Applying the human rights framework to economic policy:

Insights from an impact assessment of services trade liberalization in Mauritius

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# Abstract

This article sets out the methodology and findings of a Human Rights Impact Assessment (HRIA) of the Trade in Services Agreement (TiSA) for Mauritius. It presents a legal analysis of possible impacts of services trade liberalization and deregulation on the right to water, on labour rights and on labour migration. Through examining impacts of trade-related policies through the lens of human rights law, this article brings to the fore how a HRIA can strengthen trade policy-making, and how it can provide African negotiators and other stakeholders with legal and conceptual arguments to strengthen their positions in economic negotiating contexts that are often highly complex. The article is a contribution to the literature in that it provides insights into the underexplored area of human rights impacts of liberalization of trade in services, and in that it illustrates through specific examples, how the human rights analytical framework can be applied to services trade negotiations in other fora, and to economic policy more broadly.

**Keywords:** Mauritius, international trade, trade in services, human rights impact assessment, economic, social and cultural rights, right to water, right to work, women’s rights, rights of persons with disabilities, labour migration.

# I Background

## Context

In 2015 Mauritius joined the group of countries negotiating the Trade in Services Agreement (TiSA), becoming the first, and only, African country to do so.[[2]](#footnote-3) TiSA aimed to increase liberalization of international trade in a broad range of services, including financial services, energy, tourism, healthcare, retail, accounting, parcel delivery and various types of transport. Even though Mauritius’ services sectors were already open to national and international competition, the decision to join the negotiations drew strong criticism from some quarters. For this reason a social and human rights impact assessment of the draft agreement was commissioned.[[3]](#footnote-4)

## Mauritius, economic and social development

In spite of its small economic size, low endowment of natural resources, and remoteness from world markets, Mauritius has transformed itself from a poor sugar economy into a middle-income country. It is now one of the most successful countries in Africa, on economic, social and political measures. Indeed, defying dire predictions for its future,[[4]](#footnote-5) Mauritius has recorded high growth rates and sustained increases in human development indicators.[[5]](#footnote-6) It consistently scores well on the Human Development Index (HDI) coming in 65th out of 189 countries and territories.[[6]](#footnote-7)

This success has been attributed to a range of factors, amongst which the country’s strong institutions, a stable social and political climate, investment in education, human capital and social welfare, and receptivity and adaptability to new situations and economic opportunities, in particular those offered by international trade.[[7]](#footnote-8)

Since the 1960s, successive Mauritian governments have pursued a strategy of diversification away from agriculture and into manufacturing and services, particularly tourism, real estate and financial services. By 2016, the services sector was the largest contributor to the country’s GDP, at around 75 %, followed by manufacturing at 21 %, and agriculture at four percent. The services sector is continuing to grow in importance,[[8]](#footnote-9) and constitutes an important part of the Mauritian government’s strategy to foster inclusive growth and reach the high-income country milestone.[[9]](#footnote-10)

## Liberalisation of trade in services

Services make up the majority of economic activity in most countries, affecting virtually all aspects of life and society. Important in their own right, they also serve as crucial inputs into the production of most goods. Services represent the fastest growing sector of the global economy and account for two thirds of global output, one third of global employment and nearly 20 % of global trade.[[10]](#footnote-11)

Those in favour argue that trade liberalization in the area of services is just as efficiency-inducing as for goods. The rationale for this is that open markets encourage competition among producers and service suppliers, thus inciting efficiency and innovation, and offering consumers wider choice at better prices. Critics, however, say that rules on services trade liberalization are driven by large international corporations, whose lobby groups are seen as wanting to restrict government regulations, including public interest regulations, so as to facilitate the entry of global service corporations into all countries’ domestic markets.[[11]](#footnote-12)

Indeed, whilst barriers to trade in goods tend to be imposed at the border through means such as import tariffs, quotas, or inspection procedures, the “barriers” to cross-border trade in services are national and local regulations, such as licensing requirements or standards. Thus, efforts to remove obstacles to international services trade necessarily touch on areas of domestic policy.

Agreeing on rules for trade in services is a difficult and complex endeavour. Their intangible and in some cases, rapidly-evolving nature contributes to this.  Rapid progress in information and communications technologies (ICT) is driving services trade by facilitating international transfers of goods and services, but ongoing innovation and changes in the technical elements involved constitute a challenge to anticipating what appropriate regulation should be or how it should be applied.[[12]](#footnote-13) Added to this, the difficulties inherent in quantifying the costs and benefits of a regulation’s existence make it harder to negotiate international trade liberalization in services than in goods.

