The trouble with TiSA: The Trade in Services Agreement and how it threatens transport workers’ rights

By Professor Jane Kelsey, Faculty of Law, the University of Auckland, New Zealand

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Commissioned by the International Transport Workers’ Federation and Friedrich-Ebert-Stiftung
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EXECUTIVE SUMMARY

1. The International Transport Workers’ Federation (ITF) is a global trade union federation. The rules that govern the global services market shape the daily lives of its affiliated unions and their members. The Trade in Services Agreement (TiSA) has the potential to dramatically change that world. The negotiations are currently paralysed. This is the time for the ITF and transport workers everywhere to make their voices heard.

TISA: CORPORATE RULES FOR THE 21ST CENTURY

2. Since 2013, TiSA has been negotiated in secret by a club of 23 parties who call themselves The Really Good Friends of Services: Australia; Canada; Chile; Colombia; Costa Rica; the European Union; Hong Kong; Iceland; Israel; Japan; Lichtenstein; Mauritius; Mexico; New Zealand; Norway; Pakistan; Panama; Peru; South Korea; Switzerland; Taiwan, China; Turkey and the USA.

3. They are on a mission to create a ‘21st century’ agreement that serves the interests of the world’s most powerful corporations for decades to come. Governments are agreeing to put handcuffs on their right to regulate services and technologies, including those that don’t yet exist. Uruguay and Paraguay quit this club after strong union-led campaigns demanded the right to decide their own futures.

4. The corporate cheerleaders, called Team TiSA, are dominated by tech giants like Microsoft, IBM and Google, global logistics and transport operators like DHL, Fedex, and UPS, and finance moguls like Citigroup and AIG. They have privileged access to negotiators. Legislators, unions and social movements from TiSA countries are shut out.

5. Team TiSA want global rules that allow them to run e-commerce and global supply chains seamlessly across the world using digital platforms and new technologies. TiSA would require governments to remove national and local government laws and practices that the corporations see as barriers, including protections for workers – or at least freeze them at their current level, and promise never to adopt new regulations that might restrict existing and new services or technologies (think of drones, robots and driverless vehicles). TiSA’s transparency annex would give other TiSA governments and corporations rights to lobby against proposed regulations that affect their interests.

TISA AND THE FOURTH INDUSTRIAL REVOLUTION

6. The radical impact of new technologies has been called the ‘fourth industrial revolution’. ‘Free trade in services’ through TiSA would remove restrictions on its expansion. That means continuous reorganisation and disruption, as corporations respond to new technologies, shifts in market, the cost of labour and automation. Corporate wealth is bound to strengthen the power of those who control global supply chains and digital technologies. Their actual operations will run through layers of competitive contractors who employ a fragmented, vulnerable, de-unionised and exploited international workforce.

7. Continuous restructuring and chronic instability will create large scale unemployment and social disruption. Already digital technologies are transforming what workers do, where they are located, how they are employed, by whom and on what terms, and their ability to organise and bargain collectively (or bargain at all). Workers are pitted against workers in a battle for survival that is not of their making.

8. Transport workers already face these challenges every day. The pace of change is unpredictable. Air and maritime cargo transport and ground haulage will remain essential to move products around, but they will play different roles as production and supply chains, and their ownership, are reorganised. ‘Bricks and mortar’ type production and warehousing operations may become unrecognisable. The future of bricks and mortar retailing is least certain. Traditional firms like DHL and Fedex could struggle to survive as operators such as Amazon or AliBaba change how the global economy operates.

9. TiSA will not cause this new revolution. It will intensify the current pace of change, competition and unpredictability, and governments won’t be able
to address many of the problems that it creates. The actual agreement involves a core text, based on an existing World Trade Organization agreement known as the GATS (General Agreement on Trade in Services) and around 18 annexes that cover specific sectors such as maritime, air and road transport, delivery services, labour mobility, financial services, and e-commerce. A country’s obligations can be enforced by other TiSA countries (not by their corporations) through offshore tribunals where the judges are trade experts. If the rules are breached, a country can face serious penalties against its trade in goods, agriculture or services.

**WHAT TISA AIMS TO DO**

• enable the global reorganisation of capital through new technologies and digital platforms;
• support globally integrated logistics and supply chains;
• promote competition and contractualisation in providing services;
• remove barriers to cross-border services and offshoring;
• prohibit policies and strategies that support the domestic economy and jobs;
• remove employment-related obligations on foreign investors;
• ensure corporate elites have a right to enter and work in other TiSA countries;
• allow foreign firms to use foreign contract workers to deliver services in a TiSA country;
• enable employers to bypass collective agreements and de-unionise the workforce;
• require pro-business approaches to licensing, qualifications and technical standards, including those that directly affect labour; and
• weaken the standard-setting role of specialist international bodies, especially in transportation.

**THE ITF’S TRANSPORT AND DELIVERY SECTORS**

10. As well as TiSA's general impacts on national and global economies, some annexes specifically target the post and courier, maritime, air and road transport sectors. Their goals reflect the demands of the big industry lobbies:

• The **air transport annex** aims to extend the rights of foreign firms to operate ground handling, airport operations and speciality air services on the same terms as local firms.
• The **maritime services annex** predictably targets maritime cabotage (the system of reserving a nation’s domestic maritime commerce for its own citizens to ensure the retention of skilled workers and decent jobs for the future of the industry) and other services that are closed to foreign firms, and guarantee access for multimodal operators to the entire transport infrastructure on ‘reasonable’ and non-discriminatory terms.
• The **delivery services annex** aims to break down postal monopolies, minimise the public service obligation, and lock in existing and future postal liberalisation and deregulation, while the e-commerce annex allows the ‘Big Four’ global express delivery companies (DHL, Fedex, TNT, UPS) to build economies of scale that reinforce their dominance of global supply chains.
• The **annexes on labour mobility and road and freight transport** encourage governments to guarantee temporary entry for foreign contract workers to deliver services under their home country terms of employment, which would deepen problems of social dumping.

11. TiSA’s corporate-driven rules on delivery and air and maritime transport services also threaten the role of specialist international organisations like the IMO (International Maritime Organization), ICAO (International Civil Aviation Organization), UPU (Universal Postal Union) and ILO (International Labour Organization). These are places where the ITF and other unions work to protect workers’ rights and interests and balance economic and social, consumer and security concerns.
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ABBREVIATIONS

CETA European Union Canada Comprehensive Economic and Trade Agreement
CPC United Nations central product classification
EC European Commission
ECSA European Community Shipowners’ Association
EU European Union
FTA Free trade agreement
GATS General Agreement on Trade in Services
GATS 1994 General Agreement on Trade in Services agreed in 1994
GATS 2000 The negotiating round of the GATS launched in 2000
GATT 1947 General Agreement on Tariffs and Trade as agreed in 1947
GSC Global Services Coalition
ICAO International Civil Aviation Organization
ICS International Chamber of Shipping
ILO International Labour Organization
IMO International Maritime Organization
ITF International Transport Workers’ Federation
MAI Multilateral Agreement on Investment
MFN Most favoured nation (treatment)
NAFTA North American Free Trade Agreement
OECD Organisation for Economic Co-operation and Development
SOE State-owned enterprise
UNCTAD United Nations Conference on Trade and Development
US United States of America
SME Small and medium enterprise
SSE State-supported enterprise
TiSA Trade in Services Agreement
TPP or TPPA Trans-Pacific Partnership Agreement
TTIP Transatlantic Trade and Investment Partnership
UPSO Universal Postal Service Obligation
UPU Universal Postal Union
W/120 Classification list for scheduling services in the GATS
WTO World Trade Organization
Commercial presence Having an office, branch, or subsidiary in a foreign country, known in GATS as Mode 3 of service delivery.

CPCs United Nations central product classifications used to identify the services sectors and subsectors that are subject to commitments in a country’s schedule. There are several versions of these CPCs, dating from 1991.

Cross-border supply The consumer of a service and the supplier of a service are in different countries.

Developing country There are no formal definitions of ‘developed’ and ‘developing’ countries at the WTO. Members adopt that designation for themselves, but other members can challenge their use of special and differential treatment.

Electronic commerce The production, advertising, sale and distribution of services via telecommunications networks (eg. Amazon.com or Expedia.com).

FTA Free trade agreement whose objective is to liberalise the rules that govern transactions between the parties, usually covering a wide range of areas, including goods, services, investment, intellectual property, government procurement, competition, etc.

GATS The General Agreement on Trade in Services is the agreement on services among all WTO members.

MFN Most favoured nation treatment, the principle of not giving services and suppliers from parties to the agreement less favourable treatment than is given to their counterparts from any other country.

Mode 1 The technical description for delivery of a service by a supplier in one party to a consumer of the service in another party.

Mode 2 The technical description for delivery of a service by a supplier in one party to a consumer of the service who uses the service in that country.

Mode 3 The technical description of a commercial presence of one party establishing a commercial entity in the territory of another party.

Mode 4 The technical description of the temporary presence of natural persons of one party in another party’s territory to undertake work in a service sector.

Party’s schedule A schedule that sets out the commitments that have been adopted by a party through negotiation.

National treatment Giving services or service providers of the other party no less favourable treatment than their national counterparts receive.

Natural persons Real people, as distinct from juridical persons such as companies and organisations.

Negative list A list that specifies which services, modes of delivery, and/or regulations and other measures are not subject to certain rules of the agreement.

Nullify and impair Damage to the benefits that a party expects to receive from its membership of TiSA that is caused by another party making changes to its services regime or failing to carry out its obligations.

Offer A party’s proposal to commit to a certain level of liberalisation, usually by improving access to its markets or national treatment, in response to a request from another party during negotiations; involves initial and subsequent offers.

Policy space limitation This limitation in a party’s schedule protects its right to maintain and introduce new measures that are inconsistent with its obligations to specified rules. In TiSA that applies to national treatment. These limitations are usually specified by name or by the service sub-sector or activity.

Positive list A list that sets out which services, modes of delivery, and/or regulations and other measures are subject to certain rules of the agreement.

Ratchet Any new liberalisation by a party is automatically locked into that party’s schedule. In TiSA that applies to national treatment (removing discriminatory restrictions on foreign suppliers or preference to national suppliers).

Request A list of the services sectors, modes of delivery and measures that one party asks another party to commit to liberalise in its schedule during the course of negotiations.

Really Good Friends of Services A group of WTO members formed to promote the further liberalisation of services.

Schedule A party’s list of binding commitments, primarily on market access to services markets and national treatment, but with scope to make commitments on additional matters, such as adopting an annex.

Sector The description of the general service category that is subject to commitments or rules.

Standstill The rule applying in a particular subsector at the time the agreement comes into force (unless another time is stated) cannot be made any more restrictive. This applies in TiSA to national treatment, where domestic services and suppliers receive better treatment than their counterparts from other TiSA parties.

State-owned enterprise An enterprise in which central government owns more than 50 percent of shares or can appoint a majority of directors, which is principally engaged in activities undertaken with an orientation towards profit-making and which can decide its own production and prices.

Subsector A more specific service category within a general category of a service.

Supply of a service All stages of production, distribution, marketing, sale and delivery of a commercial service.

TiSA Trade in Services Agreement being negotiated among 23 parties.

TPP or TPPA Trans-Pacific Partnership Agreement negotiated between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, USA.

TTIP Trans-Atlantic Trade and Investment Partnership between the USA and EU

Universal postal service obligation (UPSO) Obligation on government to provide a baseline level of a postal service to every resident in the country.

WTO World Trade Organization, whose (currently 164) members are committed to obey the organisation’s trade rules. These rules cover services through the GATS.
PART 1.
TISA – A GAME-CHANGER FOR THE ITF

The International Transport Workers’ Federation (ITF) is a global trade union federation. The rules that govern the global services market shape the daily lives of its affiliated unions and their members. The Trade in Services Agreement (TiSA) has the potential to dramatically change that world. The negotiations are currently paralysed. This is the time for the ITF and transport workers everywhere to make their voices heard.

1.1 EMPOWERING CORPORATIONS

A club of 23 governments are on a mission to create a 21st century international agreement that will serve the interests of the world’s most powerful corporations for decades to come. They call themselves The Really Good Friends of Services. They can more accurately be called the Really Good Friends of Services Corporations. Their vision for the future would remove barriers to the global expansion of services industries and enable them to operate seamlessly across the world. As states acting under international law, the Really Good Friends propose to voluntarily restrict their own regulatory sovereignty and the right of future governments at central, regional and local levels to decide how to address their social, economic, gender, environmental, cultural and political challenges. They would even forfeit the right to regulate as-yet-unknown services and technologies, irrespective of their impacts or when new crises emerge.

The corporate beneficiaries, who call themselves Team TiSA, enjoy privileged access to the negotiators and, through them, the negotiations. Team TiSA is dominated by technology giants such as Microsoft, IBM and Google, and global logistics and transport operators like DHL, FedEx, and UPS. The other tech giants are present through overlapping industry organisations. Under the guise of creating a ‘level playing field’, they want to ensure the new digitised models of logistics, transport and delivery, and the rapidly growing sphere of e-commerce are, as far as possible, a regulation-free zone.

Behind the trendy taglines of the ‘sharing economy’, the ‘people-to-people economy’ and the ‘gig’ economy is the new Wild West of capitalism. In just a decade, Google’s search engine and the social media platform Facebook have come to control massive data through faceless algorithms. Data matching platforms such as Uber connect suppliers and users through faceless algorithms to deliver services through ‘self-employed’ contractors whose terms of employment they control. Traditional ‘bricks and mortar’ retailers like Walmart compete online with the likes of eBay, offering flexible last-mile delivery. Supermarkets offer ‘click and collect’ or order-drive-through-pickup delivery options. In-store robots direct customers; ‘virtual avatars’ provide advice; and ‘sentiment trackers’ monitor positive and negative comments about services and workers.
Cross-border logistics operators like FedEx and DHL deploy multimodal and multi-channel systems with intensely competitive layers of sub-contractors along global supply chains. Amazon delivers more products to more countries through a combination of traditional operators and its own logistics arm, with its private aircraft and airfields. ‘Online factories’ enable the mass customisation of production. The location of 3D printers close to consumers is potentially beginning to bypass traditional factories and warehousing. Logistics marketplaces, such as Shipwire, run web-based fulfilment programmes that allow consumers to choose their preferred combination of ground and air transportation. ‘Maintenance on-demand’ allows trucks to decide their need for repairs. In October 2016, Uber’s new acquisition, Otto, made its first delivery of beer by driverless truck in Colorado, and Domino’s Pizza made its first home-delivery by drone in Auckland, New Zealand. Many of today’s novelties will not survive or will be quickly superseded by unimaginable innovations. But TiSA’s rules are designed to enable whatever replaces them.

1.2 FREEDOM FOR CAPITAL

In the abstract legal world of TiSA, services are commercial commodities to be exchanged for money through disembodied markets. Their social essence and intrinsic social relations are stripped away; the workers who actually operate the services economy are invisible. Labour is just a factor of production to be reorganised, relocated and automated as corporate strategies, profit targets and technologies dictate. ‘Free trade’ equates to outsourcing and offshoring through a contractualised services workforce. Public ownership of services, support for local businesses and workers, and social regulation are ‘anti-competitive barriers’ to be removed. Consumers are courted, their data captured and sold, while their protections and remedies are minimised. This distorted worldview already underpins the General Agreement on Trade in Services (GATS) in the World Trade Organization (WTO) and the services chapters in bilateral and regional free trade agreements (FTAs). But TiSA is not just more of the same: its role is to act as midwife and protector of what some are calling the ‘fourth industrial revolution’. In the 1980s and 1990s the priority for trade in services agreements was to open up countries’ services to foreign direct investment. Today, it is to remove constraints on cross-border services and digital delivery, and prohibit new restrictions. E-commerce is the new buzz-word for rules that expand global supply chains and the cross-border digital marketplaces, with dedicated chapters in the new mega-agreements.²

1.3 DISEMPOWERING WORKERS

The ITF is already reflecting on what the fourth industrial revolution means for its affiliates and their members. Recent advances in technology (the internet, mobile communications, big data) and emerging new technologies, such as nanotechnology, biotechnology, artificial intelligence communications, and data, are creating a new technological infrastructure for the global economy. These new methods of production and forms of transport are transforming what workers do, where they are located, how they are employed, by whom and on what terms, as well as the ability of workers to organise and bargain collectively (or bargain as individuals). Air and maritime cargo transport and ground haulage are still essential to move products around, but they will play different roles as production and supply chains and their ownership are reorganised. Bricks and mortar production and warehousing may become recognisable, with the future of bricks and mortar retailing even less certain.

This transformation portends a prolonged period of continuous restructuring and chronic instability, bringing with it the prospect of large-scale unemployment and social disruption. The pace of change is unpredictable; it could be episodic or exponential. In discussions, the ITF’s researchers identified three broad categories of challenges facing the workforce:

- Labour replacing technologies that displace human labour, either partially or completely;
- Labour intensification technologies that are used to force workers to work much harder, without necessarily providing adequate working conditions or improving pay; and
- Platform workers who are organised through software platforms that operate as a form of labour exchange or agency and are nominally ‘self-employed’ on terms set by those who control the platform.

1.4 A SNAPSHOT OF TIISA

TiSA has a core text and currently around 18 proposed annexes (Appendix B). Not all the annexes will be included in the final version, if TiSA is ever agreed. However, that ‘final’ version could be added to over subsequent years by negotiating to extend the rules and include new annexes in a never-ending process. Future changes are likely to be even less visible than the original negotiations and less likely to be subject to the same approval processes at the national level.

Most of the core rules are carried over from the GATS to facilitate the export of TiSA back to the WTO (as explained in Part 3). The real changes are achieved through a mixture of schedules and annexes. Every country that becomes a party to TiSA must record its obligations in a binding schedule of commitments to the core rules said to give foreign firms certainty and stability. The parties have promised, in principle, not to limit their market in a service, whether it is supplied from offshore, through foreign investment or by visiting personnel. They have also agreed, as a general principle, not to regulate those services in ways that would favour domestic services or firms, nor restrict foreign ones. Their schedules may allow them to keep existing preferences, but automatically lock in every future liberalisation. In some cases, they may be allowed to preserve the right to increase or introduce local preferences in the future. But they must bargain with all the other parties for the right to have those limitations in their schedules.

Once made, schedules of commitments would be enforceable by other TiSA states in offshore tribunals. There is a risk that TiSA commitments may apply whatever technology is used to deliver the service, even if that technology poses new and unforeseen challenges that governments believe require regulation (known as ‘technological neutrality’). Specific annexes, including for delivery and maritime, air and road transportation, seek to place additional handcuffs on governments’ ability to decide what services are covered by TiSA and how a services sector should operate.

² TiSa annex on electronic commerce includes provisions designed to protect digital providers of services from national regulators, facilitate cross-border transactions and ensure states of rights to opt for security purposes, with minimal consumer, privacy and other citizen protections. TiSa annex on electronic commerce, dated November 2016
It is impossible to predict what the digitally-enabled global economy will look like even in 2025. Yet TiSA is setting the rules for how governments can regulate that economy, in 2025 and beyond. There are several ways to explain how TiSA seeks to achieve this. Figure 1 identifies four of kinds of freedom that corporations consider are essential to global capitalism: movement of money, movement of information, movement of people and movement of things. To achieve these freedoms, they need to remove or restrict the state’s power to regulate various functions:

- Regulate business and foreign investment to protect consumers, competitors, workers, indigenous peoples, public health and the environment;
- Provide or subsidise services to ensure a decent and sustainable economy and society;
- Procure goods and services to enable government activities and support local economies;
- Tax people and businesses to pay for public goods (roads, schools, etc) and essential services.

Figure 1: Corporate demands for TiSA: To limit functions of government and ensure complete freedoms of movement across borders

Many of the sector-specific annexes are pet projects of particular TiSA countries. Some overlap, because they approach similar services activities from different perspectives – for example, delivery services span the annexes on post and express delivery, all forms of transportation, and distribution; ‘maritime services’ potentially includes multimodal transport through road and rail. Because they reflect particular countries’ interests, they tend to attract quite polarised positions and where they face strong resistance they may not survive. The most recent leaked texts show that the more extreme demands in some annexes were severely pruned, and much of the substance was still not agreed – although what has been dropped could well find its way back onto the negotiating table now the deadline has been extended, or in some future negotiations.

Figure 2: How TiSA rules and annexes serve global services and supply chains

1.6 THE STRUCTURE OF THIS REPORT

This report explains how TiSA could become a reality and why, from an ITF perspective, it must not. Because the negotiations are secret, the analysis relies on leaked draft texts and analyses, statements from governments and corporate lobbies, historical material from earlier trade in services negotiations, and interviews with experts from the ITF and the European Transport Workers’ Federation, academics and non-governmental organisations.
The report is organised into seven parts and a number of appendices. Following this introduction, Part 2 explains the historical origins of TiSA in the GATS at the WTO, and identifies the governments and corporate lobbies that are championing the agreement.

Part 3 provides an overview of how TiSA is redesigning the GATS to better serve corporate interests, as revealed in the leaked texts. There is an understandable temptation to go straight to annexes whose labels appear most directly relevant to a sector, but as Figures 1 and 2 show, TiSA has to be viewed as a whole. The most serious implications derive from quite technical features: the core rules and obligations, supported by the schedules and systemic annexes, and the new emphasis on cross-border services. This third section of the report tries to decode some of these concepts and rules and their potential impacts. A glossary of key terms is provided, with a more technical explanation in Appendix B for those who want to understand the text in more detail.

The ITF identified three sectors for case studies: maritime services, air transport services and post and express delivery. They were all once considered integral to the national economy and national security, and essential to the public and social infrastructure, but they are now being reconceived through TiSA as private commercial operations whose liberalisation from regulation is essential to 21st century capitalism. Within this framework, services and post and express delivery. They were all once considered integral to the national economy and national security, and essential to the public and social infrastructure, but they are now being reconceived through TiSA as private commercial operations whose liberalisation from regulation is essential to 21st century capitalism. Within this framework, each sector is discrete, with its own characteristics, skill requirements, regulatory frameworks, intergovernmental organisations, political sensitivities and public service functions. Parts 4, 5 and 6 analyse the implications of the proposed core texts and annexes of TiSA for these three transport sectors in terms of the goals, context, powerful players, core rules, special annexes and labour issues.

Part 7 reflects more broadly on what TiSA means for organised labour within the ITF’s constituency, including how TiSA would intensify social dumping using the example of road transportation, and how it would compound the challenges that unions already face from the fourth industrial revolution.

PART 2.
THE POLITICS OF TISA

The groundswell of opposition from people’s movements, including trade unions, and legislators over the past few years has finally sunk a number of mega-regional agreements – notably the 12-country Trans-Pacific Partnership Agreement (TPPA) and probably the Trans-Atlantic Trade and Investment Partnership (TTIP) between the US and EU. As of early 2017, it is uncertain whether the TiSA negotiations will reconvene, let alone be concluded, but there is a real risk that negotiations could suddenly resume and gain momentum unless critics, including the ITF, make that impossible. This part of the report provides some necessary background to TiSA and introduces the main players, both the states that are negotiating the agreement and the corporate lobbies that aim to benefit.

2.1 INVENTING ‘TRADE IN SERVICES’

The historical context of trade in services agreements is essential to understanding the ambitions and substance of the TiSA negotiations. In the late 1970s, as manufacturing was relocating from the affluent industrialised countries to Asia, affected workers and communities were promised a ‘new economy’ based on services, intellectual property, foreign investment and the high-value end of transnationalised production. Corporate lobbyists in the US, led by American Express, AIG and originally Pan Am, convinced their government to push for international rules that would enhance their offshore expansion and profitability. The US convinced others in the rich countries’ club of the OECD (Organisation for Economic Co-operation and Development) to support them.

Their priority was to secure control of the ‘blood supply’ (finance) and ‘nerve system’ (telecommunications) of an integrating global marketplace. In addition, they wanted to remove two sets of laws, policies and practices that they saw as ‘barriers’: (i) those that put restrictions on foreign firms or gave preferences to their local counterparts, such as closed cabotage, caps on foreign investment, or limiting subsidies to nationals; and (ii) those that limited their access to, and the potential for growth of, services markets, in particular public monopolies, economic needs tests, numerical caps on the number of operators or service activities, or requirements to invest using particular legal forms, especially joint ventures.

The term ‘trade’ was co-opted to legitimise these demands, and this allowed the rules to be developed under the cover of the Uruguay round of trade talks from 1986 to 1994. Negotiation of the GATS faced strong resistance from the Global South, so the OECD states and their services industries did not get all they wanted. Countries were allowed to minimise their exposure to the core rules by listing which services would be covered (called a positive list), differentiating between four different ‘modes’ of delivering the service (across the border, consumption of the service abroad, through a commercial presence in the host country, and by the temporary presence of a real person), and limit the extent of those

4 Australia, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, USA, who are all participants in TiSA, plus Brunei, Malaysia, Vietnam.
The trouble with TiSA

The trouble with TiSA after strong union-led national campaigns. The US has blocked China from participating.

Table 1: TiSA Negotiating Parties (* joined later; # withdraw)

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<thead>
<tr>
<th>Australia (AU)</th>
<th>Japan (JP)</th>
<th>Peru (PE)</th>
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<tr>
<td>Canada (CA)</td>
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<td>Singapore (#)</td>
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<td>Chile (CL)</td>
<td>Mauritius (MA) #</td>
<td>South Korea (KR)</td>
</tr>
<tr>
<td>Colombia (CO)</td>
<td>Mexico (MX)</td>
<td>Switzerland (CH)</td>
</tr>
<tr>
<td>Costa Rica (CR)</td>
<td>New Zealand (NZ)</td>
<td>Taiwan (China) (TW)</td>
</tr>
<tr>
<td>European Union (EU) (28 countries)</td>
<td>Norway (NO)</td>
<td>Turkey (TR)</td>
</tr>
<tr>
<td>Hong Kong (HK)</td>
<td>Pakistan (PK)</td>
<td>United States of America (US)</td>
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<tr>
<td>Iceland (IS)</td>
<td>Panama (PA)</td>
<td>Uruguay (UR) #</td>
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<td>Israel (IL)</td>
<td>Paraguay #</td>
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</table>

The first round of negotiations was held in Geneva in March 2013. By December 2016 there had been 21 rounds, variously hosted by the US, the EU and Australia. The later rounds were held within the WTO buildings and seemingly serviced by the WTO secretariat, even though TiSA is not mandated by the WTO.

The negotiating texts and documents are secret; most information that is publicly available has come from leaks posted on Wikileaks,‘Greenpeace,’ ‘Associated Whistleblowing Press,’ and bilaterals.org which hosts the most recent documents from the November 2016 round. At the beginning of negotiations the US asked other negotiating parties to agree to the same terms adopted in the TPPA; keep all negotiating documents and related communications between the parties secret for four years after the agreement comes into force (aside from the final text); each country could decide what information should be shared internally on a confidential basis.‘Cover sheets of leaked TiSA documents show the US extended the four years non-disclosure in TPPA to five years for its TiSA documents. It is not known which, if any, other TiSA parties responded to the US request. Norway, Switzerland and the EU have publicly released their own initial and revised offers of commitments along with some other documents they have tabled, and the EU has published edited summaries of each round. Other countries, such as New Zealand, say they have made no written commitment to secrecy, but still refuse to release any documents.

