closed-door negotiations on a Trade in Services Agreement (TISA) whose text has been kept secret, despite that the pact, as proposed, would impose binding constraints on a broad swath of domestic safeguards, including financial regulations.¹ On July 2, 2015, leaked copies of [several draft TISA texts](#), including an Annex on Financial Services, were posted online.

The leaked TISA texts reveal the dangers of sweeping, so-called “trade” agreements that are negotiated outside of public scrutiny, providing a cautionary tale for the controversial Trans-Pacific Partnership and Trans-Atlantic Free Trade Agreement that are also being negotiated in secret. **As governments around the world implement the lessons of the 2008 financial crisis by re-regulating financial firms to prevent another crisis, the leaked TISA rules could require countries – including the world’s largest financial centers – to halt and even roll back financial regulations.**

Indeed, the leaked TISA Annex on Financial Services makes clear that TISA restrictions on financial regulations would apply to virtually the entire financial sector – including derivatives, banking, stocks and bonds, foreign exchange, life and non-life insurance, credit cards, financial data processing, credit-rating, reinsurance and other financial services (Annex, Art. X.2(a)). The extent to which each government binds its regulations in each of these sectors to TISA’s deregulatory rules ultimately would be determined by the government’s specific commitments, which were not included in this leak. TISA proponents have made clear that TISA governments will be under pressure to broadly commit to the pact’s rules.² Governments would even be bound to TISA rules for financial products that have not yet been invented (Annex, Art. X.9), and with regard to foreign banks that are not yet operating within their borders (Annex, Art. X.2(b)).

TISA would expand deregulatory “trade” rules written under the advisement of large banks before the financial crisis,³ requiring domestic laws to conform to the now-rejected model of extreme deregulation that led to global recession. Any TISA government that fails to alter its financial policies to conform to TISA’s deregulatory terms could face indefinite trade sanctions, authorized by an extrajudicial tribunal, until it brings its financial policies into conformity.

The leaked TISA texts build on pre-crisis rules of the World Trade Organization’s (WTO) General Agreement on Trade in Services (GATS) that claim to just focus on trade liberalization, but actually require deregulation. The rules prohibit many common forms of financial regulation, even if such policies apply to domestic and foreign firms equally. Rather than revamp these rules to incorporate the lessons of the financial crisis, **the leaked TISA texts would actually extend further the deregulatory GATS model by adding even more onerous rules and imposing them on a wider array of domestic financial regulations.**

Below are 10 of the most concerning threats that the leaked TISA texts pose to commonsense financial regulations. References to provisions of the leaked texts are included throughout (“CT” refers to the leaked TISA core text, “Annex” refers to the leaked Annex on Financial Services).

- 1. Restricting even-handed policies that limit financial risk:** TISA’s sweeping “market access” rules conflict with commonsense financial regulations that apply equally to foreign and domestic firms.⁴ One rule would expose governments to legal challenges before extrajudicial tribunals for banning risky financial services or products, such as the complex derivatives that fueled the financial crisis. The same rule threatens proposals to limit the size of banks so that they do not become “too big to fail” (CT, Art. I-3(2)(b,c)). Another TISA “market access” rule contradicts efforts to “firewall” different financial services to prevent the spread of risk (CT, Art. I-3(2)(e)). For example, TISA would expose to challenge increasingly common policies that prevent banks that hold consumers’ deposits from engaging in hedge-fund-style trading of high-risk securities. Despite the post-crisis consensus on the importance of robust financial regulations, TISA makes zero changes to the “market access” rules of GATS that were developed during the deregulatory 1990s. Indeed, the very purpose of TISA, according to its proponents, is for governments to commit more sectors, and thus more domestic policies, to those deregulatory rules.⁵ TISA governments that exempted certain financial regulations from GATS rules are under pressure during the TISA negotiations to eliminate those exemptions. In addition, the leaked TISA text includes a proposed provision not found in GATS that TISA governments “shall endeavor to remove” or limit the effects of “non-discriminatory measures” – even ones that otherwise conform to TISA rules – if they prevent foreign-owned financial firms from offering financial products and services (Annex, Art. X.14(1)). That is, in addition to exposing more financial regulations to the deregulatory strictures of the old GATS rules, TISA countries are being asked to weaken or roll back even financial policies that comply with those rules, if they inhibit financial firms’ business.
- 2. Allowing consumers’ sensitive financial data to be offshored:** Despite increasing concerns about data privacy, sparked by revelations of the U.S. National Security Agency’s dragnet spying, TISA would require that financial firms be permitted to transfer consumers’ personal financial data overseas, where it could be exposed to unwanted surveillance. TISA includes two competing proposals regarding the cross-border transfer of information, both of which would prohibit government policies to prevent the offshoring of citizens’ financial data (Annex, Art. X.10(1)). These terms seem to conflict with TISA members’ existing data privacy policies. For example, the European Union (EU), a TISA negotiating party, maintains strict data privacy protections and generally prohibits the export of citizens’ data to countries without an “adequate level of protection” for privacy.⁶ TISA could expose this policy to challenge as a violation of the TISA rule against government “measures that prevent transfers of information...into and out of its territory.” (The EU and several other TISA countries have proposed a clause that would allow them to avoid committing all financial sectors to this rule, though the United States and other TISA countries have not indicated support for that clause.) While the first of the two TISA proposals does include a weak allowance for data privacy protections, that language is rendered ambiguous at best, and null at worst, by a contradictory clause. The clause states that such data privacy protections are only permitted insofar as they “are not used to circumvent” TISA rules, which presumably includes the TISA requirement to allow the offshoring of financial data. The second proposal, supported by the United States alone, does not even include this self-contradictory allowance for data privacy protections, nor any mention whatsoever of data privacy concerns (Annex, Art. X.10(1)).⁷

