

APPENDIX 3

LABOUR MOBILITY UNDER TISA

The proposed Annex on Movement of Natural Persons in TiSA would give privileged access to four categories: foreign intra-corporate transferees, business visitors, independent professionals, and contractual service suppliers, which potentially opens the door to a large increase in foreign contractualised labour.

GATS ‘Mode 4’

The temporary movement of natural persons to deliver a service in another country is recognised as one of four modes for ‘trading’ services internationally and is commonly known as ‘Mode 4’. These categories were developed in the 1980s when the GATS was being negotiated. The focus was then on foreign investment, formally called establishing a commercial presence (Mode 3). The élite labour of executives, managers and professionals was treated as a valuable asset to the enterprise, and commodity labour as a cost to business that is readily substitutable by other workers or technology. Nothing has changed.

However, making that crude class distinction in the Uruguay round would have deepened the objections by developing countries that GATS was a deal for rich countries, their corporations and élites. As a result, ‘Mode 4’ in the GATS does not distinguish between classes of labour. Instead it distinguishes between the entry of someone who is *employed by a service supplier from another GATS country* to perform a service, which is considered ‘trade’, and those seeking *entry to the employment market*, which is treated as immigration for the purpose of employment.¹ This can be a spurious distinction as those engaged in ‘trade’ will often directly or indirectly displace locals in the host employment market.

Technically, GATS Mode 4 applies to all categories of workers who are employed by a service supplier from another GATS country and to independent professionals. Governments could have made commitments in their schedules for mode 4 to guarantee entry for commodity labour,² including care givers, construction workers and agricultural labourers employed by a service supplier from another country. That did not happen because the positive list approach allowed the likely destination countries not to list them in their schedules. Instead, they granted entry rights to intra-corporate transferees, managers and executives, specialists and some professionals in particular sub-sectors.

Since then, many FTAs have explicitly restricted chapters on ‘temporary movement of natural persons’ to élite corporate personnel and independent professionals. Because TiSA needs to be compatible with the GATS, it retains the original approach to Mode 4, but a separate annex requires or encourages parties to give priority to preferred categories.

The TiSA annex on labour mobility

The most recent leak of the TiSA Annex on Movement of Natural Persons from November 2016³ continues the distinction between persons *employed* by a service supplier from another TISA country and those seeking to access to the *employment market*. This distinction becomes even less credible

1 GATS 1994, Article 2, Annex on Movement of Natural Persons Supplying Services Under the Agreement

2 GATS 1994, Article 3, Annex on Movement of Natural Persons Supplying Services Under the Agreement

3 TiSA, Annex on Movement of Natural Persons, TISA/JUL.2015/negotiating text/MNP, dated 8 November 2016.

in TiSA because governments are encouraged to guarantee entry for foreign workers to deliver contracted services in highly contractualised economies. Four rules have been agreed in the annex:

- **Scheduling.**⁴ The standard rules for scheduling TiSA commitments would apply to Mode 4:
 - a positive list approach to market access commitments in Mode 4, promising not to restrict temporary access to the domestic market for a foreign person to deliver a service in a specific sector. Often that would be written as a horizontal entry that applies to all services sectors committed in the schedule, subject to any limitation the country wants to retain (such as a quota on numbers allowed entry or a time limit on stay);
 - once a market access commitment has been made there are no rights to restrict entry on the basis of foreign nationality, unless the schedule that has been agreed with the other TiSA parties allows:
 - a standstill that preserves the status quo in a service, but prevents any new or stronger protections for locals, such as reserved occupations, with a ratchet that locks in all new liberalisation; or
 - full policy space that allows existing or new rules to apply to foreign and domestic labour in that service
- **Strike breaking:**⁵ A country may suspend the Mode 4 obligations in its schedule where entry and temporary stay might adversely affect the settlement of a collective labour dispute at the relevant workplace or the employment of someone involved in the dispute. This is the only indirect reference to unions in the annex. However, the protection is weak, because it relies on the government to invoke it and would not apply where the strike-breakers are providing the service from offshore.
- **Immigration and visa laws:**⁶ States are assured that they can regulate entry and temporary stay, including to protect the integrity of their borders—but only where that does not nullify or impair the benefits another TiSA country expected from the annex or from a scheduled commitment. That proviso, derived from the GATS, would apply even if the measure did not directly breach a TiSA rule- for example, if a government adopted more complex, costly and lengthy immigration or visa procedures for approval that seriously impeded the ability of a foreign firm to conduct its business in the country, as it had expected TiSA would enable it to do.
- **Information⁷ and entry⁸ procedures:** Certain information must be publicly available, and processing, fees, documentation requirements, multiple-entry visas and opportunities for review should facilitate entry under TiSA. That could make entry easier for all kinds of workers, but it is linked to commitments in schedules that will apply mainly to elite categories. A person granted entry would still have to comply with licensing requirements or mandatory vetting or codes of practice for their profession. Expediting access, as proposed here, carries risks of poor quality vetting and undetected fraud, especially where employers have incentives to abuse the looser arrangements.