The defining global effort to liberalize trade in services worldwide is the World Trade Organization (WTO)’s General Agreement on Trade in Services (GATS), which came into force in 1995 and established the framework for services trade liberalization that is still used today. As WTO negotiations ground to a halt in the 2000s, those countries wanting to further open up countries’ markets for trade in services turned to other international fora. We now see provisions on trade in services in bilateral, regional and mega-regional trade agreements.

## The Trade in Services Agreement

Figure 1 about here.

Talks towards a standalone Trade in Services Agreement (TiSA) were launched in 2012, gathering some twenty countries and the European Union, who, together, account for approximately 70 % of world trade in services.[[13]](#footnote-14) TiSA’s sectoral scope is vast, but its real source of innovation lies in its proposed regulatory provisions.[[14]](#footnote-15) These address the “barriers” to cross-border trade in services that regulations pose. Such barriers include foreign ownership restrictions, recognition of qualifications obtained in other countries, licensing requirements, administrative processes, local language requirements, environmental, labour or quality standards, financial regulations, universal service obligations, or measures in favour of public services.

TiSA’s structure is based on GATS, and has three elements. The first is the Core Text,[[15]](#footnote-16) which contains general obligations and disciplines which apply across all services sectors. A number of annexes set out rules that are specific either to particular sectors (such as telecommunications or energy-related services) or to governmental regulation. The third element is made up of individual countries’ “schedules” which lists their specific, negotiated, commitments to allow access to their markets in particular sectors.

TiSA, like GATS, is based on three principles: national treatment, market access and most-favoured nation treatment. National treatment means that, in sectors where a government has made commitments in its schedule, it must treat services and service suppliers of other parties to the agreement no less favourably than it treats its own, either in law or in practice. If a country makes market access commitments in a sector, this precludes them from limiting the number of suppliers or the value of services, nor can they require that service suppliers take a specific legal form. If a country has not specifically anticipated them in advance, such measures are prohibited even if they apply equally to foreign and domestic service suppliers. Most-favoured nation treatment requires that a country accord to services and service suppliers of any other country treatment no less favourable than that it accords to like services and service suppliers of any other country.[[16]](#footnote-17)

TiSA “locks in” limits on countries’ ability to regulate service providers more than GATS does, in a number of ways. For example, whilst GATS applies the national treatment and market access obligations to a sector only if a country has specifically made a commitment in that sector (known as the “positive list” approach), TiSA applies the national treatment obligation to all sectors that a country has not specifically excluded through its schedule. The standstill and ratchet clauses, discussed below in section IV.D further limit governmental regulatory flexibility in a way that has drawn much questioning and criticism.[[17]](#footnote-18)

Much has been written about the wide scope, stringency and uncertainty of TiSA. Some of these aspects will be analyzed in sections IV, V and VI below. Suffice it to say here that TiSA is extremely complex and even seasoned negotiators and services trade experts are unsure of how its various provisions would play out in practice.

In late 2016, after several negotiating rounds TiSA negotiations were suspended, mainly due to uncertainty about the US position and no-one now expects them to resume. The analysis presented in this article remains relevant, however, as the question of how to discipline domestic regulations affecting trade in services is live in a number of negotiating fora, including the African Continental Free Trade Area,[[18]](#footnote-19) APEC,[[19]](#footnote-20) and the WTO where two parallel processes are underway. In one, the full WTO Membership is considering a number of domestic regulation issues with a particular focus on Mode 4,[[20]](#footnote-21) whilst a plurilateral process, spearheaded by the richer economies, seeks adoption of many of the provisions that were controversial in the TiSA context.[[21]](#footnote-22) The African Group and other developing countries are highly critical of the plurilateral process, with one official noting that there is, in the WTO a “concerted effort to handcuff governments’ ability to regulate.”[[22]](#footnote-23)

# II Why a Human Rights Impact Assessment

## Impact Assessment

Impact assessments are policy tools that provide a structured approach to gathering and analysing evidence that can be used to contribute to sound, evidence-based and transparent trade negotiations.[[23]](#footnote-24) Assessments can be carried out for economic, environmental, social, human rights, health or other effects.