- 3. Requiring governments to predict all regulations that could at some point run afoul of TISA’s broad restrictions:** The leaked TISA text goes beyond prohibiting discrimination against foreign firms and prohibits even policies that are “formally identical” for domestic and foreign firms if they inadvertently “modif[y] the conditions of competition” in favor of domestic firms (CT, Art. I-4(3)). This rule exposes to challenge financial regulations that are neutral by design but that may have an unintended, disproportionate impact on foreign-owned financial firms. For example, many governments require all banks to maintain a minimum amount of capital to guard against bank collapse. Even if the same minimum is required of domestic and foreign-owned banks alike, it could be construed as disproportionately impacting foreign-owned banks whose home governments also require their parent firms to maintain a minimum level of capital. This common financial protection could thus be challenged under TISA for “modifying the conditions of competition” in favor of domestic banks, despite governments’ prerogative to ensure the stability of foreign-owned banks operating in their territory. TISA replicates these “national treatment” rules from GATS, making no substantive changes to account for the lessons of the financial crisis. Worse still, TISA would go beyond GATS in requiring governments to subject all financial regulations in all financial sectors to these rules, unless otherwise specified (CT, Art. II-2(1)). (In contrast, GATS only bound governments to “national treatment” rules for sectors they specifically named). This so-called “negative list” approach would impose on TISA governments the nearly impossible burden of anticipating today all possible financial regulations – including future regulations for financial services not yet invented – that may one day have an inadvertent disproportionate impact on foreign-owned financial firms. Any such regulation that a TISA government failed to predict and preemptively exempt from TISA rules could later be challenged as a violation of those rules, exposing the country to possible trade sanctions.
- 4. Indefinitely barring new financial regulations that do not conform to deregulatory rules:** The leaked TISA texts include sweeping commitments to not enact new financial policies that would contradict the pact’s deregulatory terms. These “standstill” measures would lock in the current level of financial regulation in sectors committed to TISA rules, despite that many governments are still in the process of re-regulating finance, not to mention that new regulations will be needed in the future to respond to emerging financial products and risks. One TISA proposal would prohibit governments from shielding potential future financial regulations from the pact’s broad “market access” rules, requiring that exemptions in committed sectors be limited to “existing” policies (Annex, Art. X.3(2)). Under this proposal, TISA countries would commit to not enact new, non-discriminatory policies at any point in the future that could limit financial firms’ “market access” in a given sector, such as bans on risky financial products. Indeed, another proposal in the leaked text explicitly states that countries “shall endeavor” to avoid new “non-discriminatory measures” that could “limit or restrict the present degree of market opportunities” afforded to foreign-owned financial firms (Annex, Art. X.14(2)). Another TISA provision would not allow any future deviations from the agreement’s “national treatment” rules in committed sectors, exposing future financial regulations to challenge for differently impacting foreign versus domestic financial firms, even if the regulations are non-discriminatory by design (CT, Art. II-2(2)). And while TISA countries could seek to protect an *existing* financial regulation from these rules by explicitly exempting it, if a future government would alter the regulation to diminish its impact on foreign financial firms, the country would be barred indefinitely from reverting to the original regulation (CT, Art. II-2(3)). To use an example offered above, if a future government decided to stop requiring foreign-owned banks to maintain minimum capital levels as a buffer against risk, given the perceived stability of their foreign parent firms, TISA would bar the government from reversing this decision even if the foreign parent firms became unstable.⁸