2.2 ‘THE REALLY GOOD FRIENDS OF SERVICES’

During the failed GATS 2000 negotiations rich countries with large and/or sophisticated services firms led the formation of an alliance called the Really Good Friends of Services. They developed a multi-pronged strategy to circumvent the stalemate in the WTO. When the Doha round of talks stalled, they organised plurilateral talks among their group and other willing countries in an attempt to revive the process. Some of the model schedules they proposed for sectors such as delivery and transport services, and restrictions on what services and activities governments can incorporate into their schedules, have resurfaced in TiSA. Outside the WTO, they have pressured the Global South to agree to stricter rules and much more extensive commitments on services in bilateral and regional free trade agreements (FTAs). Most recently, new generation mega-regional agreements among mainly OECD countries aimed to develop ‘gold standard’ rules for their corporations and commercial interests – notably with the TPPA, the TTIP, and the EU Canada Comprehensive Economic and Trade Agreement (CETA). While there are commonalities across their texts, each negotiation reflects the parties’ particular sensitivities and interests; such differences are also apparent in TiSA.

2.3 THE TISA NEGOTIATIONS

Plurilateral negotiations for a TISA were launched in 2013. Operating under a veil of secrecy on the fringes of the WTO, the self-selected group of Really Good Friends has sought to rewrite the original GATS in ways that weaken, or remove, the ability of governments to protect their national interest. Their proposals move well beyond the mandate of the failed GATS 2000 negotiations and import GATS-plus elements from other mega-agreements, notably in scheduling cross-border services and annexes on e-commerce and state-owned enterprises (SOEs).

As of early 2017 there were 23 parties negotiating TISA (counting the EU as one). Table 1 shows several countries from the Global South have joined the talks (Colombia, Costa Rica, Mauritius, Panama, Pakistan), Singapore, Uruguay and Paraguay have left, the latter two after strong union-led national campaigns. The US has blocked China from participating.

2.4 THE STATE OF PLAY

The uncertain fate of the TPPA, CETA and TTIP has made TiSA much more important, symbolically and strategically. The TPPA and CETA were each concluded in February 2016, with their ratification falling captive to domestic politics in the US, and the EU and Canada, respectively. Perhaps in anticipation of this, the then Obama administration tabled a text on SOEs in TiSA in July 2016 that was drawn from the TPPA. The US also planned to use TiSA to impose an additional obligation on the participating TPPA parties to allow offshore storage of financial services data,seen as a pre-condition for Congress approving the TPPA. However, the TPPA was never put to a vote. In February 2017, new President Donald Trump effectively withdrew the US from the deal. The TTIP talks were also stalled. However, no statement was made about TiSA.

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1. https://wikileaks.org/tisa/
9. New Zealand Secretary of Foreign Affairs and Trade to: Jane Kelsey, 28 October 2016
10. TPPA parties not in TiSA would be pressured to sign side-letters to the same effect
The TiSA parties set a serious target to conclude the agreement at a ministerial meeting in early December 2016. This was presumably driven by the desire to sign a deal before President Obama left office. The only way they could have achieved this was by dropping provisions and whole annexes which had the least support or that either the US or EU was prepared to veto. Leaked texts from November 2016 indicate a serious attempt to achieve this. However, the US and EU would have also had to finesse their major points of dispute, notably on the maritime transport annex and sub-federal financial regulation on the US side, as well as the privacy protections for e-commerce and commitments not to regulate ‘new services’ for the EU. This all proved impossible.

Two points stalled the negotiations. Any genuinely ‘21st century’ deal for the corporations will have to protect digital platforms and internet-enabled commerce from future regulation and enable delivery and logistics operators to reorganise their global supply chains freely through whatever new technologies emerge. The EU firmly resisted demands to promise not to regulate new services in the future. It would also not have a position on privacy protections relating to offshore data repositories before the planned ministerial meeting, and would not commit to allow data to be held offshore without them. That made it impossible to meet the deadline;

From mid-November 2016 these were overlaid by the unwillingness of other parties to negotiate with the US, given the uncertainty about the position of the Trump administration. Unlike the TPPA, TiSA remained under the radar during the presidential election campaign. As a result, the ministerial meeting was cancelled and officials conducted a ‘stocktake’.17

As of March 2017, both positions are unresolved and the negotiations remain suspended. TiSA was not mentioned in President Trump’s executive order on trade that effectively withdrew the US from the TPPA, although he expressed a clear preference for bilateral rather than plurilateral deals so that the US could exercise even more leverage.18 That left withdrew the US from the TPPA, although he expressed a clear preference for bilateral parties to negotiate with the US, given the uncertainty about the position of the Trump administration. Unlike the TPPA, TiSA remained under the radar during the presidential election campaign. As a result, the ministerial meeting was cancelled and officials conducted a ‘stocktake’.18

That made it impossible to meet the deadline; there were suggestions that TiSA could proceed without the EU, but these lacked credibility.19


22  ‘EU decision on data flow language in TiSA not expected until fall; U.S. position still unknown’, Inside US Trade, 13 February 2017


24  see www.tppnocertification.org


26  Recently, Commission officials confirmed that TiSA would be treated as a mixed agreement because it covers some matters that fall under member state responsibility. That means the final text would require the consent of the European Parliament and ratification by EU member states according to their national procedures. Resistance within some member states and European parliamentarians to CETA suggests that achieving consensus support could be difficult. To date, Brexit appears not to have affected the progress of the negotiations, but it may be the bargaining over schedules more complex. These political pressure points provide strategic opportunities for the ITF and its allies, especially within Europe, and delays allow more time to develop a global campaign.

2.5 ENTRY INTO FORCE

Leaked texts from November 2016 showed it was not yet decided how many countries would have to ratify TiSA before it could come into force, although the proposal was two-thirds of the original signatories.22 The deal would lack political or commercial meaning without both the US and EU, but the criteria for entry into force do not appear to be weighed to reflect that (by contrast, both the US and Japan had to be original parties to the TPPA). Because TiSA would reflect US law, it is not clear whether it would need approval by the Congress and the position of the incoming Republican-dominated Congress on TiSA is unknown. Elements of TiSA are strongly supported by their corporate allies, but TiSA would also promote more offshoring and a loss of jobs in bricks and mortar businesses.

An equally important unwritten factor is the domestic US process known as ‘certification’, the US conditions its ratification on the administration certifying that each TiSA party individually has implemented the US understanding of that country’s obligations. Certification basically allows the US to require other countries to accept its interpretation, at times effectively rewriting the ‘final’ deal.23 The Trump administration can be expected to exploit the leverage of certification to its fullest effect for TiSA.

27  ‘Hazards ahead for TiSA trade’, Politico, 24 October 2016

28  TiSA, Article IV:16, Section IV – Administrative and Institutional Provisions, Core text, dated November 2016


24  see www.tppnocertification.org


22  ‘EU decision on data flow language in TiSA not expected until fall; U.S. position still unknown’, Inside US Trade, 13 February 2017


19  ‘Donald Trump says he’s looking to create a new trade deal between the US and EU, Bloomberg, 14 December 2016, https:/ /www.bloomberg.com/politics/ article/2016-12-14/trump-promises-tech-companies-he-will-make-it-a-lot-easier-for-you-to-trade-across-borders


16  ‘EU ambassador skeptical of value, possibility of TiSA deal without the EU’, Inside US Trade, 16 November 2016

15  From mid-November 2016 these were overlaid by the unwillingness of other parties to negotiate with the US, given the uncertainty about the position of the Trump administration. Unlike the TPPA, TiSA remained under the radar during the presidential election campaign. As a result, the ministerial meeting was cancelled and officials conducted a ‘stocktake’.17


13  TiSA, Article IV:16, Section IV – Administrative and Institutional Provisions, Core text, dated November 2016


and the committee will take a decision ‘as necessary’. There are several ways this process might occur.29

Early in the negotiations, the EU proposed a modular approach: TiSA would be structured around the core text, with additional annexes that could be adopted using various WTO rules. The process would begin by recruiting more parties to TiSA. Once they reached a critical mass they could propose the adoption of TiSA as a plurilateral agreement. Individual WTO members would take unilateral steps to add to their GATS schedules of commitments.30 The US prefers the less ambitious, but self-serving approach of promoting specific annexes within the WTO, such as e-commerce and SOEs.

2.7 EXCLUSION OF THE GLOBAL SOUTH

While TiSA’s negotiating parties claim common cause and point to the participation of several countries from the Global South, the Really Good Friends are predominantly wealthy countries. This is important for three reasons.

First, the plan to negotiate a self-serving deal that is exported back into the WTO is an unacceptable power play, reminiscent of attempts to set global rules through a Multilateral Agreement on Investment (MAI) in the OECD in the 1990s, but which collapsed in the wake of a massive international campaign, including from the Global South.31

Secondly, there is a lot of double-speak about the development dividend of the fourth industrial revolution. Expansion of e-commerce and global value chains is often hailed as an opportunity for greater inclusion of the Global South in the globalised economy, especially for small and medium enterprises.32 But if they cannot achieve a rapid catch-up in education, technological knowhow and infrastructure, they risk becoming even more marginalised, especially as the gatekeepers to the digital platforms and global logistics and supply chains are mega-corporations. TiSA would prohibit policies and regulation that are traditionally used to promote development, such as support for infant industry, requirements for technology transfer and skills and management training, use of local content by foreign investors, building of local capacity though a local presence, use of local facilities, with flow on benefits to local businesses and local jobs.

Thirdly, the GATS33 and the Doha negotiating mandates34 say that developing countries are entitled to special and differential treatment when making commitments and attaching limitations to them, and that they should receive commitments that will genuinely bring economic benefits. This treatment applies to all ‘developing countries’, but least-developed countries (LDCs) are entitled to even greater flexibility. Development asymmetry is also recognised in the GATS rules on free trade and investment agreements;35 special flexibilities are mandatory when the agreements are with ‘developed countries’, but TiSA has no special and differential treatment or development flexibility. If more countries from the Global South are recruited to TiSA, and/or TiSA is inserted into the WTO, developing countries and LDCs are entitled to special and differential treatment when making commitments and attaching specific annexes within the WTO, such as e-commerce and SOEs.

2.8 ‘TEAM TISA’

TiSA’s official corporate cheerleaders call themselves Team TiSA. According to its website Team TiSA is ‘dedicated to promoting and advocating for an ambitious agreement which eliminates barriers to global services trade, to the benefit of services providers, manufacturers and farmers, and consumers globally’.36 While consumers receive a mention, workers and the grounded communities in which consumers and workers live are ignored, as are the responsibilities of governments to their people.

The US-led coalition has six co-chairs whose sectors reflect the dominant corporate interests: Citigroup (finance), IBM (tech), UPS (express delivery, logistics), Walmart (retail, e-commerce), MetLife (insurance) and Liberty Mutual (insurance). The full membership is set out, by sector, in Table 2. Those of particular interest to ITF include Amway, AT&T, Cisco Systems, Computer and Communications Industry Association, Consumer Technology Association, eBay, Express Association of America, Fedex, Google, IBM, Intel, Microsoft, National Retail Federation, Retail Industry Leaders Association, Software and Information Industry Association, TechAmerica, Verizon, Walmart, and Western Digital. Major US lobby groups are also members, including the US Chamber of Commerce, Emergency Committee for American Trade, and US Council for International Business. Many of their demands span across the TPP, TTIP and TiSA, stressing their inter-relationship as the new global rule makers, and the importance of TiSA as the ‘last man standing’.

Table 2: Team TiSA by Sector

<table>
<thead>
<tr>
<th>IT and telecoms</th>
<th>Finance</th>
<th>Retail &amp; Logistics</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T</td>
<td>AIG</td>
<td>21st Century Fox</td>
<td>Mediacom Entertainment</td>
</tr>
<tr>
<td>BSA / The Software Alliance</td>
<td>American Insurance Association</td>
<td>Motion Picture Association of America</td>
<td>National Foreign Trade Council</td>
</tr>
<tr>
<td>Cisco Systems Ltd</td>
<td>Citigroup</td>
<td>National Retail Federation</td>
<td>US Chamber of Commerce</td>
</tr>
<tr>
<td>Dell</td>
<td>Council of Insurance Agents and Brokers</td>
<td>Retail Industry Leaders Association</td>
<td>American Farm Bureau Federation</td>
</tr>
<tr>
<td>Ericsson</td>
<td>JPMorgan Chase &amp; Co.</td>
<td>UPS</td>
<td>Agri and manufacturing</td>
</tr>
<tr>
<td>Google</td>
<td>Liberty Mutual</td>
<td>Walmart</td>
<td>Air Products</td>
</tr>
<tr>
<td>HP</td>
<td>Mastercard</td>
<td>American Express</td>
<td>Astoria Bank</td>
</tr>
<tr>
<td>IBM</td>
<td>Mobile Inc.</td>
<td>eBay Inc</td>
<td>Aflac</td>
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<tr>
<td>Microsoft</td>
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<td>Express Association of America</td>
<td>Ace Group</td>
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<td>Oracle Corporation</td>
<td>Prudential</td>
<td>AIA</td>
<td>Aflac</td>
</tr>
<tr>
<td>Software and Information Industry Association</td>
<td>Visa</td>
<td>Allianz</td>
<td>Ace Group</td>
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<td>TechAmerica</td>
<td>Visa International</td>
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<td>Ace Group</td>
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</tbody>
</table>
| Verizon | Western Digital | Large 

29 The mention from GATS to TiSA is examined in Jane Kennedy. From GATS to TiSA. Placing the trade in services regime beyond the limit. European Yearbook of International Economic Law, 7, 2016, 119-152
multilateral-agreement-on-investment-GAIA.html
32 World Development report 2016: Digital Dividends
33 GATS 1994, Article 4.3 says: ‘Particular account shall be taken of the serious difficulty of the least-developed countries in accepting commitments.34 Paragraph 26 of the WTO Hong Kong Ministerial Conference Declaration 2005 recognised that LDCs should not have to make any new commitments beyond those already made in the GATS.35 GATS 1994, Article 5
36 www.teamtisa.org
The trouble with TiSA

These lobbyists enjoy privileged access to governments, negotiators and the WTO, giving credence to the view that TiSA is not just being written for the corporations, but also partly by them. The US has a system of advisory committees whose members, as cleared advisers, have access to draft texts. For example, the US Chamber of Commerce, Express Association of America, UPS, FedEx and DHL Global Mail all sit at the table of the US Department of State as major players in its Advisory Committee on International Postal and Delivery Services. Legislators who seek to find out what is going on have no equivalent access or influence, let alone critics of the TiSA agenda, including global, regional and national unions.

THE GLOBAL SERVICES COALITION

From an international perspective, the most significant member of Team TiSA is the Coalition of Services Industries (CSI), whose constituent corporations are also members. The CSI is part of the Global Services Coalition (GSC) whose vice-president for global trade services is from FedEx. The GSC has been running hard on TiSA, especially on digital trade. Its annual summit in 2013 was entitled Pushing the Frontiers of Services and singled out ‘the new so-called ‘21st century issues’ such as cross-border data flows, so-called forced localization requirements, and competition from state-owned and state-sponsored enterprises (SOEs).’ The GSC has supported the inclusion of China in the TiSA talks, but only at the required level of ambition.

The global coalition has issued four TiSA-specific statements urging a rapid and ambitious deal. Two of these in mid-2016 targeted domestic regulation, transparency in licensing procedures, telecommunications and e-commerce (particularly data flows and prohibitions on requirements to hold data locally), financial services and delivery services. Further areas considered important were temporary mobility of service providers, environmental services and transportation. Their statement in July 2016 also sought coverage and commitments on ‘new services’ (those that do not yet exist), removal of all ‘barriers’ at subnational levels of government, and minimisation of reservations that maintain a country’s ‘policy space’ (on the grounds that the general exception, discussed in Part 3, would protect ‘legitimate non-discriminatory policies’).

In the same month, the GSC organised a workshop at WTO headquarters on Making the Digital Economy Work for Services Trade. The presenter from the UN Conference on Trade and Development (UNCTAD) stressed the need to address barriers that countries from the Global South face to access technology and skills, alongside balanced data protection laws. By contrast, Digital Europe, of which the European Services Forum is a member, pushed for ambitious chapters on e-commerce, teleports and permissions on data localisation requirements (dubbed ‘digital protectionism’) and stressed the importance of collaborations with the G20/G7, OECD, World Bank, World Economic Forum, International Centre for Trade and Sustainable Development and the UN (CTAD). The agreement on the US-EU Privacy Shield was viewed as a ‘green light’ to talking about data flows. The ‘shield’ was adopted despite the view of the European Data Protection Supervisor that a more robust and sustainable solution was needed. However, an executive order from President Trump excluding non-US citizens from the protection of personal information under the US Privacy Act has cast that into doubt.

NATIONAL AND REGIONAL CORPORATE LOBBIES

Members of the Global Services Coalition include national coalitions from 10 TiSA parties: Australia; Canada; Colombia; the EU; Hong Kong; Japan; Mexico; New Zealand; Taiwan; China; UK (the City) and the USA. This spread gives the GSC access to many national governments and international institutions, including the WTO.

The European Services Forum bills itself as ‘a major voice of the European services industries’ whose main stake lies in the liberalisation of the services markets in connection to the WTO GATS negotiations and the EU bilateral trade negotiations. It was an early promoter of TiSA and plays an active lobbying role across the EU’s many negotiations. Members include British Telecom, Deutsche Post DHL, Deutsche Telekom, Groupe La Poste, Inmarsat, Oracle, Tata Consultancy Services and Telenor, along with numerous finance-related firms, BusinessEurope and Digital Europe. Sectoral groups include postal and express delivery, distribution, retail services, shipping and telecommunications.

Japan’s main corporate lobby Keidanren has prioritised the interconnectedness of manufacturing, services and information, citing as examples their integration in the manufacturing of cars and the operation and maintenance of overseas production, agriculture for export (sales, inventory, logistics, quality, traceability, etc), and ‘efficient maintenance of a large ship’ by collecting sensor data to secure safe service and lower costs of maintenance. Keidanren identified the need to ‘break silos against data flows from all over the world’ as crucial to the control of commerce.

INDUSTRY LOBBIES

Most of TiSA’s sector-specific annexes have their origins in powerful industry lobbying whose patent states proposed them. Two examples feature in this report. The Global Express Association, which also functions as the Express Association of America, comprises the world’s four largest express delivery firms: DHL Express, Fedex Express, TNT and UPS. Trade liberalisation is an explicit priority. Recent papers set out their long-term objectives for trade agreements generally, and specifically on air transport liberalisation. Their evidence to the US House Ways and Means Committee to support ‘fast track’ authority to speed deals through Congress set out the following wish list for TPPA, TTIP and TiSA: Eliminating tariffs and non-tariff barriers to trade in goods; Removing market access barriers to trade in services; Achieving a much higher level of regulatory convergence; Removing barriers to investment;

64 http://www.expressw.com/express/index.html
66 http://www.expressw.com/index.html?expressw.db/memberby-area
67 Deutsche Post DHL, European Express Association, Grupo La Poste, PostEurop
68 Economist Europe, GuniCommerce, Foreign Trade Associations, Selko European Direct Selling Association
69 European Community Shipowners’ Association
70 British Telecommunications, Deutsche Telekom, Inmarsat, Orange, Telital: European Telecommunications Network Operators Association, European Satellite Operators Association
74 Testimony of the Express Association of America to the Committee on Ways and Means, United States House of Representatives hearing on US Trade Policy Agenda, 4 April 2015, https://www.heightenhanced.com/uploadedFiles/The_Express_Association_of_America%20CITAgenda.pdf
• Aligning standards and practices, whether through harmonization, mutual recognition, adoption of international standards, or other methods;
• Eliminating restrictions on cross-border data flows (the free flow of data across borders is critical to the express industry);
• Prohibiting forced localization (including in-country requirements for servers and data storage);
• Developing disciplines on state-owned enterprises (SOEs) and state-supported enterprises (SSE) to ensure fair competition between these entities and the private sector.
• Given the sheer size of our trade with the EU and TPP partners, even marginal convergence in these policy areas could have substantial positive effects for business.

In similar vein, the European Community Shipowners’ Association represents the national associations of the EU and Norway; its comprehensive position paper on TiSA is reflected in the proposed annex on maritime transportation services. The specific demands of both lobbies are discussed in Part 4.

2.9 THE NEXT MONTHS MATTER!

To reiterate the political situation as of February 2017: the Trump administration has not announced a position on TiSA, and the EU says there will not be an agreed position on data for it to table in the negotiations until at least Autumn 2017. The future of TiSA negotiations is now highly politicised. The current paralysis also provides a critical window for the ITF to educate and mobilise its affiliates and their members to intervene at a national, regional and international level.

PART 3.
UNPACKING TISA

These agreements are never negotiated from scratch: existing texts are adapted to new proposals and parties. In the case of TiSA, the starting point is the GATS 1994 in the WTO. As Part 2 explained, the Really Good Friends group has been frustrated that other WTO members, mainly from the Global South, have blocked the revision and expansion of the GATS. Their game plan is to achieve those changes through TiSA, and then export TiSA back to the WTO. For that reason, parts of the TiSA legal text are almost identical to the GATS. Other parts are new, mainly the annexes and the new kinds of schedules.

TiSA also promises a more streamlined and coherent version of the many ‘GATS-plus’ free trade agreements (FTAs) among the 23 negotiating parties. However, it could end up adding yet another layer to the already complex web of commitments, obligations and constraints among them. That would make it even harder for local authorities, parliamentarians and policy makers to know what restrictions apply to their activities and avoid their government being sued for a breach – let alone for the public to understand what TiSA means for services that matter to them.

The leaked texts show TiSA has a preamble plus four parts: I. General Provisions, II. Scheduling Commitments, III. New and Enhanced Disciplines (including annexes), IV. Institutional Provisions. The following overview explains in general terms how TiSA could impact on the ITF’s constituencies. Appendix A lists the known provisions and Appendix B gives a more detailed outline. Readers may also find it helpful to refer to the glossary.

3.1 THE MAIN OBJECTIVES

The structure and substance of TiSA makes most sense when analysed in terms of its broader objectives:
• to deliver a modular agreement that can be exported back into the WTO to serve the interests of OECD states and their transnational corporations in a better way than the GATS;
• to enable seamless global commerce through unfettered cross-border flows of data, capital, finance, and elite personnel;
• to reorganise and expand the GATS’ categories of service sectors, to merge some and add new ones;
The trouble with TiSA

The trouble with TiSA

The core TiSA text says: 'Parties recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their policy objectives.' What it doesn’t make clear, however, is that this right is subject to the rules of WTO, ‘Services Sectoral Classification List’, MTN.GNS/W/120, 10 July 1991 (W/120), http://i-tip.wto.org/services/default.aspx

Used to identify services covered by the GATS, known as GATS was adopted in 1994 the worldwide web was in its infancy. The classification used to identify services covered by the GATS, known as

The GATS positive list approach is still used for the market access rule – each government lists which services it will subject to the rule and any limitations on that commitment. For example, there may be no limits on the number of container ports, but investment must be through a joint venture, or cross-border retail transactions may be unrestricted, except for alcohol and tobacco.

However, once a market access commitment has been made, it is presumed that the non-discrimination (national treatment) rule would automatically apply (forever), unless the schedule explicitly states otherwise. The negative list approach is designed to maximise the exposure of services to the non-discrimination rule and restrict the legal space for new restrictions on foreign services or services firms, or new preferences for locals. Negative listings put a country’s future regulatory capacity at risk of error, omission, unforeseen or unforeseeable situations, or of a highly liberalising government that is intent on binding the hands of its successors. The risks are greatest for countries from the Global South with weak regulatory frameworks and limited negotiating resources and power.

There are two ways governments can protect themselves from these risks. First, a party may be allowed to carve out a service or measure from the national treatment obligation through its schedule, referred to in TiSA as a policy space exception. However, that only applies to the non-discrimination (national treatment) rule. The cumulative effect of the market access rule and many others could still hog-tie a government in regulating a new service or a new way of delivering it.

A ‘policy space’ protection may not be sought, or not be allowed by the other parties; the alternative is to maintain measures that support local services and suppliers at the existing level (standstill). This freezes the status quo in the particular subsector; the government

### CORE RULES AND SCHEDULES

TiSA proposes several complementary techniques to achieve their goal. The core market access and national treatment rules are the same as the GATS. The market access rule says a government must not restrain competition in, and the potential expansion of services markets, either regionally, or across the country, by imposing limits that are quantitative or have a similar effect, even where those limits apply to locals as well. Examples of prohibited market access measures include a transport monopoly, a requirement to show unmet need before opening a new hypermarket or port, limits on the size and numbers of airports or of cruise ship visits, a cap on taxi licences in a region, a ban on offshore windfarms, or requiring that investment in essential infrastructure is through a joint venture or a subsidiary rather than an agency.

The national treatment rule says a government cannot give local services and suppliers better treatment than their counterparts from a TiSA country. Examples of discriminatory treatment include exclusion of foreign operators from domestic cabotage; local hiring requirements; only paying subsidies to local providers; a ban on foreign ownership of land or assets; restricting local transportation or eco-tourism operations for local firms; levying remittance insurance only on offshore platforms that are foreign owned; allowing only nationals to register as ships’ masters.

The main difference in TiSA is how each country schedules its commitments to those rules. The GATS positive list approach is still used for the market access rule – each government lists which services it will subject to the rule and any limitations on that commitment. For example, there may be no limits on the number of container ports, but investment must be through a joint venture, or cross-border retail transactions may be unrestricted, except for alcohol and tobacco.

However, once a market access commitment has been made, it is presumed that the non-discrimination (national treatment) rule would automatically apply (forever), unless the schedule explicitly states otherwise. The negative list approach is designed to maximise the exposure of services to the non-discrimination rule and restrict the legal space for new restrictions on foreign services or services firms, or new preferences for locals. Negative listings put a country’s future regulatory capacity at risk of error, omission, unforeseen or unforeseeable situations, or of a highly liberalising government that is intent on binding the hands of its successors. The risks are greatest for countries from the Global South with weak regulatory frameworks and limited negotiating resources and power.

Negative lists are high risk even for governments with a long experience of liberalisation, privatisation, de-regulation and market-based regulation, and which have well-resourced bureaucracies and experienced negotiators.

There are two ways governments can protect themselves from these risks. First, a party may be allowed to carve out a service or measure from the national treatment obligation through its schedule, referred to in TiSA as a policy space exception. However, that only applies to the non-discrimination (national treatment) rule. The cumulative effect of the market access rule and many others could still hog-tie a government in regulating a new service or a new way of delivering it.

A ‘policy space’ protection may not be sought, or not be allowed by the other parties; the alternative is to maintain measures that support local services and suppliers at the existing level (standstill).

