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WHAT TiSA MEANS FOR UNI WORKERS

A snapshot

Trade in services agreements are designed to serve capital. Labour is rarely visible, except as a commodity, a mode of delivery, or a ‘barrier to trade’ - even though it is workers who provide the services that are being ‘traded’. On the rare occasions that the Really Good Friends of Services and Team TiSA talk positively about workers it is either to promise a fanciful increase in employment from TiSA or to extol the benefits for workers of greater flexibility from harnessing new technologies.

Their vision of a globally-integrated services market is devoid of politics or social responsibility, leaving them free to maximise their profits through constant reorganisation, relocation and technological innovation. Those with corporate wealth and power are concentrated at the top of the pyramid, operating through layers of highly competitive subcontractors who employ a fragmented, vulnerable and exploited workforce. The 21st century vision of constant disruption and creative destruction poses an existential threat to working people, their families and communities.

This trend is not new, but TiSA will intensify the international race to the bottom for labour in at least four ways:

- **Internationally**, corporations play countries off against each other to secure the least burdensome regulations and taxes;
- **Within nations**, a race to the bottom among layers of contracts, contract workers and the nominally ‘self-employed’ erodes hard-won protections, poses new barriers to the organisation of labour and undermines the bargaining position of those who are unionised;
- As new technologies enable **cross-border** supply of services that were once territorially bound, jobs are outsourced and offshored from one country to another, creating precarious new jobs that can easily be moved elsewhere or displaced by new technologies that encourage the ‘reshoring’ of operations to the home country; and
- In the guise of ‘trade’, **foreign workers** are imported for short periods to deliver services in another country under terms of employment that are often exploitative of the worker and exacerbate social dumping in the host country.

There is a common theme: workers are pitted against workers in a battle for survival that is not of their making.

This commercial model is not only unjust; it is socially and politically unsustainable. Rampant inequalities and the economic distress borne by families, communities and entire nations have provoked a mounting backlash against such agreements. While the turmoil in the US and Europe makes the headlines, this radical disruption will impact most severely on the global South. Those workers have fewer choices, as do their small and medium businesses, and even their national enterprises. The promise of new prosperity through the digital economy and global supply chains is a cruel illusion.¹ The more power is concentrated in those who control the global finance, logistics and digital platforms, the less power governments, workers and unions in the global South will have.

¹ South Centre, ‘The WTO’s Discussion on Economic Commerce’, Analytical note SC/AN/TDP/2017/2, January 2017

TiSA's systemic effects on labour

TiSA would impact on workers and unions at the systemic level, where the project aims to:

- support the global reorganisation of capitalism through a digitally-enabled mode of production;
- facilitate globally integrated, but highly fragmented, logistics and supply chains;
- promote hyper-competitive service provision through outsourcing and contractualisation;
- remove barriers to cross-border services and offshoring;
- prohibit economic strategies and policies that support the domestic economy and jobs;
- remove requirements on foreign investors to buy local and train local workers in new technologies;
- ensure the élite workforce has a right to enter and work in other TiSA countries;
- allow foreign firms to use cheaper foreign contract workers to deliver services in a TiSA country;
- enable employers to bypass collective agreements and deunionise the workforce;
- expand the feminised, vulnerable, lower paid services workforce and widen the gender gap with secure and high-paid élite services work;
- create new jobs in the global South that are even more precarious, with workers clustered at the bottom end of the global value and supply chains;
- require pro-business approaches to regulation of licensing, qualifications and technical standards that directly affect labour; and
- weaken the role of specialist international standard-setting organisations, notably in postal and telecommunication services.

The politics of labour in TiSA

The US and EU will determine the final shape of TiSA (if it is ever agreed). Both have political sensitivities that will frame their positions on matters that directly affect labour.