Social and human rights assessments introduce qualitative elements, providing insights that a quantitative approach alone cannot. They focus on process as well as outcomes and pay attention to differential impacts of proposed interventions and their potential impacts on the most vulnerable or marginalized sectors of the population that other types of impact assessments may overlook. Through ensuring participation in the policy-making process as well as in the impact assessment itself, social and human rights impact assessment ensures that a wide range of views and impacts are taken into account. Indeed, even if economic models’ assumptions and predictions are relatively accurate (which is not always the case),[[24]](#footnote-25) it is impossible to foresee with certainty how new policies will play out. Considering a wide range of perspectives prior to agreeing new trade-related provisions can shine a light on a range of effects of a given policy, and so contribute to pre-empting errors and oversights and planning compensatory mechanisms in advance.[[25]](#footnote-26)

Human rights impact assessment methodology is rooted in a clearly defined legal and analytical framework: international human rights law. This particularly pertinent when considering impacts of TiSA in Mauritius as the country has ratified most of the relevant international human rights instruments. The other TiSA negotiating parties also have human rights obligations (see Figure 2) which they must honour domestically as well as through their international agreements. Thus the human rights framework also offers a tool that Mauritius can bring to bear in future rounds of negotiations on trade in services, whether in the TiSA framework or elsewhere.[[26]](#footnote-27)

Figure 2 about here.

## The Human Rights Analytical Framework

All human rights impose a combination of negative and positive duties on States, which can be understood via the “respect, protect and fulfil” framework. The duty to respect requires that States refrain from interfering directly or indirectly with the enjoyment of human rights. This entails that States must not enter into trade arrangements that oblige them to implement measures that would impact negatively on human rights. The duty to protect requires the State to take positive measures to guard individuals’ and groups’ rights against abuse. The duty to fulfil requires States to take action towards the facilitation of basic human rights.[[27]](#footnote-28)

Human rights law recognises that it may not be possible for a State to realise all human rights (such as the right to food or the right to work) immediately. But some obligations are immediate: these include taking steps towards the progressive realisation of human rights, ensuring respect for minimum core elements of human rights, preventing discrimination in the enjoyment of human rights and monitoring progress towards realisation.

Taking steps involves devising specific strategies and programmes and implementing legislative measures **which must be “deliberate, concrete and targeted.”**[[28]](#footnote-29)towards the full realisation of the rights to which the country has committed. The obligation to take steps entails a prohibition on retrogression, that is, measures that directly or indirectly lead to backwards steps in the enjoyment of human rights are not allowed.[[29]](#footnote-30) The obligation to take steps is closely linked to the obligation to monitor. This is so as an essential first step towards improving enjoyment of economic, social and cultural rights is diagnosis and knowledge of the existing situation. In the trade policy context, this obligation points to the need for trade and trade-related policies and measures to be based on awareness of their likely impacts.

Importantly, human rights law also requires respect for a number of procedural principles, such as the rights to information, to freedom of expression, to participation in decision-making and in public affairs, and the right to effective remedies.

# III Methodological Approach

Methodologies for human rights impact assessment of trade-related processes include the steps of preparation, screening, scoping, evidence-gathering, analysis, consultations, and recommendations, followed in some cases by further evaluation and monitoring.[[30]](#footnote-31) For the HRIA of TiSA for Mauritius, the following steps were carried out.

## Preparation

This involved taking cognizance of work already done relating to TiSA and its possible impacts on Mauritius. The primary documents consulted were the draft TiSA Core Text and Annexes, as well as those countries’ offers that were publicly available. Other documents included the Mauritius Ministry of Foreign Affairs’ Briefing Note on TiSA,[[31]](#footnote-32) the Sustainability Impact Assessment (SIA) of TiSA commissioned by the European Union (EU),[[32]](#footnote-33) and a critique of the EU SIA.[[33]](#footnote-34)

As little research has been done on possible human rights impacts of TiSA in Mauritius or elsewhere, publications analyzing social and human rights impacts of liberalisation of trade in services were consulted.[[34]](#footnote-35) Also taken into account were writings relating to the rationale behind TiSA,[[35]](#footnote-36) legal analyses of its draft texts[[36]](#footnote-37) and articles relating to regulation, attraction of foreign investment and related topics.[[37]](#footnote-38)