- 5. Prohibiting capital controls used to prevent or mitigate financial crises:** The 2008 financial crisis has spurred an emergent consensus among economists that capital controls – regulations to stem destabilizing flows of speculative “hot money” into or out of a country – are legitimate policy tools for preventing or mitigating financial crises.⁹ Indeed, the International Monetary Fund, which urged countries to abandon capital controls in the 1990s, officially endorsed a new, post-crisis policy position in 2012 that recognized that capital controls may be needed to ensure financial stability.¹⁰ Contrary to this post-crisis consensus, TISA replicates pre-crisis rules that bar the use of capital controls with limited exceptions (CT, Art. I-3(footnote 2), Art. I-7, Art. I-8). The leaked texts prohibit restrictions on financial inflows – used to prevent rapid currency appreciation, asset bubbles and other macroeconomic problems – and financial outflows, used to prevent sudden capital flight in times of crisis.¹¹ The only “exception” to TISA’s broad prohibition of capital controls is limited to balance-of-payments crises, despite that capital controls are used for a wider array of legitimate financial stability objectives. Even in the narrow permitted instance of balance-of-payments crises, capital controls would have to “be temporary and be phased out progressively,” rendering the “exception” useless for capital controls of a more permanent nature used to *prevent* financial crises. And even *temporary* capital controls taken *in response* to a balance-of-payments crisis could be challenged as not “necessary” under the provision (CT, Art. I-8). While GATS included the same capital controls restrictions, TISA would cement these anachronistic rules and expose capital controls to another forum for challenge.
- 6. Requiring acceptance of financial products not yet invented:** Despite the pivotal role that new, complex financial products played in spurring the 2008 financial crisis (e.g. collateralized debt obligations, credit default swaps), TISA would require governments to allow any new financial products and services – including ones not yet invented – to be sold within their territories. The TISA Annex on Financial Services clearly states that TISA governments “shall permit” foreign-owned firms to introduce any new financial product or service, so long as it does not require a new law or a change to an existing law (Annex, Art. X.9). (This caveat is unlikely to exclude many new financial products from the sweeping rule, as the introduction of a new product often does not require the creation of a new law or the modification of existing ones.) The provision allows governments to deny authorization of new financial services “only for prudential reasons” (Annex, Art. X.9). But unless a government can preemptively prove that a new financial service or product may one day pose a threat to financial stability – an unrealistic requirement – this exception would seem to not apply, meaning the government would have to accept the new product or service. For example, it would have been difficult to prove the prudential threat posed by “collateralized debt obligations” when the complex financial products were first introduced in the United States in 1987, despite the significant role they played two decades later in spurring the financial crisis. In addition, governments can deny authorization of new financial services for legitimate reasons beyond “prudential” ones, such as consumer protection. For example, say that a foreign financial firm wanted to open the first payday lending service in a TISA country that had no payday lenders even though the service was technically legal, intending to profit via predatory loans to credit-strapped consumers. Since the protection of those consumers would not likely pass for “prudential,” TISA could bar the government from preventing the introduction of payday lending in its territory.¹²
- 7. Outsourcing domestic financial regulation to foreign governments:** The leaked text states that TISA governments may consider exempting foreign-owned financial firms from domestic “prudential” regulations if their home countries are deemed to have regulatory regimes that are

roughly “equivalent” – a process known as “recognition” (Annex, Art. X.18).¹³ With respect to these foreign-owned firms, TISA countries would effectively outsource to other governments the responsibility of ensuring financial stability. In other policy arenas, such as food safety regulations, this practice of substituting domestic standards with roughly “equivalent” foreign standards has resulted in a weakening of safeguards.¹⁴ Alternatively, the leaked text suggests that TISA governments could alter their financial regulations to conform to new standards negotiated with other TISA governments – a process known as “harmonization” (Annex, Art. X.18(1)). Past experiments with “harmonization” in sectors beyond financial services suggest that safeguards established by democratic processes would be replaced by ones developed in closed negotiations advised by industry.¹⁵ The lower degree of public scrutiny could foster a lowest-common-denominator approach to divergent regulations, resulting in weakened protections. While the TISA text does not *require* governments to pursue “recognition” or “harmonization” of financial regulations, it moves in the wrong direction by suggesting that governments experiment with these deregulatory approaches rather than enforce their own democratically-established prudential protections.