US constitutional limits: The US cannot make TiSA commitments on labour mobility, even for élite labour, because the Congress has said it will not allow its constitutional authority over immigration to be eroded any further through free trade deals.² It is likely that political objections to the inclusion of entry rights for non-corporate labour in TiSA would intensify under the Trump presidency. The other parties to the TPP allowed the US to avoid making any such commitments. Some similar dispensation would be required for temporary labour mobility (mode 4) in TiSA, but the current proposals do not guarantee that flexibility.

Social dumping: Social dumping has become recognised, at least in the EU, as the flipside of freedom of movement. When contract workers from cheap labour countries are used to supply cross-border services into countries that have higher labour standards, the rights of those workers are often violated and the minimum standards set by statute and/or collective agreements in the host country are undermined. Environmental dumping also occurs, as the dispute on cross-border trucking between the US and Mexico under the North American Free Trade Agreement (NAFTA) shows.³

Border security: Movement of people across borders has become hugely sensitive, especially in Europe, because of the refugee crisis and heightened border security. Yet governments are expected to guarantee increased access for services labour from other countries under TiSA. They may want to restrict that access for security reasons. However, a clampdown that prevents foreign firms from

2 This was made clear following US FTAs with Chile and Singapore that made commitments for entry of specific numbers under the H-1B visa programme. See Lori Wallach and Todd Tucker, 'Debunking the Myth of Mode 4 and the U.S. H-1B Visa Program', March 2006, https://www.citizen.org/documents/Mode_Four_H1B_Visa_Memo.pdf

3 'Teamsters Denounce DOT Decision to Open Borders to Mexican Trucks', 9 January 2015, <https://teamster.org/news/2015/01/teamsters-denounce-dot-decision-open-border-mexican-trucks>.

undertaking activities or delivering services, as they have done in the past, might well be challenged if the government has made a TiSA commitment in mode 4. They could invoke the national security exception (which the leaked core text showed is the same as in the GATS), but its scope is limited to action to protect the country's 'essential security interests ... in time of war or other emergency in international relations'. That wording suggests an immediate and finite period, not precautionary or semi-permanent measures. Alternatively, the government could invoke the problematic general exception for measures 'necessary to protect public order'. These are discussed in more depth in chapter 5 and the accompanying appendix.

The EU's response to the social dumping and security issues in TiSA is to propose an EU-specific 'declaration' in the Annex on Movement of Natural Persons. This would require source countries in TiSA to accept the **return and readmission of nationals** who have contravened rules for entry and stay, consistent with customary international law.⁴ When there is a bilateral agreement on return and readmission between the EU and another TiSA party, and the EU considers it is not being honoured, the EU could unilaterally suspend the operation of the TiSA annex for that country's service suppliers. There is no indication that any other country supports the EU on this. The EU is proposing a unilateral declaration, which has a dubious legal status in a multilateral agreement. It may be a bargaining chip to secure the right to subject contract service suppliers to an economic needs test, which it has proposed, or it might be intended for internal political consumption.

TiSA's impacts on services workers

Services are at the heart of the social, cultural, environmental, economic and political life of communities; they are also the major source of jobs. TiSA would directly impact on both:

- The market access rule in TiSA removes key tools of economic management and the ability of central, regional and local governments to shape the service economy;
- The non-discrimination rules remove the right to impose restrictions on foreign firms, and to support local businesses and their workers through 'buy local' campaigns and apprenticeship subsidies;
- More liberalisation and competitive pressures through contracting and sub-contracting drives down wages, unionisation, skills, safety and accountability;
- Governments can't require foreign services firms that set up inside the country to use local content that supports local businesses and jobs;
- A standstill on current supports for local firms and restrictions on foreign firms, coupled with a ratchet to lock in any erosion of those supports and restrictions, locks in anti-worker neoliberal policies for the long term;
- Expansion of anti-union tech companies like Uber and Amazon destabilises existing businesses, jobs and working conditions;
- The focus on cross-border services and e-commerce promotes further outsourcing and offshoring, and recruitment of platform workers euphemistically described as 'self-employed';
- Rights to deliver services across the border without a local presence, and to hold all data offshore, allows employment under offshore labour wages and conditions and restricts governments' ability to regulate the 'gig' economy;
- Growth in precarious labour and invisible online work intensifies the vulnerability of women workers and the gender divide in the services workforce nationally and globally;
- Guaranteed entry for lower-paid foreign employees of foreign contractors exploits those workers, and triggers a race to the bottom in wages and conditions that worsens social dumping;