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56 TiSA, Article 1-3, Core text, dated 14 July 2016
57 TiSA, Article I-4, Core text, dated 14 July 2016
58 TiSA, Article II-2.1, Core text, dated 14 July 2016
59 TiSA, Article II-2.2, Core text, dated 14 July 2016
60 TiSA, Article II-2.4, Core text, dated 14 July 2016
61 TiSA, Article II-1, Core text, dated 14 July 2016
62 TiSA, Article II-2.3, Core text, dated 14 July 2016
63 TiSA, Article II-2.4, Core text, dated 14 July 2016
64 See Appendix B for the definitions of ‘supply’ of a service, a ‘measure’ ‘affecting’ a service, the general scope of some sectors (eg. computer services or data services) for the different modes of trade, the concept of ‘technological neutrality’ and the domestic regulation disciplines
65 TiSA, Article II-2.2, Core text, dated 14 July 2016
66 TiSA, Article II-2.3, Core text, dated 14 July 2016
68 WTO, Services Sectoral Classification List, MTN/GNS/W/281, 10 July 2016 (W/281), http://i-tip.wto.org/services/default.aspx
cannot adopt policies, regulations or other measures that are more restrictive of foreign services firms or more favourable to locals, for example by reversing a privatisation. A standstill vastly increases the risks from policy, regulatory, social or political failure, and can leave a government impotent to respond to new circumstances, including the unforeseen impacts of technologies.

A standstill is accompanied by a ratchet, every time a government adopts any more-liberalised measure towards foreign services and services firms or removes a benefit to locals, that change is automatically locked in. It is irrelevant if the government was poorly advised, reckless, ideologically driven, corrupt, or a captive of corporate elites. The ratchet would also allow a political party in power to adopt an extreme agenda of liberalisation, deregulation and privatisation, knowing its opponents would be unable to implement an alternative political manifesto. A future government that is more prudent, seeks to rebalance social and commercial interests, or to close the opportunities for profiteering or corruption, could not undo what the previous government has implemented without risks of litigation under TiSA.

TiSA’s negative list approach is profoundly anti-democratic: it forecloses the right of democratically-elected governments to change their policy settings in the future on pain of economic sanctions. Those risks are heightened for the Global South in another example of how they are denied the mandatory development flexibilities built into the GATS, and is why most have resisted using negative lists to date.

As with the GATS, it would be extremely difficult, and potentially very costly, for a country to make changes to its TiSA schedule. If another party objects, the country must negotiate additional liberalisation to compensate, meaning the price of rescuing one service falls on another; this has rarely been attempted under the GATS. In the most notorious example Bolivia, one of the world’s poorest countries, notified the WTO in 2008 that it wanted to change the GATS schedule drawn up by its neoliberal predecessor and take the hospital services back under public control in line with its new constitution. The US objected at the last minute. That was almost a decade ago, and the US is presumably waiting for a less progressive Bolivian government to withdraw the request. Meanwhile, the US stance sends a clear message to any other country seeking to change its schedule.

The handcuffs would bind even tighter if TiSA parties agree to adopt the concept of technological neutrality: TiSA commitments would apply irrespective of the technology used to deliver the service, even if that technology did not exist when the schedule was drafted. Technological neutrality is not written in the GATS or TiSA draft texts and its status is contested. The concept was agreed in a dispute brought by Antigua and Barbuda against the US over a ban on internet gambling: the dispute panel just observed that the principle ‘seems to be largely shared among WTO members’. China argued that the principle had never been accepted by WTO members as part of its defence to a dispute brought by the US; that dispute panel found it was unnecessary to decide the question, although it did not reject the possibility. If TiSA treated technological neutrality as a settled question, it would have greater impact than in the GATS, because countries are expected to make more extensive commitments on cross-border services as new technologies rapidly evolve. There are clues in the leaked texts that it has been discussed, but no indication of what position has agreed, if any.

**OTHER ‘DISCIPLINES’ ON GOVERNMENT REGULATION**

Additional constraints apply to the criteria for, and processes of, regulatory decisions. It is an ideological tenet of neoliberalism that governments should adopt a light-handed and market-based approach to domestic regulation, as per the OECD’s guidelines on regulatory policy.

This pro-business bias has triggered calls for more balanced criteria, as with the EU’s Better Regulation Package, and was diluted in the Regulatory Coherence chapter of the TPPA after resistance from a number of developing countries.

Since the Uruguay round, some trade-activist governments (New Zealand, Australia, Hong Kong, Switzerland) have been trying to impose these criteria on three kinds of services regulation: qualification requirements and procedures, licensing requirements and procedures, and technical standards (the characteristics of a service or how it is supplied).

The same countries are pushing for the Annex on Domestic Regulation in TiSA (see Appendix B). As the sectoral case studies show, these rules would have worrying implications for the ITT; as they would require pro-business, light-handed regulation of freight loading rules, health and safety codes, odour requirements, consumer protections, and universal service obligations, as well as professional qualifications and licensing. Additional rules would prohibit ‘unreasonable’ administration of general regulations that ‘affect’ services transactions.

TiSA’s innovations become even more dangerous when a government cannot insist that the entity supplying a service from outside the country has a presence inside the country (what the corporates term forced local presence). This rule has been agreed in the November 2016 text, meaning that firms who supply services across the border would be governed by their home country rules, including their labour laws on wages and conditions and unionisation. Not having any local presence would also pose serious obstacles to effective legal liability, consumer protections, abilities to tax, the vetting of qualifications and assessing compliance with technical and professional standards. By agreeing to this rule, governments may effectively outsource part of their regulatory sovereignty to the lawmakers of another country.

Equally, a proposed rule against so-called forced localisation of data in the e-commerce chapter would give suppliers of a service the right to hold the data remotely – anywhere in the world. It has not yet been agreed whether information held or processed by or on behalf of the government would be excluded. The rules that then apply to that data would depend on where the server was located. The ‘cloud’ usually means the US, whose laws on privacy are lax, laws on surveillance are intrusive, and commercial sale of data is free. There appears to be nothing to stop the data services being subcontracted to a third party in another non-TiSA country. It could become extremely difficult for authorities to access the data necessary to monitor compliance of companies with its safety standards,

**Notes:**

66 TiSA, Article II.2.2, Core text, dated 16 July 2016.

67 TiSA, Article II.7 with Core text, dated 16 November 2016.


69 Mr Xiang Hu, “When Trade Encounters Technology: The role of the technological neutrality principle in the development of WTO rules in e-commerce”, Conference on services and intellectual property, Berlin, 4-5 June 2014.


75 For example, the political economy of the EU’s Better Regulation Package. See the Better Regulation Watchdog, http://www.betterregwatch.eu.


labour laws or financial regulation. Effective oversight and enforcement would depend on those countries’ laws, the cooperation of their regulators, affordable access to their legal systems, their courts’ willingness to accept jurisdiction and the robustness of their legal processes.

### 3.3 PUBLIC SERVICES

The intrinsically social nature of services and their multiple functions makes trade in services negotiations very politically sensitive. That is one reason for the secrecy, but there are also false assurances in the rhetoric of GATS and TiSA that governments disingenuously hide behind. The ‘right to regulate’, as cited above, is just one.

**MISLEADING EXCLUSIONS**

Supporters of the GATS often misleadingly insist that public services are carved out. But that applies only where services that are supplied under governmental authority are both non-commercial and have no competitor – a monopoly that supplies services for free. Almost no services meet these criteria today. The same provision is in TiSA, so services that fall outside that narrow definition are subject to TiSA’s rules.

It is also sometimes said that core rules of GATS and TiSA do not apply to government procurement of services. However, the term is narrowly defined to cover the procurement of services for the internal use of a government agency where they are not used in the supply of services for sale. The core rules on market access and non-discrimination still apply to services that are procured by governments and sold or resold, such as utilities like water and electricity, public-private partnership (PPP) roads or rail transport that use, operate, or construction services or IT where these form part of a service that is ultimately charged for. A separate annex has been proposed for TiSA, but there is strong opposition so it is likely to be dropped.

Under the November 2016 core text monopoly service suppliers would have to comply with the most favoured nation (MFN) rule (giving the same best treatment to service suppliers from all TiSA countries) and with some other commitments that are not yet specified. Where the monopoly supplier or postal or port services competes in providing non-monopoly services that are subject to TiSA obligations, they must not ‘abuse their monopoly position’. That may include direct or indirect cross-subsidisation, such as providing non-monopoly services that are subject to TiSA obligations, they must not ‘abuse their monopoly position’.

### eENTERPRISES (SOEs)

In mid-2016, the US belatedly tabled an Annex on State-Owned Enterprises that draws on the chapter it insisted on in the TPPA. The US has several strategic goals:

- to lock in that commercialised model for the long term;
- to foster conditions for privatisation;
- to have a chilling effect on the exercise of public good functions by governments and SOEs;
- to establish a precedent-setting norm as a precursor to negotiations in the WTO, which could force radical economic restructuring on SOEs in the Global South;
- to neutralise what it sees as the competitive advantage of state-managed economies in which state-owned and state-supported enterprises play a dominant role, especially China;96
- to use TiSA as a backstop to the TPPA, although the TiSA version does not go as far.

SOEs that are majority-owned by a central government would have to act as if they were a private sector business and apply purely commercial considerations when selling or buying services. They could also not favour domestic consumers or businesses, and TiSA parties could demand information on each other’s SOEs. Each country could seek to protect its sensitive SOEs, but all the other parties would have to agree. Other annexes that affect specific public services, such as delivery services, telecommunications, maritime and air transportation, as well as government procurement, would also apply to SOEs.

The latest leaks show the annex has been subject to small group work involving both the US and EU. An October 2016 text suggests the EU is not opposing the annex per se. Some of its proposals would inject more EU competition policy into the US proposal, notably additional rules on monopolies that would supplement the provision on monopolies in the core text. The EU also seeks greater flexibility for public policy and protection for the non-commercial activities of SOEs. Later version from November 2016 appears to show the US rejecting most of the EU paper, but there is nothing to indicate the position of any other TiSA parties. Those TiSA countries that agreed to a more radical SOE chapter in the TPPA might be expected to accept the annex. However, some might also welcome the opportunity to dilute or exclude it from TiSA. More details on the rules in the annex are set out in Appendix B.

This would have significant implications for ITF unions. An OECD study in 2014 shows SOEs still operate many sectors. The network industries (utilities and post) made up about half the total value of the SOE sector in OECD countries and 60 percent of employment; next came finance, at about a quarter of total SOEs by value, followed by transportation and the primary sector, including mining. Data in the study also shows that some TiSA countries, including a number of EU member states, would have quite extensive exposure to the SOE annex, whereas others, including the US, have very few SOEs that would be affected. The potential impact on airlines, shipping companies and railways, as well as airports, seaports and other facilities and infrastructure that are majority-owned or controlled by central government makes the SOE annex specially important for the ITF.

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80 Referring to TiSA, Article I-1.3(b) and (c), Core Text, dated 14 July 2016. See, eg New Zealand Ministry of Foreign Affairs and Trade presentations on TiSA, 2016, https://www.mfat.govt.nz/assets/Uploads/TiSA-Public-Sessions-Presentation-June-2016.pdf
81 ‘Services supplied in the exercise of governmental authority’ are defined as a service supplied neither on a commercial basis nor in competition with one or more service suppliers.
82 TiSA, Article XII GATS: Government Procurement, Core Text, dated 14 July 2016.
83 TiSA, Article X:[…]. Monopolies and Exclusive Service Suppliers, Core Text, dated 14 July 2016.
84 https://wikileaks.org/tisa/document/201504_Annex-on-Government-Procurement/
86 The US proposal for TiSA does not include the TPPA rule that prevents SOEs receiving non-commercial advantages causing adverse effects to another party, but would require negotiations if another country that had extended SOEs sought to join TiSA (Article X:4). The EU opposes that proposal, as do other TiSA parties. For an early analysis of the thinking behind the TPPA US chapter see: June Kehayia, The Battles of Disciplines on State-owned Enterprises in the Proposed Trans-Pacific Partnership Agreement, 4 March 2012, http://www.brookings.edu/events/2012/03/05-tpp-commodity-review-kehayia
87 SOEs that are majority-owned by a central government would have to act as if they were a private sector business and apply purely commercial considerations when selling or buying services. They could also not favour domestic consumers or businesses, and TiSA parties could demand information on each other’s SOEs.
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PRIVATISATION AND PUBLIC SERVICE ENTERPRISES

The annex does not require privatisation of SOEs and that is not the inevitable outcome; rather it creates the conditions for privatisation. Since the 1970s, governments have used this corporatisation model of state enterprises to shed their social, employment, and economic development responsibilities; drastically cut the public-sector workforce, and shift workers onto private sector employment conditions; reduce government subsidies and other supports; create lucrative markets for private businesses; and prepare SOEs for full or partial privatisation. Once a public entity is required to be fully commercial, the rationale for it remaining public is undermined, aside from providing a revenue stream for the government. Partial privatisation is often presented as a benign way to bring in new equity or pay down corporate or public debt, while maintaining public control. But selling a minority stake creates investor demand and dilutes political resistance to full privatisation down the track.

While the annex says that governments can create new SOEs, they would still have to comply with the TiSA rules. That could be very difficult as a new SOE usually requires special treatment when it is being established. The TiSA annex would make it impossible to develop a less commercial model of public enterprise, even in the face of policy, market or social failure. Experience shows that governments sometimes need to rescue privatised SOEs when businesses fail, often through profiteering or asset stripping, or when market or social failures create unacceptable costs, as has occurred with banks, airlines, railways, water and other utilities. But reversing failed privatisations, or nationalisation, would breach the national treatment rule where a commitment has been made in the relevant sector, unless full policy space had been preserved in the country’s schedule.

PUBLIC GOOD ROLES OF SOES

There are three potential protections from these rules:

1. The November 2016 text would allow countries to schedule activities of SOEs that would otherwise breach the non-discrimination rule, but that list has to be negotiated. An SOE would be allowed to apply non-commercial considerations (such as the need to ensure public access, affordability, or cultural sensitivities) where it is fulfilling a ‘public service mandate’ that makes a service available to the public within its territory. This excludes any cross-border activity and the SOE must still not discriminate against services, and service suppliers from other TiSA countries.

2. The non-discrimination rule cannot restrict the temporary response of a government or an SOE to a national or global economic emergency, but not other emergencies. In those situations, governments would have to rely on the inadequate general exception, discussed below.

3.4 SOCIAL RIGHTS

Defenders of trade in services agreements commonly claim that public policy, especially environmental and health policies, are excluded. This usually refers to the general exception, which is a defence that governments can raise when accused of breaching the rules. It has been carried over from the GATS into TiSA, and applies to measures necessary to protect human life or health, public morals and public order. Its scope is very limited. It does not explicitly cover human rights, including labour rights set out in the ILO Conventions or sectoral instruments; they would have to be brought in under human health, public morals or public order.

3.5 NATIONAL SECURITY

National security is crucial for the transportation sector, especially aviation and maritime services. However, TiSA strips out the intrinsic strategic and security dimensions of airports and seaports and treats them as purely commercial operations. This means that measures adopted for security reasons may breach the agreement. For example, excluding foreign suppliers from providing certain maritime services could violate national treatment. Security-related technical standards could breach the domestic regulation annex if they were held to be disguised ways to restrict foreign firms or administered in an unreasonable way.

The national security exception in TiSA would provide very limited protection to a government. It is taken from the GATS, which was itself adapted from the GATT 1947 and reflects perceptions of national security from the World War II era. It allows governments to take action to protect their essential security interests, which they can judge for themselves. But the defence only applies to the supply services, directly or indirectly, to provision a military establishment, relating to nuclear materials, in time of war or ‘other emergency in international relations’, or for action pursuant to a United Nations mandate. It does not cover general national security precautions, or ‘anti-terrorism’ measures unless they are accepted as an ongoing ‘emergency in international relations’. The alternative would be to invoke the part of the general exception for measures ‘necessary to maintain public order’, but that would be subject to the problematic multi-layered necessity and discrimination tests. The exception would not apply to broader conceptions of threats to national security, such as measures to respond to climate change.

96 TiSA, Article XI, Core text, dated November 2016
97 TiSA, Article I-9(c), Core Text, dated July 2016
PART 4.
MARITIME TRANSPORT SECTOR

4.1 A SNAPSHOT

The historic standoff over how maritime transport is treated in trade in services agreements continues in TiSA. In the early 1990s, a group calling itself the Friends of Maritime Services was formed to push for liberalisation of the sector in the GATS. Almost all those Friends are participants in TiSA: Australia, Canada, the EU, Hong Kong, Japan, Mexico, New Zealand, Norway, Panama, South Korea and Taiwan.\(^{100}\) They are promoting an Annex on International Maritime Transport Services that draws on the failed negotiations on maritime services in the GATS, the maritime services provisions in their various free trade agreements (FTAs), and the OECD’s International Understanding on Maritime Transport Principles.\(^{101}\)

Early leaked versions of the TiSA annex show these friends wanted guarantees that shipping companies and their vessels could provide international maritime services into all other TiSA countries. All cargo-sharing arrangements would be eliminated. Technical standards, including those that affect crewing, would be based on narrow pro-business criteria. Domestic rights over cabotage could be protected, but only with the consent of all the other TiSA parties. Other internal operations for feeder services, repositioning of containers, and transport to offshore facilities would be subject to TiSA rules. Foreign entities would be guaranteed equal access to and use of ports, infrastructure and auxiliary services. Multimodal operators would gain guaranteed access to internal rail, road and waterways on neutral terms, complementing proposed annexes on road transport and competitive delivery, and providing a fall back if those annexes were not agreed.

It is possible the maritime annex could be dropped from TiSA. The leaked version from November 2016 shows the original proposal has been severely cut.\(^{102}\) Even with those compromises, the parties have only agreed on the definitions; the substance remains contested. That is mainly due to resistance from the US for whom the Jones Act remains contested. That is mainly due to resistance from the US for whom the Jones Act is sacrosanct.\(^{103}\) The Act requires, among many other measures, that all goods transported by water between US ports are carried on US-flagged ships that are built in the US, owned by US citizens, and crewed by US citizens and permanent residents. Protection of domestic cabotage is a political red line. In the November 2016 text the US still opposed or was silent on those provisions.

Even without the annex, however, other aspects of TiSA would affect the maritime transport sector with damaging long-term consequences for the FTT constituency. Core rules aim to prohibit any favourable treatment for local services, or restrictions on foreign firms involved in shipping, ports and related services, and prohibit restrictions on the market in those services, including through monopolies, or limiting the number of operators or activities. Under the proposed annex on labour mobility, TiSA governments could guarantee temporary entry rights for foreign workers in management positions or those employed by foreign contractors of other TiSA countries, including shipping companies or port operators, to deliver services inside their countries. Another annex would restrict the public good role of state-owned enterprises (SOEs).

Four systemic effects on the maritime transport sector stand out:

1. The powerful shipping lobby claims TiSA would create a ‘level playing field’ and greater efficiencies. It is more likely to strengthen the market power of international transport and logistics operators and increase their dominance over local firms. Local businesses and workers would become more dependent on them. Even greater market power would, in turn, give them added leverage over national regulators and providers of port and auxiliary services, including state enterprises.

2. Treating maritime transportation and ports as purely commercial services ignores their status as essential services and their strategic role in national security, which may justify having restrictive and discriminatory rules. Those considerations fall outside the limited scope of TiSA’s national security exception and governments would have to rely on the inadequate general exception for measures ‘necessary for public order.’\(^{104}\)

3. Bringing more maritime services under a ‘trade’ agreement that gives primacy to commercial interests and factors, and is enforceable through arbitration by panels of trade experts, would erode the status of the International Maritime Organization (IMO) as the international regulatory body for the sector and its mandate to balance economic, social and security interests.

4. Guaranteeing rights of entry for foreign contract workers, and increased competition and contractualisation at the ports, would undermine existing arrangements and unionisation of the workforce. The significant voice of maritime unions in the IMO and International Labour Organization (ILO) would also be weakened, as they are excluded from rule-making in a ‘trade’ arena where the protection of maritime workers is deemed a barrier to be dismantled. By contrast, the maritime industry would be guaranteed the right to comment on new laws proposed by individual TiSA countries that affect their interests.

4.2 OBJECTIVES IN A NUTSHELL

The Friends of Maritime Services want to use TiSA to achieve the following:

- agreement on binding rules for maritime services that proved impossible in the GATS and which the US has rejected in its FTAs;
- unrestricted cargo and passenger shipping between TiSA countries from port of exit to port of entry, with any limitations explicitly listed in a country’s schedule;
- re-engaging the battle over domestic maritime cabotage between those who demand its total exclusion from trade in services agreements and those who say that countries should be able to commit to open cabotage and those that want to maintain a closed regime must list it as a reservation;
- eliminate all cargo-sharing arrangements involving a TiSA country;
- the powerful shipping lobby claims TiSA would create a ‘level playing field’ and greater efficiencies. It is more likely to strengthen the market power of international transport and logistics operators and increase their dominance over local firms. Local businesses and workers would become more dependent on them. Even greater market power would, in turn, give them added leverage over national regulators and providers of port and auxiliary services, including state enterprises.

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\(^{100}\) China and Singapore are ‘Friends’ but not involved in TiSA

\(^{101}\) OECD, International Understanding on Maritime Transport Principles, 28 October 1996. Many participating parties in this understanding are involved in TiSA: Australia, Canada, Chile, Hong Kong, Iceland, Japan, Mexico, New Zealand, Norway, South Korea, Switzerland, Taiwan, China, Turkey, UK and many EU member states.

\(^{102}\) TiSA, Annex on International Maritime Transport Services, dated 16 November 2016

\(^{103}\) The Merchant Marine Act of 1920

\(^{104}\) Footnote 5 to the General Exception Article XV in the GATS text. ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.’
The trouble with TiSA

and other economic partners. This includes identifying all barriers that prevent the establishment of true Motorways of the Sea, such as flag restrictions and ownership requirements, market access restrictions in ports, outdated, unnecessary and repetitive administrative formalities, and the lack of reciprocity in multilateral and bilateral forums.

The London-based International Chamber of Shipping (ICS) has consistently demanded the liberalisation of shipping markets to counter ‘protectionism’, especially in Africa, Russia and the US. It works alongside the Consultative Shipping Group of maritime administrations, chaired by Denmark. The Chamber considers regional regulation a threat to globalisation, and it approves the EU’s stance in the WTO and TiSA, while it warns of calls by European seafarers’ unions for an equivalent of the Jones Act, and pressures for new environmental rules, including on climate change.

4.3 THE CORPORATE LOBBIES

Two maritime industry lobbies have been to the fore in TiSA. The most active is the European Community Shipowners’ Associations (ECSA), which covers the EU and Norway. ECSA claims to control 40 percent of the world fleet by gross tonnage, 60 percent of the world’s container ships, 82 percent of multi-purpose vessels and 43 percent of the oil tankers, and 37 percent of the world’s offshore vessels. They have urged the European Commission to ensure that maritime transport is included in all FTAs, and to use CETA, TTIP, TiSA and the EU-Japan FTA to ‘create a better and more stable environment for shipping companies and other economic partners’. This includes identifying all barriers that prevent ‘the establishment of true Motorways of the Sea’, such as flag restrictions and ownership requirements, market access restrictions in ports, outdated, unnecessary and repetitive administrative formalities, and the lack of reciprocity in multilateral and bilateral forums.

The WTO Secretariat prepared a lengthy updated note on Maritime Transport Services (S/CSS/W/115, 22 December 2000) following the announcement that the WTO would consider maritime transport services in its Uruguay Round negotiations. The note was developed on the basis of a consultation process with interested WTO Members involving the submission of written comments and oral presentations.

4.4 THE HISTORICAL CONTEXT

There is a long history to the TiSA negotiations. In 1986, maritime transport served as one of the four pillars of the 1986 agreement to launch negotiations on Cross-Border Services, which were extended and then suspended in June 1996 when the Negotiating Group on Maritime Transport Services failed to make progress. WTO members were allowed to alter their offers on maritime services; the European Commission, for example, withdrew its offer. An Annex on Maritime Transport Services said future negotiations would be part of the next comprehensive round of GATS negotiations scheduled for 2000 and must conclude no later than the end of that round.

The WTO Secretariat prepared a lengthy updated note on Maritime Transport Services for the GATS 2000 talks, which were then incorporated into the Doha round. The Friends of Maritime Services presented a model maritime schedule developed during the earlier negotiations, based on three pillars:

1. coverage of international maritime transport services (without cabotage);
2. coverage of maritime auxiliary services: cargo handling (excluding dockers), storage and warehousing, custom clearance services, container station and depot services, maritime agency, freight forwarding;
3. access to and use of port services, covering nine services: pilotage, towing and tug assistance, garbage collection and ballast waste disposal, port captain services, navigation aids, essential shore-based operational services, emergency repair facilities, anchorage and berthing facilities.

Some countries went further. Australia proposed a cluster approach that grouped the most economically important maritime-related services together. It also challenged measures and practices it considered too burdensome, such as ‘unreasonable environmental and safety standards, burdensome vessel and cargo examination procedures, and lengthy and cumbersome port access and clearance procedures’. Australia said these barriers could be removed without ‘endangering legitimate safety, national security and environmental requirements’.

The three pillars were sometimes supplemented by a fourth pillar for intermodal or multimodal transport services. Switzerland called for an integrated and comprehensive approach to all transport and a new focus on logistics and auxiliary services. The EU also presented an overarching position on the entire transport sector, and wanted the maritime talks to centre on the model schedule and the inclusion of multimodal operations. The main target markets were the US, Argentina, Brazil and the ASEAN countries. The US did not make an offer in response to these requests.

Consistent with its historical positions, the EU has required extensive maritime services provisions in all its FTAs. By contrast, maritime transport services remain absent from all US FTAs and the US was allowed to avoid making any commitments on them in the TPP.

Transport Services failed to make progress. WTO members were allowed to alter their scheduled offers on maritime services; the European Commission, for example, withdrew its offer. An Annex on Maritime Transport Services saidfuture negotiations would be part of the next comprehensive round of GATS negotiations scheduled for 2000 and must conclude no later than the end of that round.

The WTO Secretariat prepared a lengthy updated note on Maritime Transport Services for the GATS 2000 talks, which were then incorporated into the Doha round. The Friends of Maritime Services presented a model maritime schedule developed during the earlier negotiations, based on three pillars:
4.5 TISA’S COVERAGE OF MARITIME TRANSPORT

The core TISA test word would affect maritime transport and related transport sectors in many ways, even without the annex on international maritime transport services. It is essential to remember that TISA rules apply very broadly to ‘measures’124 that are adopted by a central, regional or local government or by a body exercising powers delegated by those governments, such as a port authority or a maritime licensing body, and affect the ‘supply’125 of a service in any of the four modes of delivery.126

The range of services covered by these rules is very broad and somewhat unpredictable.

- Countries can request, and offer to make, commitments on access to the maritime services market, and non-discriminatory treatment for foreign suppliers, for the six categories of maritime transport services in the standard classifications list:127
  - passenger transportation,
  - freight transportation,
  - rental of vessels with crew,
  - maintenance and repair of vessels,
  - pushing and towing services, and
  - supporting services for maritime transport, as well as other relevant services, such as rental/leasing services related to ships and other transport equipment without operators.128
- Commitments in more general service sectors can also apply to maritime services, such as technical testing, satellite services, commission agents’ services, private education services, wholesale distribution, refuse disposal, placement and supply of personnel.
- Other modes that are part of multimodal transport – road, rail, inland waterways – and the many auxiliary services associated with them, may also be covered in countries’ schedules, and in other TISA annexes.

