Statement on the goals and principles
of the Trade in Services Agreement (TISA)

Introduction

1. The Trade in Services Agreement is being negotiating among a group of World Trade Organization (WTO) members, self-defined as the "Real Good Friends of Services" and include Australia, Canada, Colombia, Costa Rica, the European Union, Hong Kong, Israel, Japan, Mexico, New Zealand, Chile, Norway, Peru, South Korea, Switzerland, Taiwan, Turkey, the United States, Pakistan, Iceland and Paraguay.

2. TISA must not be an 'early harvest' of the Doha round or serve advanced countries to get around the developmental goals and mandate given to the WTO in Doha. By concluding a major services agreement, the negotiating power of developing countries seeking access and equitable trade in agricultural –and other- markets is reduced. This should be compensated in the WTO.

3. The agreement aims at providing new market access to and by the Parties, creating a level playing field for foreign and domestic investors, as well as creating conditions of 'competitive neutrality' between public and private sector. The agreement is to impose regulatory disciplines on public and other services and decrease regulation across the board.

4. The negotiations are taking a positive-list approach in making offers for market access; therefore, states will have to name sectors they would commit to open. A negative-list approach is taken on national treatment, which means that states must name sectors that they wish to exclude from providing foreign capital treatment not less favourable than domestic capital. The negative list approach would create on-going liberalisation processes, and it is bound to reduce room of manoeuvre for social, labour, consumer protection and other regulations on national, regional and local level. The union movement calls for a positive list approach on all matters.

A comprehensive assessment of the agreement's impact on environment, and on economic and social development, is a prerequisite for informed negotiations.

5. In light of this, the trade union movement urges that before commencing, the governments should conduct a comprehensive assessment of the agreement's impact on environment, and on economic and social development. They should examine the agreement in the light of financial market weaknesses and instability, a persisting jobs crisis, growing inequalities, the need to obtain affordable access to public goods and services, tackle climate change and other major challenges.

6. In particular, the governments must demonstrate based on research and assessment how the TISA would create benefits for all. The research should take into account negative effects as well as the possible distribution of gains and risks among the population of the different countries.

Transparent and accessible negotiations are essential to democracy and inclusion.

7. The global trade union movement calls for transparent negotiations. The process should be accessible by civil society and interest groups so as to increase the probability of a fair, inclusive and relevant agreement to all. The negotiations should not start before the analysis of assessed impact is completed, and enough time should be provided.

8. In addition, making trade inclusive has been stated as a global goal in several international fora and processes, and should be a consideration for any agreement.

The international trade union movement urges the negotiating governments to adopt the following principles and pledges in the negotiations:

Uphold regulatory sovereignty to ensure high standards.

9. It is imperative that governments retain their ability to regulate to achieve public goals, like environment protection, social security, securing public health, financial stability, and protecting workers and consumers. The agreement must not impose downward harmonisation of standards.

10. Also, some Parties may propose that regulatory assessment processes are established on national and international level. However, the TISA must respect the cultural values reflected in different regulations, as well as the sovereign and democratic right of governments to use regulation when it is deemed necessary under their own criteria.

Standstill and ratchet clause would irreversibly limit policy space.

11. Apart from the negative-list approach in national treatment, some governments want to achieve an irreversible standstill on the current level of liberalisation in services. They have also called for a ratchet clause, meaning that once a market opens, it would be automatically locked in the agreement and subject to further liberalisation in the future. In a world of increasing social and sovereign emergencies, these approaches would limit policy space that would otherwise be available consistent with current WTO rules.

12. Combined with considerable consequences for leaving the treaties, ratchet rules bind future generations to the decisions made by current ones in a way that creates intergenerational inequity. Further, it is fundamentally undemocratic to bind future governments to the decisions of current governments. Evidence from different countries shows that liberalisation and privatisation can have negative effects. In such cases it must be possible to revoke measures of liberalisation and privatisation.

Financial services commitments should guarantee financial stability.

13. Financial services commitments should neither undermine financial stability nor provide legal coverage for excessive risk taking, speculation and other common damaging behaviour of banks and capital pools. IMF research clearly shows that sustaining an adequate level of capital controls to intervene in harmful fluctuations of capital movement and protect the balance of payments is necessary[1]. Also, there should be no restriction for measures of sovereign nature against systemic failures in the fiscal, monetary or financial sector. Preserving regulatory space for governments, including prudential financial regulations, would allow for rapid and effective reactions to market failures, and it would contribute to the stability of the global economic system. The financial crisis demonstrated that instead of further liberalisation and deregulation, governments must bring back the rules and regulation on the financial markets.