⁴ TiSA, 'EU Declaration regarding cooperation on return and readmission' (unnumbered), Annex on Movement of Natural Persons, TiSA/JUL.2015/negotiating text/MNP, dated 8 November 2016.

- Requiring state-owned banks, telcos and post offices to operate like private corporations under a corporatisation model promotes cost-cutting, redundancies and privatisation, and is especially targeted at the global South;
- Pro-business approaches to technical regulation, licensing and professional qualifications of services distorts the balance between economic, social and safety considerations, and undermine protections for workers and consumers, such as health and safety standards, staffing levels and operational requirements; and
- Bringing employment and other standards that are set by inter-governmental bodies like the International Labour Organisation and the International Maritime Union under a ‘trade’ agreement for services undermines the specialist role of those bodies and stakeholder participation in setting those standards.

TiSA's impact on services jobs

A number of TiSA rules impact directly on employment and labour standards. Some of the worst that were carried over from the failed Multilateral Agreement on Investment (MAI) have been deleted in the most recent leaked texts.⁵ But the remaining provisions are problematic enough. Three **localisation** requirements would be prohibited:

- It has been agreed that a TiSA country cannot require an offshore supplier of a service to have a **local presence** in its territory.⁶ This promotes offshoring of jobs. If there is not even a local agent it becomes very difficult to secure the information needed to monitor the qualifications, skills and training of offshore workers or compliance with standards and workplace conditions, or to take enforcement action.
- A government must not impose certain **performance requirements on foreign firms** as a condition of them establishing a business inside the country to supply a service or of receiving a subsidy or similar advantage. They cannot require the firm to achieve a certain amount of local content, including using local services,⁷ to transfer or use local technology,⁸ or train or employ local people where that would require transfer of proprietary knowledge⁹ – all of which are ways to support the local economy and start-up industries and to maintain and expand future employment opportunities. Governments could still make access to subsidies or other supports conditional on an investor locating in a particular region or training or employing workers.¹⁰
- The parties have also agreed that no TiSA government can require any **senior management positions** to be filled by locals or people from any particular country, so those responsible for running a business do not need to have local knowledge.¹¹ There is disagreement over whether, and what, nationality rules might apply to the **board of directors**. Experience shows it is much more difficult to hold foreign directors and executives legally accountable for an accident or disaster, pension fraud or malfeasance.

These rules prohibiting localisation requirements are subject to a standstill that allows countries to keep existing measures, but only if they are listed in a country’s schedule, with any future liberalisation locked in; or if they are listed in the country’s broader ‘policy space’ reservations.¹² Both lists of reservations require agreement by the other parties.

⁵ The EU wanted foreign investors protected from a number of performance requirements, including that they employ local workers. TiSA, Article X.3.1(h), Localization Provisions, dated June 2016. See the analysis by Sanya Reid Smith, ‘Localisation provisions analysis – second update’, 7 October 2016, https://wikileaks.org/tisa/document/201606_TiSA_Annex-on-Localisation/.

⁶ TiSA, Article X.1, ‘Localization provisions’, dated November 2016.

⁷ TiSA, Article X.3.1(a) and X.3.2(a), ‘Localization provisions’, dated November 2016.

⁸ TiSA, Article X.3.1(c) and (d) and X.3.2(c) and (d), ‘Localization provisions’, dated November 2016.

⁹ TiSA, Footnote 8, ‘Localization provisions’, dated November 2016.