4.6 ACCESS TO THE MARITIME TRANSPORT MARKET

Full application of the market access rule129 would prevent a government or delegated authority imposing numerical limits on:

- the numbers of vessels allowed to dock at a port;
- the size of vessels allowed to operate in a particular region or the whole country;
- quantity of cargo or passengers berthing at a port;
- the number of ports established to service a particular need, such as liquefied natural gas tankers;
- frequency of visits, including cruise ships;
- a public or private monopoly on port services;
- daily limits on the number of towing services into and out of a port;
- requiring proof of an unmet need before a new ferry service is authorised; or
- a ban on berthing or unloading a particular kind of vessel or cargo.

A foreign firm could not be required to enter through a joint venture, or establish a subsidiary rather than an agency or branch of the parent company. Total foreign investment in a sector such as port services could not be capped.

4.7 NON-DISCRIMINATION AND CABOTAGE

The national treatment rule130 would prevent local suppliers of a wide range of maritime services from receiving better treatment than foreign suppliers, even when they have traditionally enjoyed such benefits.

Domestic cabotage is the most obvious measure that excludes a foreign firm from providing maritime transport services, whether the firm is established in the country or operating from offshore. Successive leaked texts show three positions on cabotage:

I. The US is silent.
II. Some countries131 want a maritime transport annex, but also want to protect cabotage – or avoid the US vetoing the annex. They have proposed a footnote that says ‘for greater certainty’132 international maritime transport services shall not include cabotage in maritime transport services.133 That footnote only applies to provisions in the annex that refer to international maritime transport services. That is less significant now the annex has dropped proposals to cover feeder services between ports inside a country, and maritime offshore services, such as to windfarms.134 It does not apply to foreign suppliers repositioning empty containers between ports within the country (without payment); while that is not cabotage, some see it as eroding the principle.
III. The third option is from the EU, Australia, Canada and others,135 including some supporters of option (ii): a party would be allowed to take no commitments in respect of maritime transport services ‘to the extent they fall within the scope of cabotage’ as defined in the country’s schedule.136 That negative list approach means the protection would only apply to what was clearly defined as cabotage at the time a country’s schedule was drafted. There is disagreement over how detailed the entry would need to be; because each country’s schedule is subject to negotiation, all other TISA countries would have to consent to the exclusion of cabotage and its definition. As noted above, the US avoided any commitments on maritime transport services in the TPPA through similar means. However, it may be unwilling to take that approach in TISA because there is a risk that others will not agree

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120 Defined in the core text as a law, regulation, rule, procedure, decision, administrative action, or any other form. TISA, Article 1.2(a), Core text, dated 14 July 2016
121 Defined in the core text as production, distribution, marketing, sale and delivery. TISA, Article 1.2(b), Core text, dated 14 July 2016
122 1) across the border, 2) consuming the service abroad, 3) establishing a commercial presence, 4) temporary presence of foreign natural persons. TISA, Article 1.1.2, Core text, dated 14 July 2016
123 Described as a ‘business service’ in WTO, ‘Services Sectoral Classification List’, MTN.GNS/W/120, 10 July 1991
124 TiSA, Article I-3, Core Text, dated 14 July 2016
125 TiSA, Article I-4, Core Text, dated 14 July 2016
126 TiSA, Footnote 1, Annex on International Maritime Transport Services, dated 14 November 2016
127 Colombia, China, Hong Kong, Japan, Mauritius, Mexico, New Zealand, Pakistan, South Korea, Turkey, Taiwan, China, Ireland is opposed
128 Meaning this is what we say the text means, but we want to spell it out because others may not agree
129 130 TISA, Article 1-4, Core Text, dated 14 July 2016
131 Australia, Canada, EU, Iceland, Japan, Mauritius, Norway, Panama
133 Countries can request, and offer to make, commitments on access to the maritime services market, and non-discriminatory treatment for foreign suppliers, for the six categories of maritime transport services in the standard classifications list:127

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The trouble with TiSA practices could breach the rule, such as:

- vetting of foreign investors, or limits on foreign investments, which affect international maritime transport or auxiliary services, such as foreign investment in a full or partial privatisation of a port;
- reversal of a privatisation (nationalisation);
- requirements that foreign shipping companies use local firms rather than their in-house services;
- priority access for local firms to export their perishable products;
- tax rebates that are available only to local or state-owned firms;
- employment subsidies or other benefits that are not available to foreign firms; or
- exclusion of foreign suppliers from coastal maritime services for safety or security reasons (which may not fall within the national security exception).

4.8 SCHEDULING

Governments signing on to TiSA would face two layers of obligations on maritime services. The first arises from their schedules of commitments to the market access and national treatment rules just described. Each TiSA party can decide whether to apply the market access rule to sub-sectors that relate to maritime transport. Once it does, the government is presumed to give away the right to treat locals better than their TiSA counterparts. If all the other countries agree, it may be allowed to freeze the current levels of discrimination, with any new liberalisation automatically locked in, or to have no restrictions on current and future preferences.

In addition, the maritime services annex would require governments to apply a number of other rules absolutely. These rules affect access to the ports, to port infrastructure and services, and to maritime auxiliary services;133 allowing foreign firms to reposition empty containers within a country;134 a prohibition on cargo sharing agreements;135 and a proposal from Panama on recognising the flagging of ships (which has little support).136 Other rules would impose a presumption of market access commitments, with some scope for governments to insert limitations in their schedules. These are discussed below.

4.9 SERVICES AT THE PORT AND AUXILIARY SERVICES

One absolute obligation would require international maritime transport suppliers from any TiSA country to be treated the same as locals regarding rights and terms of access to ports, to infrastructure and services at the port, and to maritime auxiliary services.137

‘Services at the port’ are defined expansively as:

- pilotage;
- towing and the tug assistance;
- provisioning, fuelling and watering;
- garbage collecting and ballast waste disposal;
- port captain’s services;
- navigation aids;
- shore-based operational services essential to ship operations, including communications, water and electrical supplies;
- emergency repair facilities;
- anchorage, berth and berthing services.

‘Maritime auxiliary services’ refers to an equally long list of activities:

- maritime cargo handling activities by stevedore companies, including terminal operators, when organised independently of those companies (not including direct activities of dockers); these explicitly include organisation and supervision of loading and discharging of a ship’s cargo; lashing and unlashing of cargo, and reception/delivery and safekeeping of cargo before shipment and after discharge;
- storage and warehousing services;
- customs clearance services;
- container station and depot services in port areas or inland;
- maritime agency services representing the business interests of a shipping line or company for the marketing and sales of maritime transport and related services, or acting on behalf of the company to organise call of the ship or taking over cargo; and
- freight forwarding services.

These rights would apply whether the foreign firm was supplying the service from outside the country across the border or through a local agent or company, and no limitations would be allowed in the schedule. There appears to be almost unanimous support for this in the leaked November 2016 annex; however, it does not record the US’s position.

4.10 MULTIMODAL OPERATORS’ ACCESS TO INLAND TRANSPORT

The international maritime transport annex seeks to secure open access for multimodal transport operators to a country’s entire national transport network, so long as the delivery includes an international maritime leg.138 Under the leaked November 2016 annex, multimodal transport operators would be entitled to access and use roads, rail and inland

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133 TiSA, Article 10; Core Text, dated 16 July 2016, discussed in Appendix B of this report
134 TiSA, Article 4; Annex on International Maritime Transport Services, dated 14 November 2016
135 TiSA, Article 5; Annex on International Maritime Transport Services, dated 14 November 2016
136 TiSA, Article 7; Annex on International Maritime Transport Services, dated 14 November 2016
137 TiSA, Article 3; Annex on International Maritime Transport Services, dated 14 November 2016
138 TiSA, Articles 71 and 72; Annex on International Maritime Transport Services, dated 14 November 2016
139 TiSA, Article 9; Annex on International Maritime Transport Services, dated 14 November 2016
140 TiSA, Article 10; Annex on International Maritime Transport Services, dated 14 November 2016
141 Multimodal transport is defined in TiSA, Article 53; Annex on Maritime Transport Services, dated 14 November 2016 as ‘the carriage of goods by at least two different modes of transport, involving an international sea-leg, on the basis of a single transport document’.
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The terms and conditions of access must not only be non-discriminatory – they must also be ‘reasonable’.143 That subjective term invites attacks on any licensing or use charges, or rules that restrict the quantity or time of access, even if the same rules apply to everyone. It could also prevent levies that require multimodal operators to contribute to infrastructure built up over the years by tax-payers or to a fund for its future maintenance and expansion. The scope of this proposal is especially broad, as the annex does not define auxiliary services for those other modes of transportation.

While the definition of multimodal transport requires an international maritime leg, the definition of Annex on Domestic Regulation144 does not say where the operator must come from. That raises the possibility that a local private multimodal transport operator could object if a state operator had preferential access or terms, for example in rail. The prohibition on restrictions would also apply to a multimodal operator from a non-TiSA country.

Multimodal operators would also have a right to prompt conveyance of their cargo, including priority over cargo that arrived later in port, irrespective of the rationale for sequencing that work or the time-sensitivity of products. If market prices determine access to the infrastructure the big players can dominate, and smaller players could be priced out of the market.

Again, this would be a strict obligation with no possibility to schedule limitations. However, a new proposal would allow a party to expressly reserve in its schedule the right to breach those obligations under undefined ‘extraordinary circumstances’.145 It is unclear whether specific types of measures that a country might adopt need to be listed in the schedule.

A more extreme proposal would have guaranteed unrestricted market access and national treatment to all elements of a multimodal transport operation for multimodal operators who have a commercial presence in a TiSA country.146 That has been dropped. But even without it, the latest version of the international maritime transport annex would capture the entire transport network and restrict the right of governments to regulate in ways that recognise the limits of their fixed infrastructure, such as railway networks, or the operational needs and limitations facing the port or workforce.

The provision has not yet been agreed. Significantly, the road transport annex has a different but overlapping proposal for multimodal transport services.147 This suggests they may be intended as a backstop in case one annex is rejected. As of November 2016, both annexes face strong opposition.

4.11 TECHNICAL STANDARDS FOR MARITIME SERVICES

The commitments countries make in their schedules have a flow-on effect to other rules in the maritime annex, and other annexes. The most significant involves technical standards. The technical standards for maritime services, auxiliary services, multimodal services, ports, etc cover almost every operational rule relating to manning, safety, loadings, on-board conditions, inspections, discharges, security, and much more. The International Convention on Tonnage Measurement of Ships provides the basis for important calculations, including manning levels and space requirements on vessels. The OECD maritime transport principles refer to rules and standards on safety of ships, persons on board, and prevention of pollution of the marine environment.153 The industry is vigilant to identify and challenge any requirements that undermine its competitive edge. Recently, the International Chamber of Shipping expressed concern about standards relating to climate change, as well as customs procedures.

Restrictions on technical standards come up in different parts of TiSA. The parties cannot agree on the extent to which governments’ right to regulate should be curtailed through the proposed Annex on Domestic Regulation. Some countries150 had wanted the maritime transport annex to impose an additional requirement that technical standards must be based on ‘objective and transparent’ criteria, such as competence and ability to supply the service.153 That could have excluded equally relevant criteria, such as environment and the ecosystem, human rights, and the views of communities affected by the standard. However, that proposal also required international standards adopted by the International Maritime Organization (IMO) and the International Labour Organization (ILO) to be ‘taken account’ of when determining whether a technical standard complied with the provision. Where measures ‘deviated’ from those international standards, the alternative standards had to be based on non-discriminatory, objective and transparent criteria.

Recognition of the standards set by the IMO and ILO was, on the surface, reassuring. It was also consistent with the position of the EU industry lobby ECSA, which has described the IMO as the only institution that can achieve a global level playing field on regulatory matters of safety, security and environmental performance of international shipping.152 Indeed, it urged the EU to strengthen the role of IMO and feed into its work, rather than undermine its process or add extra requirements.

However, the provision raised three grounds of concern. First, the wording says these standards must be ‘taken account of’ by a country, rather than be ‘based on’ or ‘at a minimum’. Secondly, it recognises that a party can deviate, but it does not specify the direction in which it might deviate. A party could adopt standards that exceed the IMO and ILO baselines, in which case the industry might object to it as unnecessary or unreasonable. Equally, a TiSA party could deviate downwards, while still meeting the criteria, which could provide a competitive advantage to those countries. This lack of open-ended wording must have been deliberate. By contrast, the preamble to the OECD maritime transport principles says they ‘should be applied amongst the participants and without prejudice to any higher standards or commitments for the benefit of freer seaborne trade and enhancing marine safety and the marine environment’.153

Thirdly, bringing the IMO and ILO standards into a ‘trade’ agreement that gives primacy to commercial interests could make these standards enforceable through a trade dispute mechanism. That is problematic, as the arbitrators in those disputes are trade experts and there appears to be no appeal mechanism in TiSA. Giving trade experts the power to interpret their instruments in the context of trade agreements would undermine the standing and function of the IMO and ILO as the rule-making bodies in their specialist areas. It also sidelines unions, who are present in the IMO and ILO but invisible in TiSA, from the process of setting, monitoring, interpreting and applying those technical standards.

142 OECD Maritime Transport Principles, Principle 11
143 International Chamber of Shipping, 2016 Annual Review, p.103
144 TiSA, Article 1(d), Annex on International Maritime Transport Services, dated 14 November 2016
145 OECD Maritime Transport Principles, Principle 11
146 TiSA, Article 7(a), Annex on International Maritime Transport Services, dated 14 November 2016
147 TiSA, Article 12, Annex on International Maritime Transport Services. The inclusion here may reflect a desire for different standards from the Annex on Domestic Regulation. For example, the maritime transport proposal does not include a necessity test. Alternatively, it may be a backstop because some countries are insisting on technical standards in the Annex on Domestic Regulation.
148 TiSA, Article 6, Annex on Road Freight Transport and Related Logistics Services, dated 9 November 2016
149 TiSA, Article 7(a), Annex on International Maritime Transport Services, dated 14 November 2016
150 Australia, Colombia, Japan, New Zealand, Norway, Panama, South Korea, Turkey
151 TiSA, Article 12, Annex on International Maritime Transport Services. The inclusion here may reflect a desire for different standards from the Annex on Domestic Regulation.
152 ECSA, ‘Setting sail for 2017’, p.7
153 OECD Maritime Transport Principles, Principles 11-16
The potential for a breach of the trade rules to attract economic sanctions risks creating a chilling effect on regulators and administrators in the maritime transportation sector. However, the domestic regulation proposal was dropped from the leaked November 2016 text of the maritime services annex. This means the rules in the core text and the Annex on Domestic Regulation would apply.

The domestic regulation annex was discussed in Part 3 and Appendix B. In relation to qualification and licensing requirements and procedures and technical standards a number of countries, led by New Zealand, want to impose a ‘necessity’ test that favours the least restrictive option available to achieve the government’s policy goals. Neither the US nor the EU supports that position, and the US has resisted constraints on the right to set technical standards in the past. However, they have agreed to wording in the domestic regulation annex which is similar to that proposed for the maritime annex: to ensure that measures are based on ‘objective and transparent’ criteria.

The domestic regulation annex also opens the administration of qualification requirements and procedures, licensing requirements and procedures, and technical standards to challenge for not being ‘reasonable, objective and impartial’. The administration of regulations across the maritime transport sector would apply to applications for licences, standards to challenge for not being ‘reasonable, objective and impartial’. The administration of regulations across the maritime transport sector would apply to applications for licences, requirements and procedures, licensing requirements and procedures, and technical standards to challenge for not being ‘reasonable, objective and impartial’. The administration of regulations across the maritime transport sector would apply to applications for licences, requirements and procedures, licensing requirements and procedures, and technical standards to challenge for not being ‘reasonable, objective and impartial’.

4.12 OTHER RULES AFFECTING MARITIME SERVICES

Most favoured nation (MFN) treatment would mean ships or firms from a TiSA country could not be treated worse than those of any other country when they are carrying out similar activities. That could make it impossible to impose more rigorous requirements or oversight on vessels or firms from TiSA countries with poor track records of compliance with international labour or maritime standards, or domestic law. Whether there will be an exception for differential treatment under countries’ FTAs has yet to be decided.

State-owned companies: The annex on SOEs proposed by the US would target port, shipping and inland transport operations that are majority-owned by central government. They would have to operate on a purely commercial basis in buying and selling their services, unless a service was covered by an explicit public mandate (proposed by the US) or fulfilling a legitimate public services obligations (proposed by the EU). However, the mandate is limited to services operated inside the country (which would exclude any international maritime services) and firms from TiSA parties must be given the same benefits as locals under the public service mandate. It is unclear whether the annex would cover fully privatised entities in which the government holds a golden share that gives it a deciding vote on strategic decisions.

Performance requirements on foreign investors: A foreign firm in the maritime sector that operates through a local investment could not be required to use some local services or to appoint locals as senior managers or a majority (or possibly any) of the directors on its board.

Cross-border operators, such as international maritime transport suppliers, could not be required to have a local presence in the country to which they are delivering the service.

Eliminating cargo-sharing arrangements: These are arrangements between two or more trading partners to share the goods traffic between them in an agreed proportion, and for those goods to be carried in vessels that are controlled or owned by their nationals. This can be efficient and help secure the survival of national shipping companies. Countries and companies which are excluded from those arrangements argue they are anti-competitive and lock out more efficient operators. Ending them would allow an even greater concentration in the hands of the mega-maritime operators. This has been a standard EU demand in its FTAs, presumably because big operators, such as Maersk, want to gain access to business covered by such agreements.

In free trade terms, cargo-sharing arrangements are considered discriminatory and breach both the national treatment and MFN rules. A number of countries want to prohibit a TiSA party from entering an arrangement that contains a cargo-sharing arrangement for international maritime transport services, and to terminate any existing arrangement once TiSA comes into force. Under an alternative proposal, cargo-sharing arrangements between TiSA parties would terminate automatically, while parties who have arrangements with non-TiSA parties would endeavour to terminate them as soon as practicable, commit not to renew them, and list them as limitations on their maritime transport commitments in their schedules. This provision would not apply to commercial arrangements between shippers.

Repositioning containers. Countries must allow an international transport operator to relocate the empty containers it owns or leases between domestic ports, provided they are not being carried as cargo for payment. Any limitations on this obligation would have to be listed in the country’s schedule (negative list). This could be seen as another step towards open cabotage, although repositioning is already permitted in many TiSA countries.

Flagged vessels. Panama wants any ship flying the flag of a TiSA country that is carrying out international maritime transport to have unrestricted access to that country’s international maritime transport markets on a commercial and non-discriminatory basis. A country could not limit this obligation in its schedule. A TiSA country would also have to recognise the nationality of a vessel on the basis of the certificate of registry that the competent authority of the other TiSA country has issued according to its laws. A number of countries, including the US, oppose this provision.

Port fees and charges. The annex requires port charges and expenses, and inspections related to tonnage, to follow the basis stated in the International Convention on Tonnage 156 TiSA, Article X.3, Localisation Provisions, dated November 2016
157 TiSA, Article X.1, Localisation Provisions, dated November 2016
158 TiSA, Article 4, Annex on Maritime Transport Services, dated 14 November 2016
159 TiSA, Article 5, Annex on Maritime Transport Services, dated 14 November 2016
160 TiSA, Article 5, Annex on Maritime Transport Services, dated 14 November 2016
The trouble with TiSA

4.13 IMPACTS ON MARITIME TRANSPORT WORKERS AND UNIONS

TiSA would impact on the local workers and unions in the maritime sector in several ways.

LABOUR MOBILITY

A proposed Annex on Movement of Natural Persons (known as Mode 4) covers temporary access for specific categories of foreign employees to deliver services in a TiSA country (Part 7 examines this in more detail). A number of countries, including the EU, want every TiSA country to make commitments to allow entry for intra-corporate transferees and contractual service suppliers.166

- **Intra-corporate transferees** would have rights of entry without an economic needs test for at least a year or the term of their contract where that is shorter. The EU says this should be automatic where a TiSA country has made a commitment to allow establishment of a commercial presence in the country (Mode 3).167 Some shipping and maritime transport firms may use this to move non-managerial staff around the world, such as higher ranks of ships’ crew, port workers with specialist training in a fleet’s vessels, or computer technicians trained in a shipping company’s technology and data analysis.

- **Contractual service suppliers** are employees of a firm from one TiSA country that has a contract to supply a maritime related service in another TiSA country, where those workers need to be present to deliver the contract. They could stay for up to three months cumulatively within a year or for the duration of the contract if shorter. That could apply to foreign transport workers employed by a foreign multimodal operator who has delivery contracts inside the country or stevedores employed by a foreign company, where the employer says these workers have special skills that are needed to perform the contract. The current proposals say TiSA countries should endeavour to make commitments on this category. The EU wants this commitment to be subject to an economic needs test showing there are no locals available to do the work.

The obligations in the annex would lapse temporarily if the worker’s presence might adversely affect settlement of a collective labour dispute at the place of employment or the employment of a worker involved in the dispute.168 This relies on the government to invoke that option.

In addition to the obvious impacts on labour conditions and unionisation, the annex could see workers brought from other TiSA countries or third countries who have minimal health and safety training, and may hold common qualifications but of a lower standard. Using poorly trained workers for specialist work, such as lashing, raises health and safety issues for workers and for cargo, and could threaten both public safety and security.

OTHER LABOUR IMPACTS

Rights of non-discriminatory access to ports and services at the port could increase pressure to allow self-handling by foreign seafarers on vessels covered by TiSA. The November 2016 text has dropped the proposed right to ‘use’ those facilities and services, which would have created a stronger platform for foreign firms to demand competitive contracts, cheaper labour and more automation.

Rights for multimodal operators to access all modes of transportation would fuel demands for greater integration of the workforce across the relevant domestic transport services. Operators may demand the right to use a single set of workers who lack specialist skills, are the least unionised, and have the worst pay and conditions. This development would also undermine occupational demarcations and coverage of specific collective agreements, and undercut occupations that have high levels of unionisation.

PROPOSALS DROPPED BETWEEN JUNE AND NOVEMBER 2016

The leaked November 2016 text shows several proposals of particular significance to maritime workers and unions were dropped from the previous leaked version dated June 2016.

- **Coverage of feeder services** and **maritime offshore services**.169 There were a number of proposals to give commercially established foreign firms and international maritime transport suppliers the right to provide feeder services, and maritime offshore services (for windfarms, oil rigs etc).170 Application of national treatment would have enabled foreign crew to operate those domestic services.

- **Turkey wanted each TiSA Party to recognise valid ID documents of seafarers and crew** that were issued and endorsed by the competent authority of another TiSA Party.171 Subject to its immigration laws, the country would have to admit crew with valid ID documents for temporary shore leave, provided passport control or immigration authorities were given a list of crew. Crew would also have to be admitted where they were to join the vessel in a TiSA country if they had a declaration from the shipping company or its agent to that effect, and be allowed to leave freely if their engagement was terminated at that place. Foreign crew could not be treated in a discriminatory way during their stay. If a seafarer needed medical observation or treatment for illness during the vessel’s stay, they would be allowed to remain for a period unspecified in the text until fit to travel, and be given medical aid in accordance with national law. Turkey’s proposal appears to reflect the objectives of the ILO Convention 188 on Seafarers’
Part 5.
Air Transportation

5.1 A Snapshot

Air transportation has been in turmoil since the 1970s, when the US began deregulating the aviation industry. Today, ownership of airlines, aviation companies and ground activities is increasingly concentrated and centralised. Privatisation, outsourcing, and cut-throat competition between legacy and budget airlines and air transport services on the ground have seen thousands of high quality jobs disappear. Security concerns and economic crises have added to the instability, with aviation workers used as shock absorbers to manage the business cycle and external crises. In an intensively competitive environment where low-cost airlines increasingly outsource aircrew and groundwork, premium national carriers are following suit. All this directly undermines the jobs and working conditions of those employed in the industry.

The opening of markets saw foreign airlines displace local, especially state-owned, airlines which collapsed under the competition or were taken over under liberalised foreign investment rules. Many developing countries were left with expensive and inefficient services as their state airlines struggled, and foreign suppliers showed little interest. The same forces generated contractualisation of the industry among the workforce and services in the air and on the ground. Most airports are now partly or wholly privatised, commercialised, or operated through private management contracts. Foreign airlines have begun taking strategic investments in other countries’ aviation industries and facilities. Even air traffic control has been privatised.

The purpose of regulation has also changed. The Chicago Convention 1944 recognised the state’s sovereign right to rule the skies above its territory. Airlines and airports were viewed as part of the national infrastructure and served a range of economic, social and security functions. That has been eroded by the neoliberal agenda of liberalisation, deregulation and privatisation, creating a tension between regulatory frameworks that recognise sovereignty over airspace and protection of national interests, and a globalised industry where an oligopoly of powerful players seeks to remake the rules.

As with other transportation services, the major operators who dominate the industry complain that national regulatory regimes still impose barriers and inefficiencies, and call for a ‘level playing field’ of open skies, and more liberalisation, deregulation and privatisation. To date, trade in services agreements have done little to advance that agenda. The GATS in the WTO only applies to three air transportation services: aircraft repair and maintenance, selling and marketing of air transportation services, and computer reservation systems services. As a result, governments have made very few commitments to core rules that prohibit restrictions on access to markets and local preferences or limits on foreign firms in the air transport sector. More commitments would in turn trigger restrictions on the way governments can set and administer licensing and qualification regimes and technical standards.

The short annex on air transportation services in TISA aims to expand coverage to six sub-sectors. The leaked text from November 2016 shows significant support for adding ground handling and airport operation services; there is less enthusiasm for specialty air services. Other annexes would play support roles. Air transportation is pivotal to delivery services, with operators like Amazon now owning their own fleets and airports; the Annex on Delivery Services will facilitate their cross-border expansion and consolidation. The Annex
on Domestic Regulation aims to make licensing, qualifications and technical standards more pro-business. The Annex on State-owned Enterprises (SOEs) would subject airlines, airports and related businesses owned by central governments to commercial imperatives and non-discrimination rules. The Annex on Movement of Natural Persons could guarantee temporary rights of entry from one TiSA country into another for managers of airport operations or, most significantly for the IFT, employees of firms with contracts to deliver ground services.

TiSA obligations would not extend to air travel itself or air traffic rights, although the SOE annex would still apply. However, expanded coverage of ‘trade’ rules to more of the sector would intensify competition, offshoring and deregulation and have systemic impacts across the industry. It would further undermine the primacy of bilateral and regional air transportation agreements, and further skew the balance of safety, security, environment and economic factors recognised by the International Civil Aviation Organization (ICAO) in favour of commercial priorities and interests.