Achieving and maintaining universal access to high quality public services should be central to the agreement

14. TISA rules, when applied to public services like education and health care, threaten to lock-in and intensify the pressures of commercialisation and privatisation. Replacing state with private provision of public services has most often demonstrably lowered quality of services, worsened working conditions and wages for service workers, and excluded the poorest – and often those geographically isolated and too remote from access to services to make service delivery profitable. When provided by the state, services provision is subject to democratic control and is sensitive to social goals. Most importantly, state provision has a role to play in achieving universal access to public services, in poverty alleviation and in addressing gender and economic inequality. Therefore, the agreement needs to protect and promote public services by allowing for broad carve-outs and exemptions. In particular, basic public services like public health,

[1] IMF, *The Liberalization and Management of Capital Flows - An Institutional View*, available at: http://www.imf.org/external/pp/longres.aspx?id=4720

education, water supply, public transport, basic energy supply, supply of basic telecommunications should be excluded from the TISA negotiations.

15. Public services also play a major role in sustaining economic growth. Reducing inequality is increasingly understood to contribute to economic growth; the public sector continues to be the best remedy for tackling income inequality. Providing transparent and accountable legal and regulatory systems free from corruption and private self-interest is essential to economic development. Education, health, social services as well as public infrastructure and utilities promote human, social, cultural and economic development, and help address important market failures and externalities. Public sector provision, not market competition, is the most efficient way to provide most of these services. Many public services are also critical for national security. Moreover, public sector spending provides important automatic stabilisers in times of economic downturn.

16. Likewise, the agreement must not promulgate regulatory restraints and disciplines that would lower the quality of services, reduce access or affect working conditions adversely. Attempts to foster the so called 'competitive neutrality' and other principles aiming at giving more rights to private providers must always take into account in their design and implementation the broad interests of the society. Public services provisions should be based on social solidarity and these provisions should aim at promoting human development for all.

17. In this regard, anchoring the agreement in GATS rules is problematic. GATS Article I:3 provides an extremely narrow definition of public services as services *"supplied in the exercise of governmental authority"* and this *"means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers"*. In other words, if a government service is provided on a commercial or for-fee basis, or if there are other suppliers that compete for clients and revenues, the service may not benefit from this general exclusion. In virtually all participating countries, essential public services such as water provision, health services, education and public transportation are provided on a commercial basis even when provided by the state – and even if not entirely centred on profit maximisation. Consequently, countries participating in TISA need to ensure clearer and broader carve-outs and exemptions for public services.

18. A similarly narrow TISA public services definition would limit the breadth of services that can be excluded from the agreement's regulatory disciplines, market access commitments and competitive neutrality requirements. The Parties must not take market opening commitments or agree to new disciplines in any public services sectors, including education, healthcare and social services. **Any agreement must provide wide exceptions and carve-outs, and allow regulatory and policy space to pursue public policy goals**. Nothing should be agreed that would create barriers or disincentives to the return, broadening or establishment of direct delivery of public services by the public sector.

Investor-to-state dispute resolution would prove to be catastrophic for policy space. Investors have responsibilities, and they need to be spelled out and enforced.

19. There must be no investor-to-state mechanism for the resolution of any type of disputes arising from the provisions or the interpretation of the agreement. The unions encourage the Parties to reject any jurisdiction other than intergovernmental dispute settlement for investor protection because investor-to-state mechanisms give private companies the unjustifiable possibility to circumvent regular independent national and international courts and to attack sensible public policies. Furthermore, the definition of investment, property, real estate, and all forms of expropriation as well as fair and equitable treatment should be realistic and appropriate.

20. If the agreement is to make investors' protection subject to intergovernmental dispute settlement, all policies, regulations and laws on labour, environment, public services, competition and anti-

corruption as well as court decisions and case law should be exempted from the scope of application.

21. Investors have responsibilities, and they need to be spelled out. The agreement should *"require that investors comply with host State laws at both the entry and the post-entry stage of an investment"* and if they fail to do so *"deny treaty protection to investments made in and operating in violation of those host State laws that reflect international legally binding obligations (e.g., core labour standards, anti-corruption, environment conventions) and other laws as identified by the Contracting Parties"* or *"provide for States' right to bring counterclaims in ISDS [investor-to-state dispute settlement] arising from investors' violations of host State law"*.[2]

22. Moreover, in deciding on investment, the governments need to take into account the 'chilling effect' that a threat of use of ISDS has on national policy-making.

Natural presence for the provision of services is not appropriate.