¹⁰ TiSA, Article X.3.4, ‘Localization provisions’, dated November 2016.

¹¹ TiSA, Article X.2, ‘Localization provisions’, dated November 2016.

¹² TiSA, Article X.4, ‘Localization provisions’, dated November 2016

The proposed **Annex on Government Procurement**¹³ would weaken the support that public purchasing can provide for local services firms and jobs, encourage short-term outsourcing contracts and promote offshoring. Unrestricted cross-border procurement of services would shift the employment and economic benefits of publicly-funded procurement contracts outside the country. It could become difficult to impose minimum labour standards in procurement contracts and be practically impossible to monitor or enforce them effectively if they were included. Because goods and services are deeply integrated in most procurement contracts, this annex would de facto apply to procurement of goods as well. If the good or service is defective, the terms of the contract could entitle the foreign employees of the contractor to enter the purchasing country to perform the remedial work under home country wages and conditions. As of December 2016, the government procurement annex had limited support. Although a number of TiSA parties have agreed to similar provisions in their FTAs, services are not covered by the WTO's plurilateral Government Procurement Agreement,¹⁴ and negotiations on government procurement are part of the unfinished business of the GATS.¹⁵

However, the absence of a specific annex on procurement does not mean it is not subject to the TiSA rules. As in Article XIII of the GATS, the exclusion of government procurement in the core text is limited in scope to internal purchasing for the use of government agency and does not protect purchasing of services that are on-sold, or form part of a service that is on-sold (for example, services used in Public-Private Partnership toll roads). That limited definition also applies where there is an explicit exclusion of government procurement in other annexes, such as financial services.

The US-sponsored **Annex on State-owned Enterprises** would require enterprises owned by central government to operate on purely commercial terms when buying goods and services, and selling services (see Appendix 10). That corporatised model promotes the competitive supply of what are traditionally considered public services. The special nature of public sector employment, for example in post offices, banks or telecoms, is replaced by private sector terms and conditions, accompanied by restructuring and redundancies, and later partial or full privatisation. By preventing SOEs from giving preferences to local services and goods, the Annex would again favour large international competitors and remove another important support for local firms and employees.

Foreign services workers (Mode 4)

The cross-border movement of labour to deliver a service (known as 'Mode 4') has always been controversial in trade in services negotiations. Rich countries want to define the movement of élite personnel as a 'trade' issue but treat the international mobility of any other kinds of workers as an immigration issue. Many countries from the global South want to export skilled and unskilled labour to reduce unemployment and attract remittances. Neither position shows any concern for the rights or wellbeing of migrant workers themselves or the impacts on the workforce they displace.

Appendix 3 explains in more detail how the annex on labour mobility in TiSA singles out four priority categories of workers for commitments in countries' schedules, either horizontally across all services or for particular sectors:

- i. employees of a corporation from another TiSA country being moved within the company, known as intra-corporate transferees;
- ii. business visitors from another TiSA country, such as short stay visits to sell products or services;
- iii. independent professionals from another TiSA country, such as lawyers or consultants; and
- iv. contractual service suppliers, who are employed by a firm from a TiSA country that has a contract to deliver a service in another TiSA country and enter temporarily to perform that contract.

13 TiSA, Annex on Government Procurement, April 2015, proposed by EU, Norway, Lichtenstein and Iceland

14 However, countries are usually required to include services when they accede to the agreement.

15 GATS 1994, Article XIII

A commitment to one or more of these categories would oblige the receiving state to allow temporary entry for specified periods of time, and would restrict normal immigration criteria and vetting processes if they nullify or impair the expected benefits.¹⁶

This annex rests on a spurious distinction that excludes temporary migrants competing in the domestic employment market and covers the temporary entry of employees or independent workers from another country, even though their presence would displace local workers, especially if there was no right to apply an economic need or labour market test. With associated risks of exploitation and social dumping.