Far from creating the much-vaunted ‘level playing field’, TiSA has the potential to further consolidate the power of those airline service and logistics operators who already dominate the industry. Requirements to liberalise a broad swathe of ground services and remove barriers to cross-border supply of those services would promote further offshoring, competitive contracting, and cost-cutting. For aviation transport workers, that means more downward pressures on wages and conditions, training, safety and unionisation.

TiSA also raises broader public policy concerns in an industry where skills, safety and security are inextricably intertwined. There is a serious risk to the ability of governments to set and enforce technical standards, qualification and licensing requirements beyond the bare minimum, and that the threshold will constantly be pushed down. The general exceptions would not provide an adequate or reliable basis on which to adopt significantly stricter standards, especially on a precautionary basis. Likewise, the national security exception requires an emergency in international relations. That means precautionary steps to improve security, and which are not in response to an immediate emergency, could be subject to challenge.

5.2 OBJECTIVES IN A NUTSHELL

Air transportation liberalisation in TiSA would have several significant impacts:

- To extend the coverage of the obligations from three commercial activities in the GATS to the six that were agreed in the Trans-Pacific Partnership Agreement (TPPA): aircraft repair and maintenance, selling and marketing of air transportation services, computer reservation systems services, airport operation services, ground-handling services and speciality air services;
- To apply pro-business technical standards and licensing rules to those activities;
- To make state-owned airlines operate on a purely commercial basis in an international market dominated by a powerful group of legacy and budget airlines; and
- To further undermine the status of the ICAO as the principal body for setting rules and standards on civil aviation.

5.3 INDUSTRY LOBBYISTS

The most visible corporate lobbying on air transportation in TiSA has been the Global Express Association, representing the Big Four express delivery companies: DHL, FedEx, TNT, and UPS. They want open air cargo markets to cover the entire range of traffic rights, and for countries to lock open their markets so they can ‘optimise their fleets by picking up cargo where there is demand for the service and transporting it to where the client requests it, with their own fleet, through the most efficient routing.’ They also want the right for an express delivery operator to own or operate facilities (warehouses, for example, or airport terminals, or indeed airports), run its own local ground transport networks, run cross-border trucking services, etc.

5.4 ACTIVIST STATES

A small group of countries that took the lead on aviation services during the GATS negotiations have continued under TiSA. Chile chairs the sector group, with other ‘hardliners’ being New Zealand, Switzerland, Norway and Iceland. The EU is aggressive on a number of points. The US has supported the position adopted in the TPPA to expand coverage to six air transportation services.

5.5 THE CONTEXT: THE GATS AND THE TPPA

THE GATS

Pan Am was among the powerful US companies that proposed international rules on trade in services in the mid-1970s and ultimately led to negotiations for the GATS as part of the Uruguay round. A number of countries tried to use the GATS to liberalise and deregulate civil aviation and bypass ICAO. Proposals to make bilateral air agreements subject to the GATS almost collapsed the entire services negotiations. The US refused to agree that liberalisation in bilateral and plurilateral arrangements should be multilateralised to all the WTO countries. As a compromise, the Annex on Air Transport Services protected existing bilateral air agreements from GATS rules. In addition, ‘traffic rights, however granted; or services directly related to the exercise of air traffic rights’ were excluded. The GATS explicitly applied to only three aviation-specific activities:

- Aircraft repair and maintenance services during which an aircraft is withdrawn from service, excluding line maintenance;
- Selling and marketing of air transport services; and
- Computer reservation system services.

Other aviation-related services are not completely outside the GATS. As the EU has noted they may be covered by a commitment to a separate service, such as leasing of aircraft without operators (business services), catering (hotels and restaurant services) etc.

173 Under the Most Favored Nation (MFN) rule
174 Under the Most Favored Nation (MFN) rule
175 WTO Council for Trade in Services, ‘Communication from the European Communities and Their Member States, GATS 2000: Transport Services’, GC(M/TP)2/2000, 2 December 2000, p.3
176 UN CPC 6423
177 UN CPC 83104
and crew training (adult education services)\textsuperscript{193}. Other relevant services that may have been committed include: technical testing, data processing, engineering services, cleaning, retail distribution, facilities management and refuse disposal.

The GATS annex requires a review of air transport services, including the scope of coverage, at least every five years. The first review formed part of the GATS 2000 negotiations. The WTO secretariat prepared seven background notes on developments in the air transport sector since the Uruguay round.\textsuperscript{194} Some countries pushed hard to extend the coverage of civil aviation. New Zealand argued that more liberalised services under the GATS could sit alongside the bilateral aviation agreements.\textsuperscript{195} The EU suggested a raft of additional services could be covered, while ‘ensuring that appropriate levels of safety, security and employment conditions are maintained and dealt with in the appropriate bodies’.\textsuperscript{196} Colombia defended the role of ICAO in relation to traffic rights, but was prepared to consider liberalisation of ancillary services.\textsuperscript{200} Costa Rica wanted better access to conduct repair and maintenance.\textsuperscript{201}

The second built-in review began in 2005 as the self-proclaimed Friends of Services resorted to plurilateral discussions. New Zealand, Australia, Chile, the EU, Norway and Switzerland argued that the provision excluding ‘services directly related to exercise of traffic rights’ should be read narrowly and that ground handling should be covered. They also sought clarity on what characteristics should define ‘hard rights’ related to traffic rights compared to ‘soft’ rights, which could include catering, baggage handling, check-in and counter, cleaning, ramp handling, warehousing and fuel services.\textsuperscript{201} Each of them attached its own model schedule. Canada, Japan and the US strongly rejected the inclusion of ground handling, which they said was covered by the ICAO template and many bilateral air agreements, and was a necessary adjunct to traffic rights. Changing that status would require a formal amendment to the GATS.\textsuperscript{202} However, they now appear willing to accept that in TiSA.

\textbf{The TPPA}

The TPPA provides further important context, as the eight countries also in TiSA have already agreed to expand coverage to six air transportation services.\textsuperscript{203} The coverage of aviation transport in TPPA differs from the GATS. There is no exclusion for ‘traffic rights’. Instead the chapter on cross-border services\textsuperscript{204} does not apply to ‘air services, including domestic and international air transport services’ or related services that support them, aside from six named services. In addition to the original three sectors from GATS, the TPPA included:

- speciality air services;
- airport operation services; and
- ground handling services.

5.6 THE TISA ANNEX

The Air Transportation Annex in TISA is short and specific. It does not directly impose new ‘trade’ rules for the air transport industry and related services, but instead it extends the categories of air transport services that are covered by TISA rules and that countries can make commitments on in their schedules. These would be in addition to commitments under other services categories, such as photography or services incidental to agriculture, retail distribution, engineering services and advertising that can also apply to aviation transport or airports.

\textbf{EXPANDING THE SCOPE OF THE GATS}

The November 2016 text shows the parties have only agreed on the definition of five of the services to be covered by the annex and not on any of its substantive provisions. There is little difference from the June 2016 leaked text aside from countries’ positions. The US and EU are both opposed to several important proposals that would decide the extent of new coverage.

There are two major points of dispute. The first is whether the list of sub-sectors covered by TISA should be ‘open’ or ‘closed’. The hard-liners\textsuperscript{205} want ‘open’ wording: the annex should cover ‘measures affecting trade in air transport services’, and lists six such services.\textsuperscript{206} Traffic rights and services directly related to traffic rights would be excluded, except as they came within those six. However, there is no stopping parties from making commitments beyond the specified services, including in sectors that do not explicitly refer

Each country could restrict the application of the core rules to each of those services,\textsuperscript{207} but that applied on a negative list basis to both the market access and national treatment rules. Each government had to list the existing measures or activities it wanted to retain or seek agreement to preserve its unfettered policy space for the future. These lists were negotiated among the parties.

In cases of inconsistency between the services chapter in the TPPA and an air services agreement between several TPPA parties, the latter would prevail.\textsuperscript{208} Parties would also have to exhaust the dispute settlement measures under the air agreement before bringing a dispute under the TPPA. However, any better treatment a TPPA party gave to any other countries in a bilateral or multilateral aviation agreement would have to be shared with the TPPA parties, unless it had taken a specific reservation to the (MEN) obligation. Most scheduled exceptions to the MEN rule only applied to existing agreements.

The SOE chapter of the TPPA also impacted on air transportation; national airlines clearly exceeded the threshold for coverage. The list of protected SOEs was heavily negotiated. Vietnam, for example, was allowed to exclude the Airports Corporation of Vietnam, Vietnam Airlines Corporation, Viet Nam National Shipping Lines and their subsidiaries and successors, but only from some rules for narrowly defined measures and services.\textsuperscript{209}
The trouble with TiSA

TiSA’s rules. Six were initially proposed; three are from the GATS, with the same definitions: included in the closed list. approaches.195 In the November text, it said its position would depend on what services were included in the closed list.

The second disagreement was over which services should be specified as subject to TiSA’s rules. Six were initially proposed; three are from the GATS, with the same definitions:

- aircraft repair and maintenance services, when undertaken on an aircraft or a part thereof while it is withdrawn from service; it does not include so-called line maintenance;
- selling and marketing of air transport services, being opportunities for the air carrier to sell and market freely its air transport services, including all aspects of marketing such as market research, advertising and distribution (which are also covered by other classification and/or the definition of supply of a service); and
- computer reservation system services, provided by computerised systems that contain information about air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

Three more are proposed, using the same definitions as in the TPPA:

- ground handling: the supply at an airport, on a fee or contract basis, of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering, except the preparation of the food; air cargo and mail handling; fuelling of an aircraft; aircraft servicing and cleaning; surface transport; and flight operations, crew administration and flight planning.

- airport operation: supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis.

- specialty air services: any specialised commercial operation using an aircraft whose primary purpose is not the transportation of goods or passengers, such as aircr AFL Europe, 2018

- airport operation: supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis. Ground handling services do not include; self-handling; security; line maintenance; aircraft repair and maintenance; or management or operation of essential centralised airport infrastructure, such as de-icing facilities, fuel distribution systems, baggage handling systems and fixed intra-airport transport systems.

- airport operation: supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis. Ground handling services do not include; self-handling; security; line maintenance; aircraft repair and maintenance; or management or operation of essential centralised airport infrastructure, such as de-icing facilities, fuel distribution systems, baggage handling systems and fixed intra-airport transport systems.

- availability, fares and fare rules, through which reservations can be made or tickets may be issued.

The market access rule would prohibit laws, policies, regulations or other government measures that restrict the size and growth of the commercial market in the listed aviation services and any other services covered by related classifications. A market access commitment could prohibit, for the whole or specific regions of a country:

- a monopoly on air traffic control or ground handling services;
- limits on the quantity of passengers, flights and/or cargo that can be marketed and sold for transportation to a sensitive region;
- a labour market test as a pre-condition for accepting foreign aviation engineers;
- requiring proof of an unmet economic need for a new domestic airport;
- a ban on offshore aircraft repair and maintenance;
- a cap on total foreign shareholding in an airport company;
- a restriction on the number of accredited providers of training for pilots;
- a limit on the number of adventure-tourism helicopter operators or a ban on high-risk activities;
- requiring a foreign ground handling company to establish a subsidiary rather than an agency or representative office;
- requiring foreign investment in a privatised airport to be through a joint venture.
The trouble with TiSA

The air transport sector to decide the most appropriate response, in addition to their schedules.

Committing the listed aviation services and other relevant services in a country’s schedule would trigger other rules. The Domestic Regulation Annex constrains qualification requirements and procedures, licensing requirements and procedures, and technical standards. In the aviation industry, skills, training and the quality of standards can be a matter of life and death. Technical standards for aviation-related services are especially critical for worker health and safety, service quality, and aviation safety. Standards include safety rules, security vetting of workers engaged in aircraft repair and maintenance, inspection requirements, and airport operating hours. Cost pressures and competition are already lowering quality conditions and encouraging poorer technology and short cuts.

The November 2016 version of the annex requires the criteria on which these regulations are based to be ‘objective and transparent’. A footnote says the criteria may include competence and ability to supply a service. There seems to be strong support for including the potential health or environmental impacts of an authorisation decision, but New Zealand and Switzerland are opposed.

Supply of services from across the border means the firm is operating under its home conditions, including labour laws, licensing and standards. It will be difficult for a regulator to assess the quality or equivalence of offshore regulations, especially if there are language issues and claims of commercial confidentiality.

New Zealand and Hong Kong want to go further and require a light-handed approach that is ‘not more trade restrictive than are required to achieve the policy objectives of the measure’. That means the government’s choice of measure can be challenged as more restrictive than other options that were available. The US and EU, among others, vigorously oppose that ‘necessity’ test.

The core text opens the administration of all general regulations to challenge on the grounds that they are not being administered in a ‘reasonable, objective and impartial way’. All these terms are elastic and uncertain, which creates potential opportunities for challenge. The Annex on Domestic Regulation would add specific requirements of independence and impartiality for administration of qualification and licensing requirements and procedures, and possibly technical standards. Examples of ‘administration’ include applications for licences, recognition of qualifications, inspections and monitoring of compliance, enforcement mechanisms and penalties. TiSA would provide enormous scope to challenge, for example:

- actions or decisions that involve discretion or subjective judgements as not being ‘objective’, for example when assessing the equivalence of training or accreditation in another country, or an airline maintenance company’s record and reputation for safety;
- considerations such as treating local community opposition as decisive when deciding the terms for an operating licence for an airport could be challenged as partial, subjective and unreasonable;

If the parties agree to apply the concept of ‘technological neutrality’, any commitment made now would apply for any new technology used to deliver that service in the future, eg robots for maintenance or drones for speciality air services. A commitment on cross-border services would mean that any new technology could be used to supply the service from outside the country.

Rapid change in aviation markets and technology, as well as new security and safety risks, makes it crucial that governments have the room to make new regulations to address them. A number of rules and annexes in TiSA would restrict the ability of regulators in the air transport sector to decide the most appropriate response, in addition to their schedules.

**FETTERS ON REGULATORS**

Under the national treatment (non-discrimination) rule, foreign suppliers of the listed services or other relevant services from other TiSA countries must be treated at least as well as their local counterparts. Measures that would breach that rule include:

- a foreign investment regime, which by definition imposes criteria and vetting procedures that do not apply to locals, eg to own or lease land for a hangar or private airstrip or buy shares in a company that owns the country’s main airport;
- limiting a foreign shareholder from a TiSA country to a minority holding in an airport management company, where no similar restrictions apply to nationals;
- requiring a company from another TiSA country that has the contract to run the gateway airport to have a majority of directors who are nationals;
- a golden share that reserves the government’s right to veto strategic decisions relating to airports and their operation;
- restricting subsidies for aviation training to local public or private providers; and
- preferential access to expedited air cargo services for local cargo of perishable products, for example where dominant foreign firms bid up the price of services to the point where locals cannot compete without special treatment.

**SCHEDULES**

The air transport annex would not require countries to make commitments in the listed aviation activities or adopt a standstill on national treatment, but there would be strong pressures to do so. TiSA’s standard scheduling approach would allow a country to choose which aviation sub-sectors were subject to the market access rule. The presumption of a national treatment commitment would then apply, meaning foreign firms must receive no less favourable treatment than their local equivalents. There are three options:

1. if the country does not list a sub-sector in its schedule, it cannot even maintain its existing measures;
2. it could seek a total carve-out for a service or measure to protect future rights to regulate, provided no other country refuses to allow it;
3. it could offer a standstill on national treatment that would freeze the current level of differential treatment for that sub-sector, meaning it could not introduce new restrictions on foreign services and suppliers or improve benefits to locals, and any new liberalisation would automatically be locked in. Again, other TiSA parties would have to approve.

Requests for a full policy space reservation for air transport services may well be opposed. The final outcome would be a matter of the trade-offs within the negotiations.

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205 TiSA, Article I-4, Core text, dated 14 July 2016
206 TiSA, Article IV-2, Annex on Domestic Regulation, dated 15 November 2016
207 TiSA, Article IV-2, Annex on Domestic Regulation, dated 15 November 2016
208 TiSA, Article 4(a), Annex on Domestic Regulation, dated 15 November 2016
209 TiSA, Article V-4, Annex on Domestic Regulation, dated 15 November 2016
• application of licensing or qualification requirements, such as high levels of language proficiency and knowledge of local cultural norms, rigorous dispute processes, and strong penalties could all be considered ‘unreasonable’, while obligations to meet additional continuing education requirements where there is concern about the integrity of the other country’s processors or providers might also be ‘subjective’. Disputes are expensive, resource-intensive and can cause reputational damage. Risk aversion and concerns not to divert resources may deter them from demanding detailed documentation and proof that applicants, whether aviation firms or individuals, truly meet the requirements.

Foreign investors in the scheduled services could not be required to meet certain conditions, including requirements to use a proportion of local services\(^{210}\) or have senior aversion and concerns not to divert resources may deter them from demanding detailed data localisation to data in emergencies. The contested proposal on 213 would prevent especially problematic where they are incorporated in countries with loose tax, employment subsidiary corporation) in the country to which they are delivering the service. That is (such as a maintenance contractors, could not be required to have a local presence where they are incorporated in countries with loose tax, employment or regulatory regimes.

Cross-border operators, such as computer reservation systems or engineering and maintenance contractors, could not be required to have a local presence (such as a subsidiary corporation) in the country to which they are delivering the service.\(^{212}\) That is especially problematic where they are incorporated in countries with loose tax, employment or regulatory regimes.

Computer reservation systems already raise issues about privacy, security, and access to data in emergencies. The contested proposal on data localisation\(^{213}\) would prevent governments from requiring that data is held inside the country or specifying a list of acceptable countries to host the server.

Commitments sought by New Zealand and Australia for private adult education and training would prevent restrictions on cross-border provision and differential treatment of foreign and local providers. There are concerns this could undermine effective quality controls and the ability to require appropriate local content and raise practical problems of language and communications.

The annex on Transparency would require other TiSA governments and their corporations to be informed of proposed new regulations, allow them to comment on them and have those views considered, increasing their leverage over regulators and those administering them. The cumulative effect could ‘chill’ policy makers and regulators so they take a conservative approach.

### 5.7 STATE-OWNED ENTERPRISES

The annex on State-owned enterprises proposed by the US targets commercial operations owned by central governments, which would include airlines, airports and air traffic control. A partly privatised business would qualify as an SOE where the government retains a majority share or appoints a majority of the board, and may also apply where a golden share allows the government a final say on strategic decisions. Such an SOE must operate on a purely commercial basis in buying and selling its services.\(^{214}\)

The US would allow an exception where the service is covered by an explicit public mandate for services supplied domestically. This fails to protect airline activities that cross the border and would be unworkable where at least part of the airline’s domestic and international activities are integrated. A public service mandate is defined as a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public.\(^{215}\) But the SOE would still be unable to treat local buyers of its services better than those from other TiSA countries. The EU has a counter-proposal to allow an exception for a ‘legitimate public service obligation’, which is not defined.\(^{216}\) The SOE would still be unable to discriminate between local buyers of its services and those from other TiSA countries.

It seems that neither option would allow a government to discount fares\(^{217}\) on the national airline for local communities in remote areas or to subsidise freight charges for local perishable products, because it would be discriminatory against customers from another TiSA country.

This annex would have serious development consequences, especially given the goal to insert TiSA back into the WTO. Forcing state airlines to operate according to purely commercial considerations ignores their strategic importance, especially, but not only, in the Global South countries. Local airlines in those countries already struggle to survive international competition. Requiring them to operate on a fully commercial basis would be unsustainable for most. People and traders would be dependent on private airlines who can quit the domestic market, or cherry-pick the lucrative routes or reject cargo or passengers to maximise their network efficiency. Regional communities and products could be left without viable or affordable transportation, even having to buy expensive cross-border travel just to move within their own country.

The problem is not confined to the Global South. When fully commercial or privatised airlines or airports fail, governments have often stepped back in. Doing so could breach TiSA commitments on standstill and rollback for national treatment and the non-discrimination rule on SOEs where subsidised services were reserved for locals. Countries might already be vulnerable to investor-state disputes under bilateral investment treaties for a breach of national treatment. The addition of TiSA could strengthen claims over violations of fair and equitable treatment, where the government broke its promise to behave in a certain way and that adversely impacted on the foreign investment.

The US justifies the SOE annex as ‘levelling the playing field’ between public and private enterprises. Ironically, the state-owned airlines of China and Arabic countries pose the most significant competitive threat to the legacy airlines, largely because they have few legacy labour costs and abundant investment capital. These state-owned airlines would not be subject to TiSA and would enjoy a competitive advantage as a consequence.

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\(^{210}\) TiSA, Article 3.1(a), Localisation Provisions, dated November 2016

\(^{211}\) TiSA, Article X, Annex on State-Owned Enterprises, September 2016 [with EU Comments October 2016]

\(^{212}\) TiSA, Article X.4, Annex on State-Owned Enterprises, dated November 2016

\(^{213}\) TiSA, Article X, Annex on State-Owned Enterprises, November 2016

\(^{214}\) TiSA, Article X.4, Annex on State-Owned Enterprises, November 2016

\(^{215}\) TiSA, Article X, Annex on State-Owned Enterprises, September 2016 [with EU Comments October 2016]

\(^{216}\) Assuming it has the funds to do so
5.8 INTERNATIONAL AIR AGREEMENTS

The Chicago Convention 1944 recognised the state’s sovereign right to rule the skies above its territory. This principle informed five ‘freedoms of the air’, setting out international traffic rights. 218 International aviation was principally organised through bilateral or plurilateral air transport agreements between states and standard setting through the inter-governmental ICAO. The original five freedoms of the air were expanded to eight. 219 Bilateral and regional air agreements remain the principal means of organising air transportation between states. They cover a range of activities, some of which would also be subject to TiSA’s rules. That raises two questions.

1. What happens if there is a conflict between an air agreement and TiSA? States are legally bound by both. Under the Vienna Convention on the Law of Treaties, a later agreement (TiSA) between parties on the same matter would apply to the extent of any inconsistency, unless stated otherwise. The GATS varied this, saying no GATS commitment or obligation would affect a WTO Member’s obligations under a bilateral or multilateral air services agreement that was in effect on 1 January 1995, but it was silent beyond that date. 220

The November 2016 leaked text shows the inter-relationship of these agreements has not been settled in TiSA. A number of countries 221 have proposed that any existing or future bilateral or plurilateral air agreement would prevail to the extent of a conflict (as in TPP). 222 Canada, Mexico and Peru have also proposed a requirement, found in the GATS and TPPA, that the parties must exhaust any dispute settlement procedures in bilateral and multilateral air services agreements before invoking TiSA’s dispute mechanism. Neither the US nor EU has stated a position.

Given there have been discussions on this matter, silence would be seen as deliberate and imply that the parties intended the Vienna Convention to apply. It is hard to see the US agreeing to that either.

2. Would the MFN rule require the parties to give any better treatment in the air agreement to other TiSA parties? That is problematic as bilateral and plurilateral air agreements reflect specific trade-offs between the countries involved. Extending the MFN rule to those agreements could severely impact on profitability, competition and security. The US has previously refused to apply the MFN obligation to those agreements.

5.9 ICAO

The Chicago Convention establishes ICAO as the specialist intergovernmental agency for setting global safety, security and environmental standards for civil aviation and balancing those considerations, even though it has no formal regulatory function. 223 As the network of bilateral and plurilateral agreements grew, ICAO developed model clauses to help harmonise approaches and improve coherence. Power asymmetries mean affluent countries dominate ICAO’s working groups and promote their pet projects. Developing countries have been unable to protect their interests. While unions are observers on ICAO’s working groups, they lack an effective voice. Unlike the maritime sector, the ILO has no standards for aviation and its relationship with ICAO is weak.

The ICAO has taken a wait and see approach to regulation of new developments, conceding de facto regulatory authority to the US and EU. The GATS, FTAs, mega-regional agreements such as TPPA, and now TiSA have been filling that vacuum. Under pressure from liberalising countries, the industry, and trade agreements, ICAO has proactively promoted liberalisation while still seeking to balance diverse considerations. The ICAO Council in November 1999 affirmed that the exclusion of traffic rights and services directly related to their exercise from the GATS was consistent with ‘the aviation community’s general goal of gradual, progressive, orderly and safeguarded change towards market access as well as the effective and sustained participation of all states in international air transport’. 225 It urged state parties to ensure their relevant domestic aviation authorities were involved in the GATS 2000 negotiations and that they carefully examined the implications for safety and security of international air transport. The council cautioned that negotiations should also take account of the obligations of ICAO parties who were not then WTO members. It asked the WTO to recognise ICAO’s constitutional responsibility and its policy on trade in services, and to involve it actively in any review of the GATS classification.

At the time, the ICAO secretariat was reported to be ‘developing a template air services agreement for liberalisation, including safety and security as well as market access elements and safeguards, for selective or comprehensive, optional use by states, either bilaterally or multilaterally’. 226 ICAO’s notion of ‘safeguarded liberalization of international air transport’ reflects its paramount objective ‘to ensure that safety is not compromised by economic considerations and consequently that safety and economic regulation are not treated in isolation’. 227 That was not the goal of the GATS and manifestly not of TiSA.

The US has an effective veto in ICAO and has blocked moves to promote a multilateral ‘open skies’ arrangement to replace the bilateral system, so as to protect its domestic industry. The leaked June 2015 TiSA annex on air transport services shows New Zealand, which chairs the ICAO working group on open skies, and Chile, which chairs the TiSA group, wanted TiSA to mandate its parties to work in ‘appropriate fora, such as the ICAO’ for an open skies agreement. 228 Switzerland preferred reference to a ‘liberal multilateral agreement’ in the ICAO. If adopted, this would deepen the power asymmetries in the ICAO. A collective push from powerful TiSA countries with a pre-determined position would be especially difficult for countries from the Global South to resist. Unions would likewise be confronted with a collective TiSA position. The much weaker proposal in November 2016 said the parties ‘should work, in appropriate fora, towards a liberal multilateral air services agreement’. 229 It was supported only by Switzerland, New Zealand and Pakistan, and opposed by a large number of TiSA participants.

Even without that explicit mandate, TiSA would expand the scope of enforceable ‘trade’ rules and commitments on air transportation based on narrow commercial objectives. The ICAO’s role as the recognised standard setter for the aviation industry, and its more balanced approach to regulating an essential industry, would be further eroded.
5.10 IMPACTS ON AIR TRANSPORT WORKERS AND UNIONS

The deregulation, liberalisation, privatisation, outsourcing and offshoring that TiSA promotes would shape the future air transportation market and behaviour of the industry for decades ahead. Workers in the industry are already battling many of these trends. Pressures to maximise profit and cut costs in an intensely competitive, but increasingly concentrated, industry have pushed down levels of crewing and skills, and eroded pay, conditions and unionisation in the air and on the ground. Intensively competitive sub-contracting of services like ground handling, maintenance, airport management, and catering threaten to undermine workplace and public safety standards, as well as pay and conditions. Budget airlines that establish themselves in low tax, low regulation jurisdictions can contract cheap crew from third countries, bypass collective agreements and undermine union’s negotiating power.