Redefining ‘Mode 4’

The most controversial parts of the annex have not been agreed. Canada, Colombia, the EU, Norway and Mauritius have a priority to secure Mode 4 commitments in four categories of persons employed by a service supplier of one TiSA party to supply a service in another TiSA country:⁹

- i. intra-corporate transferees;
- ii. business visitors;
- iii. independent professionals;

4 TiSA, Article 3, Annex on Movement of Natural Persons, dated 8 November 2016

5 TiSA, Article 3.4, Annex on Movement of Natural Persons, dated 8 November 2016

6 TiSA, Article 1.3, Annex on Movement of Natural Persons, dated 8 November 2016

7 TiSA, Article 2, Annex on Movement of Natural Persons, dated 8 November 2016

8 TiSA, Article 5, Annex on Movement of Natural Persons, dated 8 November 2016

9 TiSA, Article X ‘Specific Commitments’, Annex on Movement of Natural Persons, dated 8 November 2016

iv. contractual service suppliers.

None of the categories are defined; the following discussion uses the definition from CETA, but the meaning in TiSA could be different. Each category would be afforded a different degree of entitlement. Each TiSA party would be required to make commitments at least for category (i) intra-corporate transferees. Three categories are especially relevant to UNI.

Intra-corporate transferees¹⁰ is most important to the corporate lobby, as it allows them to move senior personnel around the world to run the business, provide a career path within the firm, and keep specialist and proprietary knowledge in-house. Those proposing this provision¹¹ want automatic entry for intra-corporate transferees (and business visitors) once a country makes commitments to allow commercial establishment (Mode 3) in a sector. This would entitle the banks and insurers or telcos to bring their management or technical personnel with them and operate colonial-style administrations in any TiSA country. Under the annex the personnel would have entry for at least one year or the duration of their contract if that is less.¹²

Contractual services suppliers is the most controversial category. In the absence of a definition, CETA is used here as a proxy, where ‘contractual services suppliers’ is defined as:

natural persons employed by an enterprise of one Party that have no establishment in the territory of the other Party and that have concluded a bona fide contract (other than through an agency as defined by CPC 872¹³) to supply a service to a consumer of the other Party that requires the presence on a temporary basis of its employees in the territory of the other Party in order to fulfil the contract to supply a service.¹⁴

The basic intention is clear: if a firm in one TiSA country has a contract to supply services in another TiSA country, it must be allowed to use workers it has employed from its own or a third (even non-TiSA) country to deliver the service, where the contract requires the temporary presence of those workers. The contract referred to is between the contracting parties to supply and receive the service. There are no rules about the nationality of the employees of the contractor supplying the service. For example, a New Zealand company that has a consultancy contract to privatise a country’s postal service could recruit personnel from New Zealand or any other country to deliver the service. A specialist call centre firm in Israel that wins a contract to deliver back office services in Canada could bring temporary employees from Israel, Pakistan or the Philippines. Express delivery firm from Turkey that competes successfully with the public postal service in Italy for delivery contracts could bring its own drivers temporarily from Turkey or Romania to supply the service.

The pay and conditions of those employees would be governed by their employment contract with the supplier of the service and the relevant law for that contract. It is possible that the original contract for the service requires the workers to be employed under the labour laws of the country in which they are supplying the service, but that is uncommon. It is also possible that the country where the service is supplied requires that local labour laws, such as the minimum wage, apply to foreign employees of foreign contractors, but that is not usually the case.

The requirement that the contract ‘requires the presence’ of the foreign employees in the country to deliver the service is also unclear. It does not mean there are no locals available to do the work, because the EU has proposed adding that requirement (an ‘economic needs test’) to the provision. That suggests ‘requires the presence’ may depend on what is written in the contract, which will be a private matter between the contracting parties.