- 8. Providing opportunities for financial firms to delay financial regulations:** One proposed provision in the leaked TISA Annex would require governments to publish proposed drafts of new financial regulations to allow “interested persons” to comment on them before the regulations are finalized (Annex, Art. X.15(4)). While there is much to recommend about a notice-and-comment system in principle, the United States’ experience indicates a need for caution, as industries have been able to add additional procedural hurdles to the system to delay and water down regulations. In the United States, the “interested persons” that comment on a proposed regulation are by and large the industries that would be subject to the regulation. The comment period offers them an opportunity to push for weaker versions of the regulation, or at least to delay its enactment. The TISA proposal would require governments to address financial firms’ criticism of a regulatory proposal when publishing a final version of the regulation (Annex, Art. X.15(5)). Even then, governments would be obliged to wait a “reasonable time” before allowing the new regulation to take effect (Annex, Art. X.15(6)). In the United States, such requirements have produced unacceptable delays – sometimes lasting years – in the enactment of urgently-needed financial and other safeguards. Were TISA to require other governments to adopt components of the industry-dominated U.S. notice-and-comment system with respect to financial regulations, it could lead to significant hurdles for the re-regulation of finance.
- 9. Prohibiting government preferences for domestic firms when safeguarding taxpayers’ funds:** A proposed provision in the Annex on Financial Services would bind government procurement of financial services to TISA’s “national treatment” rules, prohibiting governments from preferring domestic firms when contracting for sensitive financial services (Annex, Art. X.6). For example, state and local governments in the United States contract with deposit-taking banks to safeguard taxpayers’ funds.¹⁶ TISA’s requirement that foreign-owned banks be given the same access as domestic firms to such contracts has implications for broader financial stability, given that aforementioned TISA rules could jeopardize the stability of foreign-owned banks. For example, if TISA’s “national treatment” rules resulted in weaker minimum capital requirements for foreign-owned banks than for domestic banks (as described above), a state government could have legitimate concerns about entrusting foreign-owned banks with taxpayer funds. But under TISA’s proposed procurement rules, the government would be barred from formally preferring domestic banks for this sensitive service.

10. Relying on a weak defense for challenged prudential policies: TISA proponents will argue that governments need not be concerned by the agreement’s many, broad constraints on financial stability policies, given language in the leaked text concerning “prudential measures” (Annex, Art. X.16). But that provision merely replicates, nearly word-for-word, the weak prudential defense of GATS, despite years of critiques of that language by legal scholars.¹⁷ The provision, which a government could only use once its financial policies were already formally challenged, contains a clause requiring that the challenged prudential measure not be used to contradict the government’s obligations under TISA (Annex, Art. X.16(2)). But the government would not invoke the prudential defense unless it felt that the challenged measure did just that. At best, this contradictory wording is ambiguous, inviting a TISA dispute resolution panel to deem the prudential defense ineffective for safeguarding a challenged financial policy. In addition, TISA’s proposed definition of “prudential” would not cover the full scope of legitimate financial policies that TISA would expose to challenge (Annex, Art. X.16(footnote 8)). For example, policies to protect borrowers, such as restrictions on predatory lending, would appear not to qualify for the prudential defense. It would be imprudent for governments to subject their financial stability protections and consumer safeguards to TISA’s panoply of broad constraints in hopes that such a narrow and contested provision would offer an adequate defense.

ENDNOTES

¹ The TISA negotiating parties include Australia, Canada, Chile, Colombia, Costa Rica, the European Union (on behalf of its 28 member states), Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Republic of Korea, Switzerland, Taiwan, Turkey and the United States.

² For example, in a statement on TISA before the House Committee on Ways and Means Trade Subcommittee in September 2012, Deputy U.S. Trade Representative Michael Punke stated, “the agreement would encompass all service sectors and modes of supply and impose a high standard for liberalization.” Michael Punke, “Remarks by Deputy U.S. Trade Representative Michael Punke before the House Committee on Ways and Means Trade Subcommittee regarding Prospects for an International Services Agreement,” Office of the U.S. Trade Representative, Sep. 20, 2012. Available at: <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2012/september/remarks-deputy-us-trade-representative-mic>.

³ See memorandum from Timothy Geithner to Larry Summers, “WTO Financial Services Negotiations: Industry Consultations,” November 24, 1997. Available at: http://www.gregpalast.com/vulturespicnic/pages/filecabinet/chapter12/Geithner_Summers%20Memo.pdf.