TiSA would amplify downward pressure on regulations and regulators in setting and administering the professional, licensing and technical standards on which lives depend. The aviation industry is high risk and complex. Policy making and regulation require industry expertise and a careful balancing of considerations, such as cost pressures, safety, training and employment. Accidents that affect workers and the travelling public often result from human factors. Price pressures are considered to have weakened health and safety procedures and maintenance standards, including by airlines that are traditionally more safety and employment conscious. Permanent skilled workforces are already being replaced by limited term contract workers in the air and on the ground, which erodes expertise, institutional knowledge, accountability and commitment to the job and the industry. Surveillance and electronic monitoring for both security and employment purposes undermine trust and add new stresses at a time when the workforce is under pressure to maintain old aircraft and operate very technologically advanced new ones.

The focus in TiSA on liberalising the cross-border supply of services heightens these risks. The offshoring of maintenance, repair and overhaul work makes monitoring of compliance extremely problematic, especially when crucial data is held in another country by private firms who claim commercial confidentiality. Regulators, staff and customers have to rely on another country’s regulators to monitor standards, investigate failures and enforce breaches of regulations. That model assumes the cooperation of the other state, including the allocation of their own public funds to serve another country’s interests. The offshoring of maintenance, repair and overhaul work makes monitoring of compliance extremely problematic, especially when crucial data is held in another country by private firms who claim commercial confidentiality. Regulators, staff and customers have to rely on another country’s regulators to monitor standards, investigate failures and enforce breaches of regulations. That model assumes the cooperation of the other state, including the allocation of their own public funds to serve another country’s interests.

Recent air accidents have shown the intrinsic difficulty of accessing and pooling data, even without these additional obstacles. Added to this is the potential right of entry for up to 90 days a year for contract service suppliers who are employed by a legal entity from another TiSA country to deliver a service. Those workers may come from a third country, even outside TiSA, under contractual terms that are exploitative and designed to drive down the conditions across the industry. The combination of this more exploitative Mode 4 and TiSA’s coverage of ground services and engineering and maintenance services means foreign temporary contract workers could be performing that work in place of locals. While TiSA’s coverage does not extend to airlines and air crew, designating those contract workers as a mode of ‘trade’ would have a broader normative effect across the industry.

PART 6. POST AND EXPRESS DELIVERY

6.1 A SNAPSHOT

The TiSA agenda for postal, courier and express delivery services belongs to the Big Four members of the Global Express Association, aka the Express Association of America: DHL, FedEx, TNT and UPS. Public postal systems restrict their expansion, while differences in national regulations impede the efficient use of their global networks. The GATS had little effect on either, so they are both targets in TiSA. The US and EU are driving negotiations on this sector, including a sectoral Annex on Delivery Services. The latest leaked text from November 2016 does not include country attributions, but comparisons with earlier texts show it is a middle ground between the US and EU positions. Other unnamed countries are trying to preserve more policy space.

There is a historical obstacle and a political obstacle to achieving the industry’s goals. The classification system used to define which services are covered in a country’s GATS schedule was drawn up in 1991. Most postal services were still public monopolies229 and they were the main mode of delivering letters and packages. Private delivery was marginal. Public postal services were not protected by the supposed ‘public services carve out’ in the GATS because that only applies to services that are non-commercial and have no competitor. So, public postal services were potentially subject to commitments in countries’ original GATS 1994 schedules.

However, countries could still limit their exposure because the classification list treats postal and courier services separately and their descriptions are mutually exclusive: postal services are ‘rendered by the national postal administration’, courier services are private. The positive list approach to scheduling meant most governments could choose not to make commitments on the public postal service. Those schedules have not been updated. As public postal monopolies were deregulated and privatised this distinction blurred, but the classification was not updated and GATS commitments on delivery services remained limited. The initial version of the TiSA annex set out to fix this with a new definition. The November 2016 text aims for a similar effect indirectly.

The second problem is political. Governments know that attacks on core public services have proved to be the Achilles heel of trade in services negotiations. As members of the Universal Postal Union (UPU) they also have an obligation to deliver a universal postal service. The US, EU and corporate lobby will have to convince them to open up their public postal services markets in their schedules; remove or severely restrict monopolies; apply the same rules to all delivery services, public and private, foreign and local; and create a ‘level playing field’ for foreign delivery companies by removing supports that help keep their state-owned post offices commercially viable.

They are trying to achieve this through a combination of the TiSA core text, countries’ schedules and the proposed Annex on Delivery Services230. The first leaked text of the annex, from April 2014, showed they were promoting an integrated commercial delivery sector that blended public and private through new definitions of a postal monopoly and commercial or express delivery, with a minimal universal service monopoly. The latest text

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229 Sometimes including telecommunications and banking as well.
from November 2016 confirms the goal; but they are no longer trying to redefine postal and courier services, rather applying the general rules to both. Despite this common mission, the US and EU approaches reflect their different regulatory regimes. The US is mainly concerned to quarantine express deliverers from any direct or indirect public service obligations. The EU approaches the sector from the perspective of competition policy, which it has adapted in the negotiation of its various FTAs and again in TiSA. It is more aggressive in seeking to restrict the scope of postal services and the universal postal service obligation than the US. Leaked requests reveal pressure on various Latin American countries to open up their public postal services to foreign operators, especially through direct investment. Other proposed annexes are also relevant to post and delivery services. Under the SOE annex, the public post office would have to operate as a private business when selling its services and not limit certain services to locals, even when they are subsidised by the taxpayer. The domestic regulation annex would affect the terms and administration of licensing and technical standards for delivery services. The express delivery lobby are multimodal operators with interests in all modes of transport, as well as port and ground services, warehousing, government procurement of delivery services, and insurance. These are all covered by the general rules and the international maritime, air and/or road freight transportation annexes. Significantly, those traditional multinationals are themselves struggling to keep up with newer players, such as Amazon, who are setting up their own logistics operations and multiple, sometimes competing, distribution networks. They will benefit from the annex on e-commerce, as well as other transport services, and rights of entry for foreign contract workers. The transparency annex would ensure that TiSA governments and all these corporations have access to the information they require to compete, and again in TiSA. It is more aggressive in seeking to restrict the scope of postal services and the universal postal service obligation than the US. Leaked requests reveal pressure on various Latin American countries to open up their public postal services to foreign operators, especially through direct investment.

6.2 OBJECTIVES IN A NUTSHELL

If the US, EU and Big Four succeed TiSA would:

- break down remaining postal monopolies;
- lock in existing and future postal liberalisation and deregulation;
- prevent cross-subsidisation from postal monopoly services to other delivery services;
- impose private-sector practices on state-owned post offices, which is a common first step to full deregulation and/or privatisation;
- minimise the universal postal service obligation (UPSO) and shield private firms from related costs and responsibilities;
- subject regulatory bodies to greater scrutiny, especially when they operate the public postal service;
- adopt binding and enforceable ‘trade’ rules, which would have the effect of eroding the role and leadership of the Universal Postal Union (UPU) as the specialist international agency for postal services; and
- create conditions for the rapid expansion of global e-commerce, which could ironically see the dominance of the Big Four eclipsed by digital platform operators like Amazon.

6.3 CORPORATE DEMANDS

The Global Express Association/Express Association of America made an expansive set of demands across the three mega-agreements (TPPA, TTIP and TiSA), which were listed in Part 2. The Association made three specific demands on express delivery for TiSA:

Fair Competition/Level Playing Field. The TiSA should seek to liberalize trade in package delivery services further by ensuring a level playing field for all competitive services offered outside those supplied in the exercise of governmental authority, particularly with respect to state-owned and state-supported enterprises (SOE/SSE). There is a need to secure more ambitious commitments and disciplines for domestic regulation and fair competition by allowing free market principles to govern the highly competitive express sector, or where necessary, independent regulation and a level playing field with competing services offered by Posts such as express mail services. Exclusions and non-conforming measures (NCMs) for postal services should be drawn as narrowly as possible, for example, by using a reasonable price/weight multiple.

Transparency, Regulatory Coherence, and Private Sector Consultation. To encourage greater transparency, coordination, consultation, and partnership between express delivery services and regulators, the TiSA should include the establishment by each party of a national coordinating body, process, or mechanism, to ensure a whole-of-government approach, regulatory coherence, and institutionalized private sector input. Parties should also include mechanisms to review the impact of current or proposed measures and provide appeal opportunities should a measure not achieve desired results.

Integrated Approach, Particularly for Customs Processes. The TiSA should focus on removing barriers to express delivery services, recognizing that EDS faces antiquated policy environments in some countries, including onerous regulations on cross-border transport, inefficient border clearance procedures and domestic regulations that distort fair competition. To respond adequately to the nature and scope of the services this industry provides, the TiSA must address the unique needs of express delivery service providers, including the need for an integrated approach for customs clearance, seamless regulation across multiple modes of transport, and commitments to immediate release, single-window, and electronic border clearance.

6.4 ACTIVIST STATES: THE US AND THE EU

THE US

The US likes to draw a sharp line between the postal monopoly and express delivery services by defining the manner in which the monopoly must operate and prohibiting cross-subsidisation. It also seeks to protect its big express deliverers from any obligations related to universal services. The US position in the leaked TiSA annex from 2014 is based on Annex 10-8 on Express Delivery Services in the TPPA. That explicitly records the expectation

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231 TiSA, Annex on Delivery Services, dated 9 November 2016

232 This language mirrors the restrictive ‘governmental authority’ exclusion in TiSA, which only applies where the service is non-commercial and there is no competing supplier, conditions which in the context render it inapplicable.
that market access commitments would guarantee, at a minimum, a standstill on current regulation.\textsuperscript{233} That position is no longer included in the November 2016 text.

**THE EU**

The EU's approach is historically more aggressive. In 2005, as part of the plurilateral services negotiations in the WTO, the EU proposed a reference paper on postal and courier services,\textsuperscript{234} which built on an earlier one from 2001.\textsuperscript{235} It complained that too few commitments were made in the postal/courier sector and that the current CPC classification no longer reflects market reality. The EU proposed a new classification and asked all WTO members, as a medium to long term goal, to adopt the maximum level of commitments for postal and courier services that was compatible with the USP09. In the short term, countries should make full commitments to open and not discriminate on express delivery services, handling of addressed parcels and packages, handling of addressed press products, handling of non-addressed items and document exchange. The EU was willing to settle for gradual market opening and national treatment for the handling of addressed written communications and handling of items as registered or insured mail.

The EU's position was developed further in its bilateral FTAs. The agreement signed with the Cariforum (Caribbean Forum) states in 2008 was the most extreme.\textsuperscript{236} The section on 'courier services' focused on preventing anti-competitive practices, but 'courier service' was not defined. Licences could only be required for delivering the universal service, and regulatory bodies had to be independent of suppliers (which meant not the public postal service). Countries could define their own universal service, but it could not be more burdensome than necessary for that level and kind of service, and had to be administered in a transparent, non-discriminatory and 'competitively neutral' way.

The more recent EU-Vietnam FTA has a less extensive section on postal services, presumably reflecting Vietnam's development status and pervasive SOEs (although Cariforum states were from the Global South too). It explicitly uses the 1991 classifications that distinguish between public postal and private courier services. The provisions cover anti-competitive practices, transparency of licence requirements, and an independent regulator.\textsuperscript{237} There is no reference to the universal service, in contrast to the telecommunications section where it appears in similar form to the wording in the Cariforum agreement. Postal services are also explicitly included in the most favoured nation (MFN) obligation, meaning agreements with third countries would have to be shared under this agreement.\textsuperscript{238}

The Canada-EU free trade agreement (CETA) has a short annex which confirms that courier services are subject to the investment and cross-border services chapters, but that the current CPC classification no longer reflects market reality. The EU proposed a new classification and asked all WTO members, as a medium to long term goal, to adopt the maximum level of commitments for postal and courier services that was compatible with the USP09. In the short term, countries should make full commitments to open and not discriminate on express delivery services, handling of addressed parcels and packages, handling of addressed press products, handling of non-addressed items and document exchange. The EU was willing to settle for gradual market opening and national treatment for the handling of addressed written communications and handling of items as registered or insured mail.

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The Canada-EU free trade agreement (CETA) has a short annex which confirms that courier services are subject to the investment and cross-border services chapters, but that those commitments exclude air traffic rights for courier service suppliers.\textsuperscript{239} Those rights are subject to the Canada EU bilateral air transport agreement. The CETA annex on temporary entry and stay of natural persons makes it clear that commitments to allow entry for contractual services suppliers covers postal and courier services;\textsuperscript{240} this means a foreign firm could use foreign contract labour to deliver postal or courier services in the other country.

The EU initially proposed the more extreme Cariforum position for TiSA, but that has been moderated in the November 2016 text.

**6.5 EU REQUESTS OF LATIN AMERICA**

The TiSA schedules are agreed through an iterative request and offer process. If TiSA is concluded, these schedules will supersede the GATS commitments between the TiSA parties. A country's initial and revised offers are secret unless the government chooses to release them. There is a risk that governments may agree to liberalise their postal services in response to such pressure without their publics or parliaments knowing.

The EU's requests to Chile, Costa Rica, Mexico, Panama and Peru in June 2016 have been leaked. The EU has asked each of them to make broad commitments on 'postal services', usually citing the old classification; that means the EU is seeking commitments in services rendered by the national postal administration. Sanya Reid Smith writes of the EU's request for Costa Rica to liberalise its postal services for foreign investors (establishing a commercial presence or mode 3) that:

> in addition to this meaning more competition for postal services in Costa Rica, if it is privatised and the privatisation turns out to be problematic, it cannot be renationalised back to a public monopoly, [...] While the EU in other sectors seems to only want commitments in mode 3 for non-public services, the EU has no qualms asking for liberalisation of the postal sector including for public services. It may have done this since Costa Rica already opened the postal sector to US companies in its USFTA, so the EU is just asking to be given the same market access as US companies already have. Costa Rica did not liberalise postal services at the WTO or in its EU or EFTA FTAs, so agreeing to the EU requests in this sector would involve further liberalisation including to companies from additional TiSA countries.\textsuperscript{241}

The second revised offers of the target countries, dated August 2016, have been leaked, showing their responses to the EU request. These vary: Chile made no changes; Peru added courier services in Mode 3, but not cross-border postal or courier services or any postal services, as the EU wanted. This is an ongoing process, posing problems for unions and others to know what their governments are offering and having the technical capacity to interpret the draft schedules when they can access them.

**6.6 WHAT’S NEW IN TISA FOR POSTAL SERVICES**

TiSA's core rules are designed to remove restrictions on markets, including postal monopolies, and remove measures that favour local suppliers, especially public postal operators. The scheduling mechanisms in TiSA aim to maximise those obligations. Constraints on licensing requirements and the technical standards that describe how a service must operate would apply to those commitments.

The TiSA core text is always the starting point for analysis. The standard market access rule from GATS would give the courier and express delivery industry unrestricted access to a country’s market without facing monopolies or limits on the size or scope of their operation.
The trouble with TiSA

The trouble with TiSA

between public and private services, except to the extent that postal monopolies are subject
delivery services’ suggests there is no distinction
distinguish between post and courier services, or that it applies to the component elements
must be ‘reasonable, objective and impartial’. This annex would give the express delivery
and the terms of the universal service obligation. The administration of these regulations
test applies to technical standards, which include specifications of size, weight etc for each
a license, although the US and EU oppose that so it is unlikely to be accepted. The same
discretionary; some countries also insist they must minimise the burden on those seeking
requirements and procedures to be based on ‘objective’ criteria, for example they are not
administration. These services can be provided by using either self-owned or public transport media
246 New Zealand wants them to apply irrespective of schedules, but that is strongly opposed

or geographical coverage. They could not be required to set up through subsidiaries or joint-
ventures rather than agencies, or establish a local presence in the country if they operate
from across the border. A full commitment to non-discrimination (national treatment) in
a lightly regulated market would allow the dominant global firms to control the so-called
‘level playing field’ in the absence of effective domestic competition.

The scheduling rules of TiSA presume that countries will remove or freeze existing
discrimination in delivery services once they make a market access commitment and lock
in any future liberalisation, unless they can secure a carve-out for current and future
discrimination. There is no realistic way for countries to reverse commitments once they
are made.

These scheduling rules show the importance of how a service is classified. As noted
earlier, the classifications countries used to schedule their GATS commitments on market
access and non-discrimination clearly distinguished postal242 from courier244 services. The
2014 leaked Annex on Commercial Delivery Services set out to update those classifications
distinguishing between a postal monopoly, and express delivery services (US preference)
or competitive delivery services (EU preference), which would include the non-monopoly
parts of public postal services.

The November 2016 leaked text changed the terms to postal monopoly and delivery
services.243 The nature of the exclusive monopoly right was not agreed, with some wanting
it confined to an operator within the party’s territory. Delivery services were defined as
collection, sorting, transport and delivery of documents, printed matter, parcels, goods and
other items where service suppliers are in competition. An ambiguous footnote says: ‘For
greater certainty, this Annex applies to services classified in CPC 751 (Postal and Courier Services)’.244 That could mean the annex applies to the high-level classification that does not
distinguish between post and courier services, or that it applies to the component elements
of that classification including its internal distinctions. Rocusing the annex ‘Delivery Services’ from the earlier ‘Competitive Delivery Services’ suggests there is no distinction
between public and private services, except to the extent that postal monopolies are subject
to specific rules.

Once a country has scheduled a market access commitment using these definitions, the
rules in the Annex on Domestic Regulation also apply.245 These require licensing
requirements and procedures to be based on ‘objective’ criteria, for example they are not
discretionary; some countries also insist they must minimise the burden on those seeking
a license, although the US and EU oppose that so it is unlikely to be accepted. The same
test applies to technical standards, which include specifications of size, weight etc for each
category, the frequency of delivery, collection and delivery points, obligations to rural areas,
and the terms of the universal service obligation. The administration of these regulations
must be ‘reasonable, objective and impartial’. This annex would give the express delivery
lobby ample scope to press their governments to object to other TiSA countries’ regulatory
processes and decisions.

6.7 PUBLIC POSTAL SERVICES

The proposed annex on delivery services divides the market between a very narrow
and specified postal monopoly and a broader competitive delivery market in which the
postal authority, express delivery firms, and other commercial delivery suppliers all operate.

RESTRICTING THE POSTAL MONOPOLY

The definition of a postal monopoly is not yet decided in the Annex on Delivery Services.246 One or more countries want to restrict it to specified delivery services within a
party’s territory that are conferred by a government measure. That has not been agreed, but
no alternatives are noted. The scope of the postal monopoly must be defined using ‘objective’
criteria, including quantitative criteria of price and/or weight thresholds.247 It is debatable
whether geographic areas would be considered ‘objective’, given that only product-based
examples were given, although they can be clearly defined. Qualitative factors, such as
the needs of particular communities, may not qualify where the criteria are considered too
vague or subjective. Some unnamed parties want to preserve the right to decide their
own criteria in their domestic law.

A separate provision on cross-subsidisation prohibits a service supplier that is
covered by a postal monopoly from cross-subsidising its own or another supplier’s248
competitive delivery services with revenues from the monopoly.249 Cross-subsidy is not
defined and might be read to include shared premises, IT or administrative systems. The
monopoly must also not ‘unjustifiably’ apply different prices or other terms for different
users, such as bulk mailers or consolidators.

The annex requires the regulatory authority to treat equivalent (public and private)
delivery services impartially in relation to the same services.250 That authority often resides
in the public post office. The annex would subject its processes and decisions to external
oversight; however, an earlier requirement for an authority to be independent of suppliers
has been dropped.

The US also wants to protect suppliers of an express delivery service from being
required to contract with another service supplier (such as the post office) to provide part
of its service, or be stopped from contracting with a supplier of its choice.

THE ‘GOVERNMENTAL SERVICES’ EXCLUSION

The core TiSA text excludes a ‘service supplied in the exercise of governmental
authority’ from the definition of ‘services’.251 To qualify it must be ‘supplied neither on a
commercial basis, nor in competition with one or more service suppliers’. monopoly postal
services are non-competitive, but they are commercial.
UNIVERSAL PUBLIC SERVICE OBLIGATION

The November 2016 text drops some of the EU’s more extreme proposals to restrict scope of the UPSO and how it is delivered.253 The new version says countries can define what kind of UPSO they want. But they must administer it in a ‘transparent, non-discriminatory and neutral/impartial way with regard to all suppliers subject to the obligation.’254 It is unclear whether the government’s ‘administering’ of the obligation includes allocating the responsibility for providing the UPSO or conduct of the obligation once allocated. ‘Transparency’ would mean the terms of the obligation are clear and public. But the difference between non-discriminatory and neutral/impartial administration is not clear. Either could imply that foreign private firms can be contracted to deliver the UPSO and the public post office should not preferential rights to do so. The annex also says that commercial operators cannot be required to supply universal services as a condition of being authorised or licensed to supply other delivery services; nor can there be a levy solely on those who are not supplying the UPSO to fund it.

STATE-OWNED POST OFFICES

The US has proposed an annex on SOEs that would apply to the public post office if it was 50 percent or more owned by central government and ‘principally’ engaged in ‘commercial activities’; that is defined as activities undertaken ‘with an orientation towards profit-making’, meaning anything more than cost recovery. Most public postal services would fall within that definition.255 The post office would have to operate on a purely commercial basis when buying or selling their services. Countries might be allowed to exclude their postal SOEs from the annex on a schedule, but that would have to be approved by all the TiSA parties, including the US.

The US is willing to allow some limited protection for services supplied by an SOE under an explicit public mandate, such as a clearly-defined UPSO.256 But that could only apply to postal services supplied inside the country under the mandate; any international mail service would still be subject to the obligations in the annex. In practical terms, mandated domestic postal services would often be integrated within the postal service’s broader activities. The EU would allow broader protection for any ‘legitimate public service obligation’.257 Under both the US and EU approaches, the SOE could still not discriminate when it sells postal services to persons of another TiSA party.

6.8 THE UNIVERSAL Postal UNION

An unspoken consequence of TiSA is to undermine the specialist UN organisations that are international standard-setters for specific services. In the past, the EU has tried to undermine the Universal Postal Union (UPU) directly through the GATS. In a 2005 paper to the GATS negotiations, the EU recognised that the Universal Postal Convention and its regulations are binding on all member states of the UPU. It then proposed that:

These agreements should be transmitted, as far as it is necessary, into GATS schedules of commitments in order to ensure coherence between the two agreements and to provide a dispute settlement mechanism to

253 TiSA, Articles 6, 7 and 8, Annex on Competitive Delivery Services, dated 16 April 2016.
254 TiSA, Article 8, Annex on Delivery Services, dated 9 November 2016.
256 TiSA, Article 9, Annex on State-Owned Enterprises, dated November 2016.
257 TiSA, Article 9, Annex on State-Owned Enterprises (EU Comments October 2016).

6.9 E-COMMERCE AND GLOBAL SUPPLY CHAINS

Liberalisation of postal delivery in favour of private express delivery operators is a prerequisite for the expansion of global supply chains and cross-border e-commerce. The major global players are using multiple models to link business-to-business (B2B), business-to-consumer (B2C) and increasingly consumer-to-consumer (C2C) through digital marketplaces. Multimodal and multi-channel operations are also making global supply chains more fragmented. Change is rapid, volatile and unpredictable.

In practice, countries from the Global South and their workers are likely to be clustered at the bottom end of the value and supply chains. Existing models of outsourcing between home countries of TNCs and the Global South are driven mainly by cost-cutting through subcontracting. New jobs that are created by e-commerce are likely to make their employment even more precarious.

This turbulence also poses challenges to the traditional players in the industry, such as DHL and Fedex. New-generation tech companies like Amazon have less sunk infrastructure, can adapt their operations and more locations more easily, and have a largely de-unionised and contractualised workforce. They exercise different levels of direct control over each part of their operations: procurement of the products, the online purchasing process, and fulfillment after the order is placed. Distribution and last mile delivery use a variety of logistics arrangements: some involve long-standing relationships, some are in-house, some are experiments with new technology, such as drones and driverless vehicles.260 As the pace of change and competition both intensify, the Big Four express delivery firms will struggle to survive in their current form. A recent article in Bloomberg Businessweek, starkly headlined: ’Will Amazon Kill Fedex?’, suggested that Amazon is becoming a kind of e-commerce Walmart with a Fedex attached.261

Arguably, Amazon would benefit more than DHL and Fedex from the future-proofing elements of TiSA – scheduling more commitments on cross-border supply of services (Mode 1), supported by the stand-still and ratchet, no regulation of new services, no liberalisation of access to postal services for Amazon.

261
6.10 IMPACTS ON POST AND DELIVERY WORKERS

Postal workers in the public sector have been under pressure for many years as express delivery operators and courier firms push down wages and conditions, and employees compete with contractors. TISA aims to intensify competition between public and private, local and offshore in the name of greater efficiencies. Most of those efficiencies come from cutting labour costs, playing workers off against each other.

The expansion of cross-border e-commerce using digital platforms poses a further set of challenges to the existing workforce and ITF unions. As Kathrin Birner notes, the structural power of workers and the ability of unions to organise reflects workers’ positions within the economy. That position is increasingly precarious in the fulfilment and delivery parts of the e-commerce supply chains. Growing reliance on short-term contracts and subcontracting makes job insecurity a major problem. Temporary contract workers have minimal bargaining power. Amazon has already become infamous for highly exploitive labour conditions, invasions of privacy of employees, constant tracking by electronic devices, bullying of temporary foreign workers and resistance to unionisation. Work in its fulfilment centres is increasingly automated. Tasks are divided across receivers, stowers, pickers and packers, all monitored by electronic devices. The existence of multiple fulfilment centres means labour can be substituted if industrial action is taken.

Parallel trends are already impacting on delivery work through even greater use of ‘self-employed’ drivers, automated distribution centres, and unmanned vehicles. TISA hasn’t caused these challenges, but it will certainly intensify them.

7.1 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, where they are free to maximize 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; 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 economic 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, the most severe impacts of this radical disruption will fall 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.262 The more that...
power concentrates in those who control global finance, logistics and digital platforms, the less power the governments, workers and unions in the Global South will have.

7.2 OBJECTIVES IN A NUTSHELL

The impacts on workers and unions is principally at the systemic level, where the TiSA project aims to:

- support the global reorganisation of capital 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 employment-related obligations or local purchase requirements on foreign investors;
- ensure corporate elites have 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 de-unionise the workforce;
- require pro-business approaches to regulation of licensing, qualifications and technical standards, including those that directly affect labour; and
- weaken the role of specialist international standard-setting bodies, notably in transportation services.

7.3 POLITICAL CONTEXT

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

US constitutional problems: The US cannot make TiSA commitments on labour mobility, even for élite labour, because the Congress has said it will not allow its constitutional sensitivities will frame their positions on matters that directly affect labour.

7.4 GENERAL IMPACTS OF TISA ON LABOUR

Parts of TiSA impact on labour, workers and unions in diverse ways. These can be separated into: general impacts of the rules on labour; the annex enabling the entry of foreign workers; rules that threaten local businesses and local jobs; social dumping; and the lack of social and workers’ rights. The rest of Part 7 examines each of these in more detail.

Services are at the heart of the social, cultural, environmental, economic and political life of communities; they are also a major source of jobs. TiSA will 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 rule removes the right to impose restrictions on foreign firms, and to support local businesses and their workers through ‘buy local’ campaigns and apprenticeship subsidies.
- Standstill on preferential policies and restrictions on foreign firms, and a ratchet for new liberalisation, lock in anti-union and anti-worker neoliberal policies.