23. Mode IV of provision of services through the presence of natural persons is not the appropriate way to furnish labour to businesses or provide services directly to consumers. Depending on the arrangements, Mode IV provisions risk promoting exploitative labour relations for migrants and put pressure on local wages and working conditions.

24. Policies on migratory flows should be coherent with social protection policies and address relevant human rights issues. The policies' effectiveness in protecting migrants should be guaranteed with strong rule of law and high enforcement capacity. To address these aspects of migration, immigration policy is the appropriate regulatory tool. Migration policies should be based on long-term work permits with full freedom to change employers and without dependence in order to avoid violations and exploitation.

25. However, if negotiations are going to address cross-border provision of services under Mode IV, binding and time-effective instruments are imperative in order to ensure equal rights and equal standards in terms of payment and working conditions. The place of work principle must be applied from the beginning to all posted workers, if it is beneficial to them. Moreover, the agreement must include strong administrative and juridical cross-border cooperation with well-resourced institutions and access to dispute settlement.

Enforceable labour standards would guarantee a floor of convergence.

26. The agreement should provide for full protection of the human rights of workers and subject to international dispute settlement. ILO Fundamental Principles and Rights at Work Conventions, safety and health Conventions, acceptable conditions at work and existing labour laws and regulation should be enforceable in parity with commercial disputes and equal level of benefits suspension. The ratification and effective implementation of these ILO Conventions as well as the ILO Inspection Conventions must also be a prerequisite for any country who wants to participate to TISA. If not so, TISA risks becoming a vehicle for a downward spiral on social conditions in services supplying enterprises.

27. The agreement should also establish a multi-Party dispute settlement procedure accessible by the public that would make violations of internationally recognised labour standards actionable across service supply in global chains including in trade in tasks. Cases could be submitted on the basis of expectation for responsible business behaviour set out in the OECD Guidelines on MNEs, the ILO Tripartite Declaration on MNEs and the UN Guiding Principles on Business and Human Rights. The procedure would be able to impose penalties on investors and corporations

[2] UNCTAD, 'Investment Policy Framework for Sustainable Development', *Policy options for international investment agreements (IIAs), Investor obligations and responsibilities, 7.1.1.*, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf

including fines, compensation, suspending market access, cancelation of contracts and exclusion from contracts for a period. These penalties would then be enforced by governments.

28. The mechanism should also establish similar procedures for cases of corruption and environmental harm based on these and other instruments. The procedure should take into account the National Contact Points and related procedures established by countries adhering to OECD guidelines.

An established and resourceful capacity building mechanism would facilitate gradual convergence.

29. The agreement should foresee an established and resourceful capacity-building mechanism with a view to achieve permanent improvements in adherence to labour standards.

States must be able to use procurement to develop their economies and create jobs

30. Government procurement should not be included in the agreement. Government procurement has strong potential to create growth and jobs and protect and improve respect of labour standards (as provided in ILO Convention 94). Fiscal stimulus has better results when it is spent in a coordinated and targeted way in the local and national economy. Either way, government procurement is covered by the WTO Government Procurement Agreement, so by no means Parties to the two agreements should be obligated to undertake further commitments in government procurement.

31. Trade unions believe that in case tendering is to be covered, commitments must not be taken on subnational level. Moreover, the agreement should stipulate that the environmental, labour and corruption records of bidders should be considered in deciding the provider. Bad records should be adequate reason for losing a bid. Reversely, a good responsibility record should be considered as an advantage in selecting the provider.

Privacy and data security need to be ensured.

32. E-commerce and internet-based commercial services involve data processing, storing and transferring. The agreement should put in place a strong legal and enforcement framework to protect users' privacy and security.

Concluding…

The TISA negotiations should be ***open to the public*** and based on ***well-researched*** impact assessments and estimations reflecting different existing views and scientific approaches. The negotiations should take into account the multifaceted crisis, growing inequalities, persisting poverty and aim at making an agreement that would benefit the people. The participating countries need to ***maintain adequate policy space***, *also with flexibilities*, to pursue development, defend against economic and social dangers as well as protect the environment.

In this respect, the importance of

(i) **promoting labour standards**,
(ii) **guaranteeing quality public services accessible to all** and
(iii) **protecting the national interests and people's sovereignty from financial instability and corporate power**

should be central to the agreement.

To this end, the agreement requires ***a binding and enforceable chapter on sustainability covering labour and environment subject to the dispute settlement mechanism***. The ratification and effective implementation of internationally recognised fundamental labour standards and environmental standards is imperative.