Workers in the global South

Precarious employment is an ever-present reality in the global South. TiSA will deepen that problem in multiple ways, from the corporatisation and consequent privatisation of government-owned businesses to the footloose networks and supply chains that relocate in a perpetual quest for cheap and compliant labour.

The World Bank's 2016 World Development Report entitled *Digital Dividends* talks up the potential benefits to the global South and its workforce from the '4th industrial revolution'.¹⁷ In practice, producers and workers from the South are likely to be clustered at the bottom end of the global value and supply chains. Existing models of outsourcing by transnational corporations are driven by cost-cutting through subcontracting: 'unregulated markets have the tendency to push developing countries towards a socio-economic position that reproduces underdevelopment. The increasing integration of developing countries in [global value chains] has not changed this in any meaningful manner'.¹⁸ E-commerce, enhanced by TiSA, will intensify those trends.

The World Bank acknowledges that skills and infrastructure deficits may undermine the potential benefits, and that risks increase when a small number of private corporations control the digital domain. But it offers either market solutions or casts responsibility onto states whose authority and resources it has systematically stripped away over several decades. The Bank is especially cavalier and contradictory when it comes to jobs. It recognises that technology augments higher skills and replaces routine jobs, forcing many workers to compete for low-paying jobs.¹⁹ In typical World Bank style, the report says: 'Adjustment takes time and will be painful for many, but this is how economies progress'.²⁰ In addition to improving workforce skills, the Bank suggests removing worker protections, and by implication unionisation, in their own interests:

changes in the labor market also require rethinking social protection and tax systems. The on-demand economy leads to more informal employment, transferring insurance and occupational obligations to freelance workers. Strict labor regulations, common in developing countries, and overreliance on labor taxation encourage faster automation by making hiring more expensive. It would be better to strengthen workers' protection independently from work contracts by delinking social insurance from employment, offering independent social assistance, and helping workers retrain and find new employment quickly.²¹

Workers' rights

There is no labour clause or annex in TiSA. Its inclusion would be anathema to many WTO members and therefore fatal to the goal of exporting TiSA back into the GATS. The labour chapters agreed in

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

17 World Bank, *World Development Report 2016: Digital Dividends*, Washington DC, 2016

18 Bezhad Azarhoushang, et al, 'Value chains, underdevelopment and union strategy', 7(1-2) *International Journal of Labour Research*, 2015, 153-175, 154.

19 World Bank, *World Development Report 2016*, p.3.

20 World Bank, *World Development Report 2016*, 19.

21 World Bank, *World Development Report 2016*, 36.

mega-agreements like the TPP are weak anyway,²² and would not address the systemic impacts of TiSA on employment and the labour market, the wellbeing of the workforce and unionisation.

The only indirect reference to unionisation allows governments to deviate from their commitments on Mode 4 where the presence of a foreign worker would adversely affect the settlement of a collective labour dispute at the relevant workplace or the employment of someone involved in the dispute.²³ However, this relies on the government to invoke that right and only applies to foreign workers inside the country, not when strike-breaking services are supplied across the border.

The only time that workers' rights appeared in TiSA was in an early draft of the maritime services annex,²⁴ but that did not survive. It also recognised the international standards on maritime transport from the International Maritime Organization and the International Labour Organization, which apply to labour, but would have allowed TiSA parties to adopt lower standards than set by those organisations.²⁵ Both provisions are absent from the November 2016 text.

22 ITUC, 'TransPacific Partnership Labour Chapter Scorecard. Fundamental Issues remain Unaddressed', December 2015, <https://tpplegal.files.wordpress.com/2015/12/ituc-labour-chapter-analysis.pdf>

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

24 Jane Kelsey, *The Trouble with TiSA*, International Transport Workers' Federation, 2017, 52-53, <http://admin.itfglobal.org/media/1635608/the-trouble-with-tisa-report.pdf>

25 TiSA, Article 12, Annex on International Maritime Transport Services, dated 24 May 2016