Risks 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.264

Border security: Movement of people across borders has become hugely sensitive, especially in Europe, because of the refugee crisis and heightened border security, but governments are being asked to guarantee access for services labour. Governments may want to restrict that access for security reasons. However, the national security exception (which the leaked core text showed is the same as in the GATS) is narrow. The need for a country to take action to protect its ‘essential security interests’ is self-judging, but it can only do this ‘in time of war or other emergency in international relations’. A clampdown that prevents foreign firms from activities or delivering services they have done in the past might well be challenged. Governments would have to invoke the problematic defence under the general exception for measures ‘necessary to protect public order’.

The EU’s response to both these issues in TiSA is a proposed 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.265 When a bilateral agreement on return and readmission exists between the EU and another TiSA party, and the EU considers it is not being honoured, the EU can 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’s proposal is presented as a unilateral declaration, which has a dubious legal status in a multilateral agreement. It may be a bargaining chip to secure the right to impose an economic needs test on contract service suppliers, or it might be for internal political consumption.


265 TiSA, EU Declaration regarding cooperation on return and readmission: Annex on Movement of Natural Persons, TiSA/ A/J.13/2015/3 (engaging both MEAs), dated 8 November 2015.
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managers and professionals as a valuable asset to the enterprise, and commodity labour as a commercial presence (Mode 3). The prevailing attitude treated the élite labour of executives, known as Mode 4. These categories were developed in the 1980s when the GATS was being contractualised labour. Contractual service suppliers, which potentially opens the door to a large increase in foreign intra-corporate transferees, business visitors, independent professionals, and workers themselves or the impacts on the workforce they displace. The proposed Annex remittances. Neither position shows any concern for the rights or wellbeing of migrant South want to export skilled and unskilled labour to reduce unemployment and attract the movement of élite personnel as a ‘trade’ issue but treat the international mobility GATS MODE 4

The cross-border movement of labour to deliver a service (known as ‘Mode 4’) has

MOBILITY: ‘MODE 4’

• Guan...and underwriting protections for workers and consumers, such as health and safety standards, staffing levels and operational requirements.

7.5 INTERNATIONAL LABOUR MOBILITY: ‘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. 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 prevailing attitude treated the élite labour of executives, managers and professionals as a valuable asset to the enterprise, and commodity labour as a cost to business and readily substitutable by other workers or technology. However, making that crude class distinction 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. 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 were free to make commitments in their schedules for Mode 4 that would guarantee entry for commodity labour, 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 preferred destination countries not to list them in their schedules. Instead, they limited entry rights to intra-corporate transferees, managers and executives, specialists and some professionals in particular sub-sectors.

Since then, many FTAs have explicitly narrowed the scope of Mode 4 to élite corporate personnel and independent professionals. Yet TiSA retains the original approach to Mode 4 because it needs to be compatible with the GATS, and has supplemented this with an annex that requires or encourages parties to focus on the priority categories.

THE TISA ANNEX ON LABOUR MOBILITY

The most recent leak of the TiSA Annex on Movement of Natural Persons from November 2016 continues the distinction between persons employed by a service supplier from another TiSA country and those seeking access to the employment market. The distinction becomes even less credible in TiSA because governments are encouraged to guarantee entry for foreign workers to deliver contracts services in highly contractualised economies. Four issues have been agreed in the annex:

• Scheduling. TiSA parties would make commitments to allow access for service suppliers in Mode 4 in the standard way:
  I. a Mode 4 commitment not to restrict temporary access to the domestic market for a foreign person to deliver a service in a specific sector would be based on a positive list. Often that would take the form of a horizontal commitment that applies to all sectors committed in the schedule, subject to any limitation the country wants to retain (such as a time limit or the number of people allowed entry);
  II. once that market access commitment has been made, either:
    • a standstill would prevent 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.
  provided the other TiSA parties have agreed.

• Strike breaking. A country may suspend the Mode 4 obligations in its schedule where entry and temporary stay might adversely affect the

266 GATS 1994, Article 2, Annex on Movement of Natural Persons Supplying Services Under the Agreement
267 GATS 1994, Article 3, Annex on Movement of Natural Persons Supplying Services Under the Agreement
268 TiSA Annex on Movement of Natural Persons, TiSA/JUL.2015/negotiatingtext/MNP dated 8 November 2016
269 TiSA, Article 3, Annex on Movement of Natural Persons, dated 9 November 2016
270 TiSA, Article 3, Annex on Movement of Natural Persons, dated 9 November 2016
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especially relevant to the ITF.

commitments at least for category (i) intra-corporate transferees. Two categories are afforded a different degree of entitlement. Each TiSA party would be required to make CETA as a proxy, but the meaning in TiSA could be different. Each category would be in another TiSA country:

I. intra-corporate transferees;
II. business visitors;
III. independent professionals;
IV. contractual service suppliers.

None of the categories are defined; the following discussion uses the definition from CETA as a proxy, 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. Two categories are especially relevant to the ITF.

Intra-corporate transferees 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 provision 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 dominant shipping, airline and logistics companies to bring their 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.

The more significant proposal for ITF relates to contractual service suppliers. In the absence of a definition, CETA is used here as a proxy, where ‘contractual service 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 8727) 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 fulfill the contract to supply a service.

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 contract to supply aircraft maintenance services to an airline at London airports could employ workers from Pakistan or Vietnam to deliver the service in London.

The wages and conditions of those employees will be governed by their employment contract with the supplier of the service and be governed by the relevant law for that contract. It is possible that the contract of 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 proposes adding that requirement (an ‘economic needs test’) to the provision. That suggests that ‘requires the presence’ may refer to what is written into the contract, which will be a private matter between the contracting parties.

The proposal allows governments more flexibility than for commitments on intra-corporate transferees. Countries would ‘endeavour to’ guarantee entry for up to 90 days cumulatively within a year or for the duration of the contract if shorter. ‘Endeavour’ requires TiSA countries to actively consider such commitments in good faith.

Applied to cross-border road haulage, air transportation, and maritime passenger and cargo transportation, such commitments would compound the problems of labour exploitation and social dumping that the European Parliament has resolved to end. Yet the EU supports this proposal, provided it is subject to the 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 challenged as breaching those requirements.

### 7.6 TiSA’s Impact on Local 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. 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. 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 a proportion of local services, transfer or use local technology, or train or employ local people where that would require transfer of proprietary knowledge — all of which are ways to support the local economy and start-up industries and to maintain employment. Governments could still make access to subsidies or other supports conditional on an investor locating in a particular region or training or employing workers.

- The parties have also agreed that no TiSA country 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. 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 protects existing measures listed in a country’s schedule, with any future liberalisation locked in, or to the much broader ‘policy space’ reservations. Both forms of reservation depend on agreement by the other parties.

The proposed Annex on Government Procurement would weaken the support that public purchasing provides 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 may become difficult to impose minimum labour standards in procurement contracts and could be practically impossible to monitor or enforce them effectively even if they were included. Given the deep integration of goods and services in procurement contracts, this annex would de facto apply to procurement of goods as well. If the goods or services are defective, the terms of the contract could entitle the foreign employer of the contractor to enter to perform the remedial work under their home country wages and conditions. However, the annex appears to have limited support. That reflects the position in the WTO. Services are not included in the plurilateral Government Procurement Agreement and government procurement negotiations remain unfinished business in the GATS, although a number of TiSA parties have agreed to coverage in their FTAs.

This 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. That corporatised model promotes competitive supply of what used to be public services. The special nature of public sector employment, for example in post offices or ports, is usually replaced by private sector terms and conditions, accompanied by restructuring, redundancies, and later partial or full privatisation.

Preventing SOEs from giving preferences to local services and goods would remove an important support for local firms and employees and favour large international competitors.

### 7.7 Social Dumping

Social dumping is dual exploitation: the foreign workers engaged to supply services are commonly exploited and vulnerable, and the workers they displace are pressured to lower their standards to remain employed and survive.

#### The EU Experience

In 2015, the European Parliament adopted a comprehensive resolution on social dumping in response to concerns raised by the ITF and others. It described social dumping as covering:

- a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and lead to violations of workers’ rights and exploitation of workers.

The preamble to the resolution began:

Whereas undeclared work and bogus self-employment can lead to distortions of competition which result in long-term damage to social insurance systems, an increasing number of precarious jobs and deteriorating levels of worker protection and job quality in general, and should therefore be combated, whereas the increasing trend towards outsourcing and subcontracting may create possibilities for the abuse or

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284 TiSA, paras X.3.1(c) and (d) and X.3.2(c) and (d), ‘Localization provisions’, dated November 2016
286 European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), Para II
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The impacts of social dumping were spread across three main dimensions:
- the economic aspect: using illegal practices, such as undeclared work or bogus self-employment to distort markets and disadvantage bona fide companies;
- the social aspect: discrimination and unfair treatment between workers and depriving them of the effective exercise of their social and labour rights, including pay and social protection;
- financial and budgetary aspect: failure to pay social security contributions and taxes, which threatens the financial sustainability of social security systems and public finances.

The parliamentary resolution specifically identified dangers in the road, maritime and aviation transport sectors, including letterbox companies that use long subcontracting chains, bogus self-employment, unpaid wages and lack of social protections, precarious work conditions, substandard training and licensing, and denial of trade union rights and collective bargaining.

Paradoxically, the EU already faces the dilemma that open borders restrict the right of member states to regulate for social dumping. The European Commission took legal action against Germany and France for requiring foreign trucking companies to pay their drivers the national minimum wage whenever they passed through those countries, alleging a breach of internal market rules. In January 2017, the EU Transport Commissioner promised new labour rules for truck drivers to address the issue on a Europe-wide basis. But even if this regulation would become binding, for all TiSA parties under rules that effectively privilege ‘free trade’ for international transport operators over national legislation.

HOW TiSÀ’S RULES PROMOTE SOCIAL DUMPING

A number of provisions in TiSÀ’s core text and other annexes would, if adopted, exacerbate the risks of social dumping and impede new regulation to address them:
- The Annex on Movement of Natural Persons (Mode 4) includes a proposal that governments should ‘endeavor’ to guarantee multiple rights of entry for 90 days over a 12-month period for contractual service suppliers employed by an enterprise in another TiSÀ country and whose entry is necessary to deliver the service.
- Qualifications, technical standards and licensing requirements must be based on ‘objective and transparent’ criteria, and all measures must be administered in a ‘reasonable, impartial and objective way.’ Some also want regulations to be the least burdensome to achieve the quality of the service (but that is unlikely to be accepted). These requirements could make it hard to introduce new and tighter regulations to prevent social dumping as proposed by the EU to address bogus self-employment, documentation of social protections or safety compliance, tax evasion, etc.
- Once a government makes a commitment not to restrict access for a foreign transport operator (and its drivers) to its market, it could not apply stricter rules to them than apply to its equivalent local operators, unless the other TiSÀ parties had agreed it could either keep its current laws, but and lock in any future liberalisation, or preserve the full policy space to introduce new restrictions.
- Other TiSÀ governments, and their road transport and logistics lobby, could claim the right under the Annex on Transparency to see and comment on any proposed new regulations to address social dumping and have those comments considered. Objections that the proposals would breach a TiSÀ rule could have a chilling effect on social regulation.
- A transport operator from one TiSÀ country could not be required to have a domestic presence (eg a subsidiary or even an agent) in the TiSÀ country where it is providing the service. That makes accountability and liability much more difficult and facilitates the use of letterbox companies.
- The proposed rule against ‘forced data localisation’ means governments could not require that data relating to road transport operations or operators must be held in the country where the service is being provided. This means the data would be subject to the privacy laws of the country hosting the server (or lack of them, in the case of the US). Access to it would require the cooperation of the foreign firm, and if necessary the authorities, of that country.
- The general exception in the leaked core text could be raised as a defence when a government measure to protect public health or the environment breaches its TiSÀ obligations. A defence to the introduction of new social protections or labour standards would have to rely on the category of ‘public morals’. But even if the measure comes within one of those categories, the government must satisfy a multi-layered test that shows it minimised the burden on business, and the measure was not unreasonably discriminatory nor a backdoor way to block the foreign operators. The general exception is so difficult to use that it has almost never succeeded.

THE ANNEX ON INTERNATIONAL ROAD FREIGHT TRANSPORT

The proposed Annex on International Road Freight Transport and Related Logistics Services would add specific new risks of social dumping. An early leaked version of the annex from June 2015 was especially aggressive:
- The stated objective was to liberalise access to road freight transport and related logistics markets to enhance competition and smooth carriage of goods, ‘recognising the right of governments to control externalities for the public’. Everything aside from the commercial

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293 Article 1, European Parliament resolution on social dumping, 2016/2762(INI).
296 Article 4(a) Annex on Domestic Regulation, dated 5 November 2016
297 TiSA, Article ‘Domestic Regulation’, Core text, dated 14 July 2016
298 TiSA, Article I.4 and II.2, Core text, dated 14 July 2016
299 TiSA, Article 3, Transparency Annex, dated 6 November 2016
300 TiSA, Article X.1, Localization Provisions, dated November 2016
302 TiSA, Article 5, Transparency Annex, dated 6 November 2016
303 ‘Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” has Ever Succeeded: Replicating the WTO Success for EU Services’. 304 Everything aside from the commercial
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• Every TiSA party was expected ‘as far as practicable’ to guarantee some market access for professional drivers306 of vehicles from other TiSA countries who provide road transport services in their country.307 That would mean no numerical limits on the number of drivers, number or duration of trips, no economic needs test, etc.

• Countries’ schedules could not impose limitations on vehicles in transit and their drivers except where necessary to protect public safety, environment, infrastructure and other public policy reasons. ‘Necessary’ means governments must adopt the least restrictive available option to achieve their policy purpose. In addition, the limit must be no more onerous than for local or other foreign operators.

• Each TiSA country had to set out in its schedule any limits on measures affecting professional drivers delivering the named logistics services from other TiSA countries. Adding to the schedule could be prohibitively costly because the country would have to commit a service that it previously said was off limits.308

• Governments had to remove any administrative or technical requirements and procedures that could be a discriminatory or disguised restriction on the ‘free supply’ of international transport services and related logistics services, even if that was not their direct goal.309 A broad interpretation of administrative procedures and technical requirements includes record keeping or documentation in specific language, rules about contracts, maximum driving hours, or social insurance requirements.

Those extreme proposals are not in the latest leaked text from November 2016.310 Nevertheless, the scope of the November 2016 version of the annex potentially reaches beyond measures affecting international road freight transportation. A number of countries, including the US and Switzerland, want to extend it to cover cargo handling, storage and warehousing, and other supporting and auxiliary services311 – in other words, the entire logistics supply chain. Turkey wants to include transit traffic.312 Whether road cabotage was excluded was still being discussed.313

The proposed rules now mainly require ‘reasonable’ and ‘non-discriminatory’ access for foreign operators to those services and infrastructure314 and the cross-border movement of transport equipment such as containers,315 and the right to choose their preferred routes316 or combination of transport modes and operators.317 Special exceptions in the annex would allow governments to adopt measures to protect the integrity and proper operation of the transport infrastructure and ensure safety standards are compiled with, but these measures would have to be non-discriminatory and not more restrictive than necessary to achieve their purpose objective.318

There is strong opposition to the remaining provisions, which are mainly proposed by Turkey. The EU has consistently said it ‘does not see a clear value in this annex given the nature of road transport’. It is nevertheless important to note what some countries want TiSA to do, because the current negotiations are not over and there will be future negotiations where similar proposals are likely to be tabled. And even without the road transport annex, TiSA could make it impossible to address the growing problem of social dumping.

7.8 WORKERS IN THE GLOBAL SOUTH

The World Bank’s 2016 World Development Report, entitled Digital Dividends,319 talks up the potential benefits to the Global South and its workforce from the fourth industrial revolution. In practice, they are likely to be clustered at the bottom end of the global value and supply chains. Existing models of outsourcing between home countries of TNCs and the Global South are driven mainly by cost-cutting through subcontracting: ‘unregulated markets have the tendency to push developing countries towards a socio-economic position that reproduced underdevelopment. The increasing integration of developing countries in GVCs has not changed this in any meaningful manner’.320 E-commerce won’t change it, either. Instead, TiSA may deepen the divide.

The World Bank acknowledges the skills and infrastructure deficits may undermine the potential benefits, and the risks when a small number of private corporations control the digital domain. But it offers either market solutions to the problems or no solutions at all. 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, especially in the Global South where automation has not yet had such an impact.321 In typical World Bank style, the report says: ‘Adjustment takes time and will be painful for many, but this is how economies progress’.322 The solutions are equally familiar. In addition to better skills: 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 to 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 wage contracts by delinking social insurance from employment, offering independent social assistance, and helping workers retrain and find new employment quickly.323

305 Defined in TiSA, Article II.3, Annex on Road Freight Transport and Related Logistics Services, dated 30 July 2015 as an individual who acts as the driver of a vehicle to provide road freight transport services as well as any other persons engaged in the driving of the vehicle who holds a valid driving licence given by the competent authorities of the Parties.
308 TiSA, Article II.1, Annex on Road Freight Transport and Related Logistics Services, dated 30 July 2015.
311 Defined as a driver or unaided journey by a vehicle where the points of departure and arrival are at different Points of a Party to the Agreement (i.e. intraparty transport).
312 TiSA, Article II.2, Annex on Road Freight Transport and Related Logistics Services, dated 9 November 2016.
313 TiSA, Article II.2, Annex on Road Freight Transport and Related Logistics Services, dated 9 November 2016. The related classifications cover: freight forwarding services; bill auditing and freight rate information services; transportation document preparation services; packing and outlining and unpacking and de-stacking services; freight inspection, weighing and sampling services and freight receiving and acceptance services (including local pick-up and delivery).
314 TiSA, Article II.2, Annex on Road Freight Transport and Related Logistics Services, dated 9 November 2016. That would be subject to the disciplines of Article V of the GATT and possibly the WTO Trade Facilitation Agreement. A number of countries, including Canada, Japan, the US and Switzerland are considering whether to support this.315 TiSA, Article II.2, Annex on International Road Freight Transport and Related Logistics Services, dated 9 November 2016.
316 TiSA, Article II.2, Annex on International Road Freight Transport and Related Logistics Services, dated 9 November 2016.
7.9 PROFESSIONALS

Australia, Norway and Iceland are pushing an Annex on Professional Services, but almost none of it is agreed. The annex would apply to measures affecting ‘trade’ by listed professions through any mode of delivery and be subject to ‘technological neutrality’ (applying obligations to whatever new technologies are used to deliver them). The list of professions does not include those most relevant to the IFT, such as airline pilots and ship officers and other maritime, air, and ground transport professionals, but it does cover engineering services. Australia and Turkey want to prevent any TISA country from applying an economic needs test only to foreigners, including a labour market test to show there are no locals to do the work. Increased cross-border provision of professional services would 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.

There appears to be extensive support for applying the Domestic Regulation annex to ‘measures affecting trade in professional services’, whether or not the particular sector is committed in a country’s schedule. However, this would only apply to those 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. The ITF would want to ensure a right to participate in discussions on relevant professions, especially if the categories of professionals were expanded.

7.10 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 mega-agreements like the TPP are weak anyway, and would not address the systemic impacts of TISA on employment and the labour market, the wellbeing of the workforce and unionisation. By contrast, the Annex on Transparency wants TISA governments and their corporations to be informed of proposed new regulations in advance so they can lobby to protect their interests. The wording of the annex appears neutral, as it refers to informing ‘interested persons’. But in an earlier version, New Zealand explicitly described the purpose as being to enable those persons to assess whether and how their ‘trade interests’ were affected. Many countries already provide similar access through so-called ‘better regulation’ processes, but that is domestic policy that can be changed, not a binding obligation in a one-sided trade in services agreement. Locking the transparency obligation in through TISA would permanently skew the balance of interests in the lawmaking process, given the massive resources these foreign companies have available.

The only time workers’ rights appeared in TISA was in an early draft of the Annex on Maritime Transport. Turkey wanted guaranteed rights for seafarers to enter a TISA country for shore leave, admission to join a vessel, and to exit once the engagement was terminated. The proposal was co-sponsored by Taiwan, which later withdrew support. Australia, Canada, Costa Rica and the US opposed the provision. Turkey also proposed a more limited approach to expedite entry for professional drivers in the annex on road freight transport. But that was designed to facilitate the freight and logistics businesses, rather than benefit workers, and had the potential to compound the problems of social dumping. While those specific proposals were dropped from later leaked drafts of each annex, a note said that Turkey would work with Peru, Pakistan and other interested parties on an alternative approach to address ‘transport operators’. Turkey also said resolution of that matter was a condition of stabilising (closure) of the transport annexes. However, it is hard to imagine any consensus to allow such rules.

An earlier draft of the maritime transport annex also recognised the international standards on maritime transport from the IMO and ILO, which apply to labour; but the loose wording would have allowed TISA parties to adopt lower standards than set by those organisations. That provision was absent from the November 2016 text. As noted earlier, governments are allowed to deviate from their commitments on Mode 4 where the presence of the 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. However, this relies on the government to invoke it and only applies to foreign workers inside the country, not when strike-breaking services are supplied across the border.

7.11 CHALLENGING THE TISA PROJECT

In the name of ‘freedom’ the Really Good Friends of Services and Team Tisa are deliberately seeking to intensify the instability and disruption of today’s turbulent social and economic world. Their vision for the 21st century offers a future where workers are vulnerable and expendable, and citizens and voters are disenfranchised. Their project is a fundamental assault on democracy, from its broad pro-corporate objectives, the secrecy of the negotiations, and enforceability of TISA’s rules by foreign states in offshore tribunals to the more specific provisions on localisation requirements and the application of standstill and ratchet mechanisms in potentially unchangeable schedules.

Governments must be able regulate and respond to unexpected problems as they see fit, without facing the threat of a legal dispute or economic sanctions. What may appear low risk when it is first agreed can become a major liability. Even without significant change, services is such a complicated area that it is easy to make drafting errors. The combination of TISA’s core text, annexes and schedules would permanently remove the flexibility that states require when domestic and global economic circumstances change and new
The trouble with TiSA technologies alter the impact of rules and commitments – let alone when a democratically elected government has a different mandate.

They are negotiating this deal, in secret, at a time when the legitimacy of the neoliberal model that has dominated the past four decades and these agreements has hit rock bottom. Yet its binding and enforceable obligations are designed as a one-way street from which there is meant to be no foreseeable retreat. TiSA would explicitly foreclose the possibility of a progressive alternative vision for the 21st century that recognises and addresses the challenges ahead – narrowing the vast inequalities of wealth, gender and race within and between countries; ensuring job security and social protections for workers and communities as they face the disruptive impacts of new technologies; radically rethinking how we use natural resources, services, capital and technology in the face of climate change; reining in speculative and destabilising financial markets; and much more.

TiSA deepens the current paradox: these agreements are binding, enforceable, and assumed to be forever; yet by denying the social realities of humankind and political responsibilities of states they make themselves unsustainable. The governments and corporations who champion TiSA expect people as citizens, workers and consumers to meekly surrender their right and power to influence the rules that govern their lives through democratic politics and organised labour for the indefinite future. They refuse to learn the lessons from the failure of the TPPA and TTIP: their pursuit of TiSA will deepen that alienation and create demands for more progressive (or sometimes regressive) change.

The stakes are incredibly high. Defeating TiSA will not stop the fourth industrial revolution nor the threats it poses to workers and unions and the quest for social justice. But it will help to maintain the space for global and national unions to develop new responses to protect people's rights as workers and as citizens in the 21st century. In the meantime, new strategies will be needed to address the challenges posed by global e-commerce that involve international coordination across sectors and across countries.

The failure of another misnamed 'trade' deal should also give impetus to unions, legislators and professionals to reassert the rightful role of international organisations whose specialist expertise recognises the need to balance economic and social, consumer and security considerations through multi-stakeholder participation.
APPENDICES

APPENDIX A: THE CONTENTS OF TISA

(based on leaked documents from the November 2016 round. Text that is not finalised is in italics)

PREAMBLE

PART 1: GENERAL PROVISIONS

I-1. Scope
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I-3. Market access
I-4. National treatment
I-5. Additional Commitments
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II-1. Scheduling of Market Access Commitments
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PART III: NEW AND ENHANCED DISCIPLINES

[known proposed annexes]

Air Transport Services
Delivery Services
Domestic Regulation
Electronic Commerce
Energy Related Services
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Government Procurement
Health Care Services

PART IV: INSTITUTIONAL PROVISIONS

Section 1: Resolution of Disputes
Section 2: Future participation to this Agreement
Section 3: Multilateralism
Section 4: Institutional provisions
[Article IV+1] Interpretations

APPENDIX B: ANALYSIS OF THE TISA TEXT

(As of November 2016, http://www.bilaterals.org/?=tisa=)

This appendix provides a technical summary of the TISA core text dated 14 July 2016 and the annexes on domestic regulation and state-owned enterprises.

CORE TEXT

PART I: GENERAL PROVISIONS

Almost all of Part I is common to the GATS and uses its standard definitions and rules. That makes it easier to export TISA back into the WTO. As with the GATS, TISA would have sweeping application to any:

- ‘measure’ (defined as a law, regulation, rule, procedure, decision, administrative action, or any other form) …
- at central, regional or local government levels and of bodies exercising authority delegated by any of those levels (with central government required to take the reasonable steps available to it to ensure their observance) …
- ‘affecting’ (not just directed at) the …
- ‘supply’ (defined as production, distribution, marketing, sale and delivery) …
- of a ‘service’.

To apply restrictions on what governments can do to particular services there needs to be a shared way to define those services. The classification list used to identify services covered by the GATS has over 160 sub-sectors (Appendix D). It is known as W/120.
and dates back to a list from the UN statistics division, drawn up in 1991.\textsuperscript{341} W/120 is the main reference used in TiSA to identify services committed in countries’ schedules, although some TiSA annexes seek to modify or supplement it and countries have added new classifications from more recent versions.

Classifying services is complicated, especially given the broad application of the rules to many sectors of both maritime transport, but other related services, such as financial (billing), agency services, and customs services, have their own descriptions. Governments may make commitments to some or all of these services. Each commitment puts handcuffs on what governments can do.

The definition of ‘supply of a service’ to include production, distribution, marketing, sale, and delivery of a service expand the reach of the classifications even further. A commitment on a seemingly narrow service can have very broad application. For example, a commitment on market access or non-discrimination in publishing services supplied across the border could limit a government’s right to regulate the distribution of books through Amazon, or commitments on cross-border computer services could mean the TiSA rules apply to last mile delivery of 3-D printed products.\textsuperscript{342}

‘Trade in services’ can be conducted in four ways:\textsuperscript{343}  
1. across the border (eg international air transport, international courier delivery, buying books from Amazon) (Mode 1)  
2. consuming the service abroad (eg ship repairs offshore, air travel within another country, study abroad) (Mode 2)  
3. establishing a commercial presence in another TiSA country (eg foreign ownership of airports, cargo handling) (Mode 3)  
4. temporary entry of foreign natural persons (eg air crew, engineers, IT specialists, contract drivers) (Mode 4)

The two core rules are unchanged from the GATS:

I. Market access

- A government must not restrain competition in and the potential expansion of, services markets, either regionally or across the country, by imposing limits that are quantitative or have a similar effect, even where those limits apply to locals as well. Examples of prohibited market access measures include a transport monopoly, a requirement to show unmet need before opening a new hypermarket or port, limits on the size and numbers of airports or of cruise ship visits, a cap on taxi licences in a region, a ban on offshore windfarms, or requiring that investment in essential infrastructure is through a joint venture or a subsidiary rather than an agency.