⁴ For detailed analysis of these rules, see Lori Wallach and Todd Tucker, “Answering critical questions about conflicts between financial reregulation and WTO rules hitherto unaddressed by the WTO Secretariat and other official sources,” Public Citizen, June 22, 2010, at 9-10. Available at: <http://www.citizen.org/documents/Memo%20-%20Unanswered%20questions%20memo%20for%20Geneva.pdf>.

⁵ For example, in a statement on TISA before the House Committee on Ways and Means Trade Subcommittee in September 2012, Deputy U.S. Trade Representative Michael Punke stated, “the agreement would encompass all service sectors and modes of supply and impose a high standard for liberalization.” Michael Punke, “Remarks by Deputy U.S. Trade Representative Michael Punke before the House Committee on Ways and Means Trade Subcommittee regarding Prospects for an International Services Agreement,” Office of the U.S. Trade Representative, Sep. 20, 2012. Available at: <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2012/september/remarks-deputy-us-trade-representative-mic>.

⁶ Article 25(1) of the European Union’s Directive 95/46/EC. See European Commission, “Frequently Asked Question Relating to Transfers of Personal Data from the EU/EEA to Third Countries,” accessed June 28, 2015. Available at: http://ec.europa.eu/justice/policies/privacy/docs/international_transfers_faq/international_transfers_faq.pdf.

⁷ Though U.S. TISA negotiators may argue that data privacy is protected by the “general exceptions” included in the leaked TISA core text (CT, Art. I-9), that language mimics the ineffective general exception included in GATS and the WTO General Agreement on Tariffs and Trade. Only one of 41 attempts to use these general exceptions to protect challenged policies has ever succeeded. See Public Citizen, “Only One of 41 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,” PC memo, April 2015. Available at: <http://www.citizen.org/documents/general-exception.pdf>.

⁸ TISA would permit countries to avoid these “standstill” and “ratchet” provisions with respect to national treatment rules for certain financial sectors that the government names at the time of negotiations. Once the deal is completed, all other financial sectors not named by the government would be bound by these provisions (CT, Art. II-2(4)).

⁹ See Public Citizen, “Alone and Confused: U.S. Trade Officials Defy Post-Crisis Consensus Backing Capital Controls,” PC memo, July 2014. Available at: <http://www.citizen.org/documents/capital-controls-USTR-vs-everyone.pdf>.

¹⁰ International Monetary Fund, “The Liberalization and Management of Capital Flows: An Institutional View,” November 14, 2012. Available at: <http://www.imf.org/external/np/pp/eng/2012/111412.pdf>.

¹¹ For detailed analysis, see Todd Tucker, “The WTO Conflict with Financial Transaction Taxes and Capital Management Techniques, and How to Fix It,” Public Citizen, July 9, 2010. Available at: <http://www.citizen.org/documents/MEMO%20on%20Capital%20Controls.pdf>.

¹² Another proposed TISA provision regarding insurance does not even cite “prudential reasons” as sufficient cause to reject authorization of new insurance services. The proposal simply states that TISA members should consider “not requiring product approval or authorization” for new insurance products (Annex, Art. X.20).

¹³ While the leaked texts do not define “recognition,” the word is a term of art in international trade law. A 2011 *Harvard International Law Journal* article on “Mutual Recognition in International Finance” described “recognition” as allowing “private actors who comply with the applicable home state rules” to “access the host state pursuant to an exemption from some or all of the host state’s rules.” Pierre-Hugues Verdier, “Mutual Recognition in International Finance,” *Harvard International Law Journal*, 52:1, Winter 2011, at 63. Available at: http://www.harvardilj.org/wp-content/uploads/2011/02/HILJ_52-1_Verdier1.pdf.

¹⁴ See, for example, Public Citizen, “The WTO Comes to Dinner,” PC report, 2003. Available at: <https://www.citizen.org/documents/PCfoodsafety.pdf>.

¹⁵ For detailed analysis of past “harmonization” efforts, see Public Citizen, “Harmonization Alert,” 1998-2003. Available at: <http://www.citizen.org/trade/harmonization/alerts/>.

¹⁶ Government Finance Officers Association, “Procurement of Banking Services,” March 2010. Available at: <http://www.gfoa.org/procurement-banking-services>.

¹⁷ For detailed analysis, see Public Citizen, “No Meaningful Safeguards for Prudential Measures in World Trade Organization’s Financial Service Deregulation Agreements,” PC report, September 2009. Available at: <http://www.citizen.org/documents/report-prudential-measures.pdf>.