## Screening and scoping

Screening and scoping aim at identifying the human rights impacts associated with the specific elements under negotiation. As this was an *ex ante* impact assessment, and the final text of TiSA was not known, the analytical work was based on the draft texts and offers as they stood in early 2018. Priority was given to stakeholder consultations during the screening and scoping phase, to discern what concerns were being expressed in Mauritius about TiSA’s impacts. In parallel, a range of documents about economic, social and human rights conditions in Mauritius were consulted. This exercise resulted in an initial identification of some possible TiSA-related impacts on human rights (see Figure 3). Following this, a more detailed analysis of possible vulnerable groups was undertaken in order to narrow down the measures to be assessed. Consistent with human rights methodology, this step considered pre-existing conditions of vulnerability, and the risk that TiSA could result in (direct or indirect) discriminatory impacts on groups who are already vulnerable.

Figure 3 about here.

The review of literature undertaken in the preparation phase revealed four areas of public interest-based concerns relating to services trade liberalization: transparency, regulation, labour standards and free movement of data. Given time and resource constraints it was decided to focus the HRIA on (1) the right to regulate, public services and the right to water (2) TiSA, employment and the right to work and (3) transparency and participation in TiSA negotiations.[[38]](#footnote-39) The screening and scoping exercise drew attention to the labour market structure and to wage inequality as significant contributors to economic and social vulnerabilities. Noting that young people experience substantially worse labour-market outcomes than the rest of Mauritius’ population,[[39]](#footnote-40) that women remain subject to de facto discrimination in economic and social life[[40]](#footnote-41) and that Mauritius has taken some laudable steps in favour of employment for persons with disabilities, it was decided that the assessment would pay particular attention to factors that can disproportionately affect women, youth and persons with disabilities.

## Evidence-gathering, analysis and recommendations

The impact assessment relied on secondary materials and in-person interviews. Once a baseline had been established with regard to the issue areas considered, indicators were identified. The analysis entailed considering the available data by reference to the human rights legal framework. Due to its *ex ante* nature, some of the analysis had to be based on hypotheses about what provisions TiSA would include and possible impacts of the agreement. The analysis permitted recommendations to be offered to the Mauritian government and other stakeholders.

## Indicators

Indicators serve to measure a State’s commitment to its human rights obligations and the efforts undertaken to meet those obligations. A cluster of both quantitative and qualitative indicators is useful to measure different facets of compliance with human rights obligations, including conduct (process) and result. Identification of measurable indicators helps gage enjoyment of a human right at the present time and offer points for consistent ongoing assessment of how enjoyment of specific rights is evolving over time.[[41]](#footnote-42) The HRIA described in this article identified relevant indicators, which can be used by government, civil society actors or others interested in assessing the impacts in Mauritius of TiSA or other economic policies on the rights the HRIA focused on.

# IV Public Services and the Right to Water

One of the most frequent criticisms heard in Mauritius about TiSA was that it would result in opening up public services to foreign, commercial service providers. This section scrutinizes this concern from a human rights perspective in relation to access to drinking water.

## The right to water

The right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordablewater for personal and domestic uses.[[42]](#footnote-43) As noted in Section II.B above, States must “take steps” towards the realization of the right to water, must ensure non-discrimination in access to water and water facilities, and must monitor the situation with regard to realization of the right to water**.**[[43]](#footnote-44)The human rights framework does not specify how people should be provided with water, nor who is to provide the service that ensures the right; the service provider can be public, private or mixed.However, States retain the responsibility to respect, protect and fulfil the right to water even when private actors are involved. The State’s role involves regulating water provision, monitoring, and ensuring accountability.[[44]](#footnote-45)

The right to water has been recognized by a resolution of the United Nations (UN) General Assembly,[[45]](#footnote-46) and in international human rights instruments to which Mauritius is a party. Bodies in which Mauritius participates, including the African Commission on Human and Peoples’ Rights and the UN Committee on Economic, Social and Cultural Rights (CESCR) have further reiterated this right. In its 2015 report to the CESCR, Mauritius reported on its implementation of the right to water.[[46]](#footnote-47)

## Enjoyment of the right to water in Mauritius[[47]](#footnote-48)

Mauritius has a clear legal and regulatory framework concerning water distribution and implements a range of programmes and measures to ensure availability, accessibility, affordability and quality of potable water. It collects information about access to piped potable water and the proportion of household budgets spent on water, with much of the relevant data being available in Statistics Mauritius’ SDG database.[[48]](#footnote-49) Despite these strong commitments, shortcomings in the legal protection of economic, social and cultural rights (ESCR) remain; notably the lack of constitutional protection for ESCR,[[49]](#footnote-50) the absence of an explicit mandate for the NHRC to consider ESCR issues and apparent lack of human rights-based redress processes if a person is deprived of ESCR.