II. National treatment

- This rule says a government cannot give local services and suppliers better treatment than their counterparts from another TiSA country. Examples of discriminatory treatment include exclusion of foreign operators from domestic cabotage; local hiring requirements; only paying subsidies to local providers; a ban on foreign ownership of land or assets; reserving local transportation or eco-tourism operations for local firms; levying remediation insurance only on offshore platforms that are foreign owned; allowing only nationals to register as ship masters.

Part I (and several related annexes) propose significant and controversial extensions to other parts of the GATS text, although their content is still being disputed:

- a light-handed approach to future domestic regulation of:
  - qualifications requirements and procedures (eg for airline pilots, engineers, ship officers);
  - licensing qualifications and procedures (eg transport operators, satellite operators, training providers);
  - technical standards (eg waste discharges, manning levels, health and safety rules, location and size of hypermarkets, daily mileage and driving hours for road haulage operators);
- and a corporate-friendly approach to the administration of general regulatory measures.\textsuperscript{344}

- opportunities for foreign states and ‘interested parties’ to review proposed laws and regulations (and possibly procedures and administrative rulings) that relate to any matter covered by TiSA so they can assess any significant effect it may have and make comments, which must be considered (transparency)\textsuperscript{347}; and
- the right of all TiSA parties to any better treatment given to an equivalent service supplier from another country, including through any FTAs that other TiSA parties have in force (most favoured nation treatment or MFN). In the GATS countries were allowed to list agreements or arrangements with other countries that this would not apply to. They were meant to be temporary, but most are still present 20 years on. They have not decided whether to allow that for TiSA; they have also not agreed about whether some FTAs can be excluded from the MFN rule.\textsuperscript{350}

There are two exclusions that appear to provide protection for public services, but their scope is very limited.

- services that are supplied under governmental authority must be both non-commercial and have no competitor – a monopoly that supplies services for free.\textsuperscript{346} Almost no services meet these criteria today.
- government procurement in the GATS: the term is narrowly defined to cover the procurement of services for the internal use of a government agency where they are not used in the supply of services for sale.\textsuperscript{350} Procurement outside that definition is covered by the GATS rules. A separate annex on government procurement has been proposed for TiSA, but there is strong opposition so it is likely to be dropped. However, the core text

\textsuperscript{341} https://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Top=1&Lg=1
\textsuperscript{342} The provision on administration is in the core text: TiSA, Article I-1.3(b) and (c), Core Text, dated 14 July 2016. 'Services supplied in the exercise of governmental authority' are defined as 'a service supplied for free.
\textsuperscript{343} Article XIII, GATS 1994
\textsuperscript{344} TiSA, Article I-1.3(b) and (c), Core Text, dated 14 July 2016. The EU, Switzerland and Norway say there must be an exception for FTAs that have an exemption from the MFN rule under the GATS, although that would not protect US TiSA parties from the MFN rule.
\textsuperscript{345} TiSA, Article I-1.3(b) and (c), Core Text, dated 14 July 2016.
\textsuperscript{346} The transparency provision in the core text requires only the publication of existing measures; TiSA, Article I-18.1, Transparency Core text, dated 14 July 2016. Article 18 of the Annex on Transparency, dated 6 November 2016, covers proposed new measures, and is subject to the proviso to the extent the provision is in the core text and is in a manner consistent with the public legal system for adopting measures.
\textsuperscript{347} TiSA, Article I-18.2, Core text, dated 14 July 2016. In the GATS countries were allowed to list agreements or arrangements with other countries that this would not apply to. They were meant to be temporary, but most are still present 20 years on. They have not decided whether to allow that for TiSA; they have also not agreed about whether some FTAs can be excluded from the MFN rule.
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\textsuperscript{350} TiSA, Article I-18.2, Core text, dated 14 July 2016. Services supplied in the exercise of governmental authority are defined as 'a service supplied neither on a commercial basis nor in competition with one or more service suppliers.'
The trouble with TiSA

Each party has a schedule that sets out its commitments to the core rules on market access and national treatment. In these schedules, TiSA parties voluntarily limit their government’s right to maintain or adopt less liberalised approaches in the future. Those commitments are binding and enforceable by other TiSA parties (not by private firms), which opens them to legal challenges and economic penalties if they breach their obligations. The TiSA approach to scheduling imposes more restraints than the GATS and attracts much greater potential liability. As noted earlier, services are generally identified using the 1991 W/120 classification list. Certain annexes would include services that were previously excluded from the GATS (such as ground handling and airport operation services in the air transportation annex).

Each country’s schedule is developed through a process of requests and offers between all the individual TiSA parties, which are then consolidated so all parties receive the same benefits. Each TiSA party guarantees to open its ‘market’ in a service sector or sub-sector (market access) the same way as in the GATS: they list what sub-sectors will be covered for each way of delivering the service (known as a positive list approach), plus any limitations on that opening. In TiSA they are expected to commit to at least the highest level of market access in their existing FTAs, even though the effect of giving such access to all TiSA countries could be much more significant; whether countries do so will reflect domestic sensitivities and their bargaining power.

Where a government has promised market access for a service sub-sector, TiSA presumes the non-discrimination (national treatment) rule will apply at all levels of government (this is a negative list approach). Existing preferential treatment for locals or restrictions on foreign services and suppliers that would breach the rules and are not expressly listed would not be allowed.

There are two ways a party could counteract the national treatment presumption:

I. a government could negotiate to keep a discriminatory measure that exists when TiSA comes into force (a standstill), but it could not introduce any new discriminatory measures. All new liberalisation would be automatically locked in (a ratchet).

II. a government could seek to preserve its policy space by excluding existing or future measures from the non-discrimination obligation, but that must be spelt out in the country’s schedule (again, a negative list).

All the other parties would have to agree to allow a country to include these reservations, within a negotiating context that aims for maximum liberalisation and where many parties see a precautionary approach as anathema.

Some proposed TiSA annexes, including those on international maritime and road freight transport, aim to remove a specific focus and aims to achieve one or more of the following goals, to:

- require governments to take a pro-business approach to regulation and policy (e.g. business-friendly domestic regulation, rights of foreign states and corporations to comment on proposed laws);
- expand the coverage of sectors, where coverage is limited under the GATS (e.g. air transport, maritime transport);
- introduce new rules for specific sectors of particular interest to some countries (e.g. road transport, energy, professional services, environment); and
- apply the services rules to activities or entities not covered by GATS, but which are included in some FTAs and the failed TPPA (e.g. e-commerce, SOEs, government procurement, prohibitions on requiring a local presence, and prohibited performance requirements on foreign investors).

The trouble with TiSA

Joining TiSA (accession) Any country wanting to join TiSA would have to get approval from all existing parties, one by one, and then collectively. In practice that means they would have to promise more than was in the original TiSA and gives any original TiSA party a veto.

Committing a service in the schedule for market access and national treatment would trigger other rules, such as those that restrict how a government can regulate qualifications, licensing and technical standards, discussed below.

As with the GATS it is extremely difficult to change a schedule later, as that requires consent of all other parties and new concessions can be demanded as the price of their consent.

PART II: SCHEDULING COMMITMENTS

This part of TiSA refers to the proposed annexes (see Appendix B). Each annex has a specific focus and aims to achieve one or more of the following goals, to:

- require governments to take a pro-business approach to regulation and policy (e.g. business-friendly domestic regulation, rights of foreign states and corporations to comment on proposed laws);
- expand the coverage of sectors, where coverage is limited under the GATS (e.g. air transport, maritime transport);
- introduce new rules for specific sectors of particular interest to some countries (e.g. road transport, energy, professional services, environment); and
- apply the services rules to activities or entities not covered by GATS, but which are included in some FTAs and the failed TPPA (e.g. e-commerce, SOEs, government procurement, prohibitions on requiring a local presence, and prohibited performance requirements on foreign investors).

PART IV: INSTITUTIONAL PROVISIONS

The final part of TiSA sets out mechanisms for decision making, dispute settlement, and operating the agreement. These are being designed so that TiSA can fit back into the WTO.

Disputes: A dispute can only be brought by another state party to TiSA. As with the WTO, the panel of arbitrators in a dispute would be trade experts, not proper judges. Unlike the WTO, the proposed text does not provide any appeal from a panel’s decision. If a party was found in breach of the TiSA rules, it would have to abandon or adjust the non-compliant measure, or could face sanctions against other parts of its export economy, such as agriculture or manufacturing.

There is no right for foreign investors to bring a dispute under TiSA. It might be possible for an investor of a TiSA country to claim that it had a legitimate expectation that another TiSA party would comply with its obligations, and failure to do so was a breach its right to fair and equitable treatment under an investment agreement between the two states. But that would be a separate dispute brought under that investment agreement.

Entry into force: A minimum number of the original signatories would have to ratify TiSA before it could enter into force; currently they are suggesting two-thirds.

B

PART III: NEW AND ENHANCED DISCIPLINES

4.208 TiSA, Articles IV:7 and 8, Core text, dated November 2016
4.209 TiSA, Article IV:16, Core text, dated November 2016
4.210 TiSA, Article IV:9 and 10, Core text, dated November 2016
4.211 TiSA, Dispute Settlement, Consolidated text, 9 November 2016
4.212 TiSA, Article IV:7, Core text, dated November 2016
4.213 TiSA, Article IV:8, Core text, dated November 2016
4.214 TiSA, Article III:10, Core text, dated November 2016
355 TiSA, Article II-2.2, Core text, dated 14 July 2016
356 TiSA, Article II-2.3, Core text, dated 14 July 2016
357 TiSA, Article II-2.4, Core text, dated 14 July 2016
358 TiSA, Articles IV:7 and 8, Core text, dated November 2016
359 TiSA, Article IV:9 and 10, Core text, dated November 2016
360 TiSA, Article IV:16, Core text, dated November 2016
DOMESTIC REGULATION DISCIPLINES

SCOPE OF THE GATS REGULATORY ‘DISCIPLINES’
Three kinds of domestic regulation are targeted, separately from the market access and national treatment rules:

- **Technical standards**: Technical standards are basically measures that regulate the characteristics of a service or the manner in which it is supplied.\(^{362}\) That covers virtually every kind of service that affects people’s everyday lives, including freight loading rules, building codes, water quality, sanitation and effluent discharges, eco-tourism rules, town planning and zoning, shop opening hours, health and safety codes, odometer requirements, consumer protections, and universal service obligations. There is no definition in the November 2016 text.

- **Qualification requirements and procedures**: This refers to substantive requirements that relate to competence of a real person to supply a service, and which they need to show to be authorised to supply that service (eg a specified degree or diploma from an accredited body), as well as the administrative and procedural rules to show compliance (eg a period in practice or continuing education and training, approval by a professional board or body, and payment of related fees). This would clearly cover the traditional professions and specialists who require occupational qualifications such as engineers, airline pilots, ships’ officers and architects, as well as those who require occupational training, such as firefighters. It arguably extends to personnel who must have a licence to provide a service, such as lorry or train drivers.

- **Licensing requirements and procedures**: Many services require the operating company and/or personnel to hold a licence that authorises them to supply the service: transport operators (bus, ferry, taxi, rail, ports, airports), utilities (telecoms and satellites, waste disposal), importers and customs agents, law firms, real estate agents, retailers of certain products, mining and forestry companies, foreign exchange dealers, security firms, personnel agencies, among others. As with qualifications, these ‘disciplines’ apply to the form and criteria for a licence and the procedures to gain the licence.

THE GATS ‘DISCIPLINES’
The GATS provision on domestic regulation imposes a multi-layered test that says, in principle, that governments must take the most light-handed approach reasonably available to achieve the goal of the regulation.\(^{363}\) These rules were never completed in the GATS, and only interim ones apply.\(^{364}\) Countries that were pushing them in the WTO – especially New Zealand, Hong Kong China, Switzerland, Australia – are now trying to achieve them through TiSA.

These ‘disciplines’ apply to measures ‘relating to’ technical standards, and qualification and licensing requirements and procedures ‘affecting’ trade in services. The proposed rules in the GATS would apply to all regulations, even those that are not discriminatory. Specifically, regulations would have to:

- not pose ‘unnecessary’ barriers to trade in services; this invites claims that the government could have taken a less restrictive approach to achieve its policy goal or that the evidence relied on was flawed;
- be based on ‘objective and transparent’ criteria, such as the competence and ability to supply the service. That opens to challenge any regulations that apply ‘subjective’ criteria, such as broad environmental, social, and regional development considerations, concerns of the local community or indigenous rights, or that allow significant discretion to the authorising body (eg balancing tests that apply multiple factors and standards for approving a pipeline or port facility);
- be the ‘least burdensome necessary’ to achieve ‘quality of the service’. This again invites claims that a less burdensome alternative was reasonably available to achieve the narrow goal of ‘quality’ of the service to a consumer – not considering the impact of a service on the community or the environment;
- licensing and qualification procedures must not themselves restrict the supply of the service; for example, imposing language or procedural requirements that only some applicants could satisfy.

International standards of relevant organisations (such as the International Maritime Organization, International Civil Aviation Organization, International Labour Organization or the International Convention on Tonnage Measurement of Ships) must be ‘taken into account’ when assessing whether a measure meets these requirements.\(^{365}\) That offers some protection to that threshold, but countries can apply lower standards if they want to.

While the GATS ‘disciplines’ are potentially far-reaching, their application was limited. WTO members agreed in 1994 only to their interim application where the government implemented a regulation in a way that nullified its national treatment or market access commitments and the regulation could not have been foreseen at the time the commitment was made.\(^{366}\) This only applies to the subsectors listed in a country’s GATS schedule, and has had very little effect. Most recent FTAs have used the same approach, making provision to adopt the more rigorous GATS rules if they are ever concluded.

TISA’S DOMESTIC REGULATION ANNEX
Negotiations in the WTO to agree on stronger disciplines on domestic regulation have remained stalled. The main proponents – New Zealand, Australia, Hong Kong and Switzerland – are now trying to advance their demands through TiSA, in the core text and an Annex on Domestic Regulation. The US, Canada and the EU oppose some of their worst aspects.

These rules relate to the three categories of qualification requirements and procedures, and licensing requirements and procedures, and technical standards.\(^{367}\) Only New Zealand wants them to apply to all services, whether or not they are committed in a schedule.\(^{368}\) Others say they should only apply to the services in a country’s schedule, but there is no

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362 Article VI:4, GATS 1994
363 Article VI:5 GATS 1994
364 Article VI:5(b), GATS 1994
365 Article VI:5(b), GATS 1994
366 Article VI:5(b), GATS 1994
367 Article VI:5, GATS 1994
368 Article VI:5, GATS 1994
The trouble with TiSA

Commitments are undertaken under a positive list approach. Canada, the US and the EU want at least a negative list to apply – they can set limitations or conditions on the rule in their schedules. But lots of other countries, including Australia, Switzerland, Norway and Japan, want it to apply to all services in TiSA. Even if it only applies to countries’ schedules, the more extensive commitments in TiSA would broaden its potential impact beyond the GATS and many FTAs.

As in the GATS, governments must also provide for prompt review of administrative decisions, as soon as practicable.

Cumulatively these ‘disciplines’ on domestic regulation could have a serious chilling effect on regulators, administrative bodies and decision makers, who become overly cautious to avoid public embarrassment and long costly legal challenges.

**STATE-OWNED ENTERPRISES**

In mid-2016 the US belatedly tabled an Annex on State-owned Enterprises that draws on the SOE chapter in the TPPA. The following reflects the November 2016 US proposal, along with significant EU positions from October.

**WHAT Qualifies As An SOE**

A number of criteria determine whether an enterprise would fall under the annex:

- **The annex only applies to enterprises owned by central government.**
- **The EU wants it to apply at all levels, as did parties to the TPPA. However, the US cannot bind its states to these rules without their consent.**
- **The enterprise must be ‘principally engaged in commercial activities’; these are defined vaguely as activities undertaken ‘with an orientation towards profit-making’ and which produce a good or service in quantities and at a price that the SOE itself determines.** Airlines, shipping, railways, or ports owned by central government could all be caught. Public universities that are structured as corporations are probably not covered, especially where they have a public education charter.
- **To be owned by central government must hold more than 50 percent voting rights or the power to appoint 50 percent of the board of directors.** Whether that includes a golden share that gives the state voting rights and veto powers on strategic matters is unclear. The status of public-private partnerships (PPPs) in which the state has a majority stake is also uncertain because they take various legal forms. The EU probably does not apply to any of one of the three preceding years.
- **Most rules do not apply to an SOE that has derived annual revenue of less than 200 million IMF special drawing rights (about USD270 million) from its commercial activities in any one of the three preceding years.**
- **Most rules do not apply to a sovereign wealth fund or independent pension fund whose investments are not directed from the government (which may preclude SOE-specific instructions on ethical investments).**

**BUSINESS-FRIENDLY ADMINISTRATION**

It is agreed in the core text to adopt the rule from the GATS that all general measures that ‘affect’ ‘trade in services’ (that long chain of ‘measures’ affecting ‘trade’) must be administered in a ‘reasonable, objective and impartial’ manner – all very contestable concepts:

- **‘Administration’** of measures spans decisions on whether to grant a resource consent or licence to operate a service, proof of authenticity of qualifications, assessing compliance with consumer protection laws, taking disciplinary action and imposing penalties for breach of regulations.
- **Almost any decision could be challenged as ‘unreasonable’ by another TiSA government on behalf of an unhappy foreign business.**
- **‘Objective’ requires that the interpretation of general criteria and the weighting given to them is public, clear and explicit, supported by strong evidence, with no discretionary elements or implicit judgement calls.** Yet much public interest regulation does involve discretionary elements and often requires explicit judgements based on the balancing of multiple criteria.
- **An ‘impartial’ decision must be made on commercial and market considerations; recognition of indigenous, cultural, social or development factors, for example, could imply a local bias.**

The equivalent provision on administration in the GATS only applies in sectors where commitments are undertaken under a positive list approach. Canada, the US and the EU want at least a negative list to apply – they can set limitations or conditions on the rule in their schedules. But lots of other countries, including Australia, Switzerland, Norway and Japan, want it to apply to all services in TiSA. Even if it only applies to countries’ schedules, the more extensive commitments in TiSA would broaden its potential impact beyond the GATS and many FTAs.

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369 TiSA, Article 1, Annex on Domestic Regulation, dated 16 November 2016
370 TiSA, Article 1, Annex on Domestic Regulation, Core Text, dated 16 July 2016
371 Article I, GATS 1994
372 TiSA, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016]
373 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016
374 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016
375 TiSA, Annex on State-owned Enterprises, November 2016 [with EU comments October 2016]
376 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016
377 TiSA, Article X.1, Annex on State-owned Enterprises, dated November 2016
378 TiSA, Article X.2.4, Annex on State-owned Enterprises, dated November 2016
There are three significant protections from these rules:

1. The November 2016 text would allow countries to schedule activities of SOEs that would otherwise breach the non-discrimination rule.\textsuperscript{379} The schedule would not protect them from other rules in the annex, such as the requirement to operate on the basis of commercial considerations. The content of the schedule would have to be negotiated; the US bargained very hard over the SOE list in the TPPA. The EU is considering how the annex relates to countries’ schedules of commitments on market access and national treatment.

2. An SOE would be allowed to apply non-commercial considerations (such as the need to ensure public access, affordability, or cultural sensitivities) where it is fulfilling a ‘public service mandate’. A ‘public service mandate’ is defined as a government mandate under which an SOE makes a service available to the public, directly or indirectly, within its territory and includes the distribution of goods and the supply of general infrastructure services.\textsuperscript{380} The EU suggests an alternative right to deviate from commercial considerations for a ‘legitimate public service obligation’.\textsuperscript{381} Even where that explicit ‘mandate’ (US) or broader ‘obligation’ (EU) exists, the SOE must not discriminate against services and service suppliers from other TISA countries. This protection excludes any cross-border activity, and assumes, often unrealistically, that SOEs will maintain a distinct firewall between mandated domestic and other domestic and international services, and between operations that relate to goods, services and IT.

3. The non-discrimination rule cannot restrict the temporary response of a government or an SOE to a national or global economic emergency.\textsuperscript{382} This provision is designed to protect the kind of bailouts the US made during the global financial crisis. It doesn’t extend to responses to other emergencies, such as natural disasters or civil strife, which would be relevant for transportation SOEs; in those situations, governments would have to rely on the inadequate general exception, discussed in Part 3.

4. The limited exception for government procurement, discussed above in relation to the core text, would also apply to the SOEs.\textsuperscript{383}

\textsuperscript{379} TiSA, Article X.5, Annex on State-Owned Enterprises, dated November 2016
\textsuperscript{380} TiSA, footnote 4, Core Text, dated 14 July 2016
\textsuperscript{381} TiSA, Article X.2.1 and X.4, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016]
\textsuperscript{382} TiSA, Article X.7.3, Annex on State-Owned Enterprises, dated November 2016
\textsuperscript{383} TiSA, Article X.2.6, Annex on State-Owned Enterprises, dated November 2016
### SERVICES SECTORAL CLASSIFICATION LIST

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|   store and forward, store and retrieve | |
|   m. Code and protocol conversion | n.a. |
|   n. On-line information and/or data processing (incl.transaction processing) | 843** |
|   o. Other | |
| D. Audiovisual services | |
|   a. Motion picture and video tape production and | 9611 |
| "The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list."
| "The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523)."
### 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES

| A. General construction work for buildings | 512  |
| B. General construction work for civil engineering | 513  |
| C. Installation and assembly work | 514+516 |
| D. Building completion and finishing work | 517  |
| E. Other | 511+515+518 |

### 4. DISTRIBUTION SERVICES

| A. Commission agents' services | 621  |
| B. Wholesale trade services | 622  |
| C. Retailing services | 631+632, 6111+6113+6121 |
| D. Franchising | 8929  |
| E. Other |  |

### 5. EDUCATIONAL SERVICES

| A. Primary education services | 921  |
| B. Secondary education services | 922  |
| C. Higher education services | 923  |
| D. Adult education | 924  |
| E. Other education services | 929  |

### 6. ENVIRONMENTAL SERVICES

| A. Sewage services | 9401  |

### 7. FINANCIAL SERVICES

| A. All insurance and insurance-related services | 812**  |
| a. Life, accident and health insurance services | 8121  |
| b. Non-life insurance services | 8129  |
| c. Reinsurance and retrocession | 81299*  |
| d. Services auxiliary to insurance (including broking and agency services) | 8140  |
| B. Banking and other financial services (excl. insurance) |  |
| a. Acceptance of deposits and other repayable funds from the public | 81115-81119 |
| b. Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction | 8113  |
| c. Financial leasing | 8112  |
| d. All payment and money transmission services | 81339**  |
| e. Guarantees and commitments | 81199**  |
| f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:  
  - money market instruments (cheques, bills, certificate of deposits, etc.)  81339**  
  - foreign exchange  81333  
  - derivative products incl., but not limited to, futures and options  81339**  
  - exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.  81339**  
  - transferable securities  81321*  
  - other negotiable instruments and financial assets, incl. bullion  81339**  
  - participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues  8132  
  - money broking  81339**  
  - asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services  81323*  
  - settlement and clearing services for financial assets, incl. securities, derivative products, or other negotiable instruments  81339**  
  - advisory and other auxiliary financial | 8119+**  
  - and other negotiable instruments  81319**  
  - and other negotiable instruments  8131*  
  - and other auxiliary financial  8131 ** |
## The trouble with TiSA

Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy. Provision and transfer of financial information, and financial data processing and related software by providers of other financial services.

### C. Other

8. **HEALTH RELATED AND SOCIAL SERVICES (other than those listed under 1.A.h-j.)**

   **A. Hospital services**
   
   **B. Other Human Health Services**
   
   **C. Social Services**
   
   **D. Other**

9. **TOURISM AND TRAVEL RELATED SERVICES**

   **A. Hotels and restaurants (incl. catering)**
   
   **B. Travel agencies and tour operators services**
   
   **C. Tourist guides services**
   
   **D. Other**

10. **RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)**

   **A. Entertainment services** (including theatre, live bands and circus services)
   
   **B. News agency services**
   
   **C. Libraries, archives, museums and other cultural services**
   
   **D. Sporting and other recreational services**
   
   **E. Other**

11. **TRANSPORT SERVICES**

   **A. Maritime Transport Services**

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<table>
<thead>
<tr>
<th>Services</th>
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<tbody>
<tr>
<td>a. Passenger transportation</td>
<td>7211</td>
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<tr>
<td>b. Freight transportation</td>
<td>7212</td>
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<tr>
<td>c. Rental of vessels with crew</td>
<td>7213</td>
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<tr>
<td>d. Maintenance and repair of vessels</td>
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<tr>
<td>e. Pushing and towing services</td>
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<td>f. Supporting services for maritime transport</td>
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**B. Internal Waterways Transport**

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<td>a. Passenger transportation</td>
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<td>7222</td>
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<td>c. Rental of vessels with crew</td>
<td>7223</td>
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<td>d. Maintenance and repair of vessels</td>
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<td>e. Pushing and towing services</td>
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<td>f. Supporting services for internal waterway transport</td>
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**C. Air Transport Services**

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<tr>
<td>a. Passenger transportation</td>
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<td>c. Rental of aircraft with crew</td>
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<td>d. Maintenance and repair of aircraft</td>
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<td>e. Supporting services for air transport</td>
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**D. Space Transport**

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**E. Rail Transport Services**

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<td>a. Passenger transportation</td>
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<td>b. Freight transportation</td>
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<td>c. Pushing and towing services</td>
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<td>d. Maintenance and repair of rail transport equipment</td>
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<td>e. Supporting services for rail transport services</td>
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**F. Road Transport Services**

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<tbody>
<tr>
<td>a. Passenger transportation</td>
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<td>b. Freight transportation</td>
<td>7123</td>
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<td>c. Rental of commercial vehicles with operator</td>
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<td>d. Maintenance and repair of road transport equipment</td>
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<td>e. Supporting services for road transport services</td>
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**G. Pipeline Transport**

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<tr>
<td>a. Transportation of fuels</td>
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<tr>
<td>b. Transportation of other goods</td>
<td>7139</td>
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**H. Services auxiliary to all modes of transport**

<table>
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<tr>
<th>Services</th>
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<tbody>
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<td>b. Storage and warehouse services</td>
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<tr>
<td>c. Freight transport agency services</td>
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<tr>
<td>d. Other</td>
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</table>

**I. Other Transport Services**

**J. OTHER SERVICES NOT INCLUDED ELSEWHERE**