10 Under CETA Article 10.1 the term ‘intra-corporate transferees’ applies to senior personnel working in a senior position in an enterprise performing senior management roles or exercise significant autonomous authority or supervisory functions; specialists who have an advanced level of expertise or knowledge of the enterprises products or services in an international market or of the enterprises processes and procedures, and those are unusual skills that cannot be learned by others easily; or graduate trainees gaining experience.

11 As of November 2016, they were Canada, Chile, Colombia, the EU, Iceland, Japan, Mauritius, Norway

12 TiSA, Article X.2(a), Annex on Movement of Natural Persons, dated 8 November 2016

13 In the UNCP classification list this covers: 87201 - Executive search services; 87202 - Placement services of office support personnel and other workers; 87203 - Supply services of office support personnel; 87204 - Supply services of domestic help personnel; 87205 - Supply services of other commercial or industrial workers; 87206 - Supply services of nursing personnel; 87209 - Supply services of other personnel – which is defined unhelpfully as ‘Supply services of other personnel not elsewhere classified’

14 CETA, Article 10.1. This is badly drafted in relation to who holds the contract to supply the service.

The proposal allows governments more flexibility in making commitments for contractual service suppliers: they would 'endeavour to'¹⁵ guarantee entry for up to 90 days cumulatively within a year or for the duration of the contract if shorter.¹⁶ 'Endeavour' still requires TiSA countries to actively consider such commitments in good faith.

Such commitments would compound the problems of labour exploitation and social dumping that the European Parliament has resolved to end.¹⁷ Yet the EU supports this proposal, provided there is a right to impose an economic needs test. Even when economic needs tests are effective and enforced (and they often are not) other parts of TiSA may make them difficult to implement in practice. For example, the domestic regulation annex requires administration of general regulations to be reasonable, objective and impartial. It would be easy to see an economic needs test being challenged for breaching those requirements.

Independent Professionals would have a right of temporary entry to deliver a service on the same terms as contractual service suppliers.¹⁸ They would still be subject to licensing and qualification requirements and procedures, including codes of conduct,¹⁹ and any technical standards that apply to the service, although those would be subject to the light-handed approach required by the Annex on Domestic Regulation.

In addition, Australia, Norway and Iceland are pushing an **Annex on Professional Services**.²⁰ Almost none of it is agreed. The annex would apply to measures affecting 'trade' by listed professions²¹ through any mode of delivery (note just Mode 4) and whatever technologies were used to deliver the service, under the principle of 'technological neutrality'. The list of professions includes engineering and finance-related services. Australia and Turkey want to prevent any TiSA country from applying a discriminatory economic needs test, including a labour market test to show there are no locals to do the work.²² Once professional services have become contractualised, for example as a result of TiSA's Annex on Telecommunications, these rights of entry could have significant displacement effects. Increased cross-border provision of professional services would also make it more difficult for governments, and people using the services, to check the authenticity of qualifications and the quality and ethics of practitioners, apply consumer protection laws and enforce penalties.

While there was limited support for these proposals in November 2016, there was extensive support for applying the Domestic Regulation annex to 'measures affecting trade in professional services', whether or not the particular sector was committed in a country's schedule.²³ This would only apply to the professions listed in the professional services annex.

The parties have agreed to encourage professional bodies to enter dialogue on mutual recognition arrangements and set up a Working Party on Professional Services. Governments and professional bodies have traditionally been cautious about recognising foreign qualifications and usually prefer more restricted mutual recognition agreements. This is provided for in the core TiSA text on the same terms as in the GATS.²⁴ UNI would want to ensure a right to participate in discussions on relevant professions, especially if the categories of professionals were expanded.

15 Colombia and Mauritius oppose that qualification.

16 TiSA, Article X.2(c), Annex on Movement of Natural Persons, dated 8 November 2016

17 European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), Para I.1

18 Article X.2(c): Specific Commitments, Annex on Movement of Natural Persons, dated 8 November 2016

19 TiSA, Article 3.3, Annex on Movement of Natural Persons, dated 8 November 2016

20 TiSA, Annex on Professional Services, dated 10 November 2016

21 The services proposed are: legal; accounting, auditing and bookkeeping; taxation; architecture; engineering, integrated engineering and engineering related scientific and consulting; urban planning and landscape architecture.

22 TiSA, Article 8, Annex on Professional Services, dated 10 November 2016. Canada, Chile, Colombia, Iceland, Japan, Norway, Mauritius, New Zealand and US are considering.

23 This article is not numbered. The EU has not stated a position.

24 TiSA, Article I.6, Core text, dated 14 July 2016