Over 99 % of the Mauritian population has access to piped potable water for at least an hour a day, of which some 61 % receive 16-24 hour service.[[50]](#footnote-51) The Mauritian government is aiming for the whole population to have continuous access to piped potable water[[51]](#footnote-52) and press reports suggest that there is progress towards this goal, although reports also indicate interruptions in piped water supply due to low reservoir levels or faulty pipes,[[52]](#footnote-53) and customers express high levels of dissatisfaction with service.

The Central Water Authority (CWA, a parastatal body) is responsible for water supply in Mauritius. CWA-supplied potable water complies with World Health Organisation (WHO) norms and with the drinking water standards set by the Ministry of Environment.[[53]](#footnote-54) Water quality is regularly monitored to detect contamination.

CWA boasts that “our water charges are one of the lowest in the world.”[[54]](#footnote-55) UNDP says that the cost of water should not take up more than three percent of median household income.[[55]](#footnote-56) In 2017 ‘Housing, water, electricity, gas and other fuels’ accounted for 11 % of household consumption expenditure,[[56]](#footnote-57) which suggests that the cost of water in Mauritius is within the UNDP suggested price bracket. These figures do not indicate whether water accounts for a higher proportion of household expenditure for poor households. But we do know that pro-poor measures are in place: the government provides grants to low income families for the purchase of water tanks, and households which consume less than 6m3 of water are exempted from payment of water charges.[[57]](#footnote-58)

Population growth, increased individual water consumption, as well as industrial and commercial development are squeezing water supplies in Mauritius.[[58]](#footnote-59) Pressure on supplies is exacerbated by the ageing pipe network and significant unaccounted-for water use and losses.[[59]](#footnote-60) The Government is mobilising additional water resources, including through building a new dam and increasing reservoir capacity and public campaigns have been organized to encourage efficient use of water. CWA is replacing and rehabilitating old water pipes to reduce water losses and ensure regularity of supply. However CWA’s pricing policy does not engender sufficient funds to do so adequately. These factors have led to recurrent debates about whether potable water supply should be privatized, which crystalized into a 2018 Government decision to appoint a private entity to operate and maintain the potable water distribution system.[[60]](#footnote-61)

The possible entry of a private operator in potable water distribution elicited strident expressions of concern, which deserve careful consideration from a human rights perspective. This section analyses possible impacts of TiSA on the right to water if a private operator enters Mauritius’ water sector. Much of its analysis also has broader application, for instance to other trade or investment agreements, or to assess compliance with human rights of a private operator in other public service sectors.

## What TiSA would – and would not – require[[61]](#footnote-62)

Debates about the successes and failures of privatization in the water sector are heated. Yet there is one point on which both proponents and critics of privatization generally agree: the need for regulation.[[62]](#footnote-63) As TiSA does not require privatization, the question is the extent to which TiSA would permit regulation of potable water provision.

### Would TiSA apply to operation and maintenance of water distribution?

#### TiSA Core Text

A State will retain full leeway to protect its water sector from liberalization, including to regulate it as it sees fit, if the potable water sector does not fall within the scope of TiSA. Therefore one must ask whether TiSA would cover operation and maintenance of water distribution in Mauritius. TiSA’s Core Text says that the agreement does not apply to services supplied in the exercise of governmental authority, specifying that “a service supplied in the exercise of governmental authority" means any service which is supplied “neither on a commercial basis, nor in competition with one or more service suppliers.”[[63]](#footnote-64) So, are public services “supplied in the exercise of governmental authority?”

Mauritius’ Ministry of Foreign Affairs information note on TISA states that the agreement recognises the sovereign right of Parties to regulate and to introduce new regulations regarding the supply of services to meet public policy objectives. Similarly, the European Commission (EC) has said that TiSA will not produce any change in the EU’s obligations relating to public services[[64]](#footnote-65) and the EC-commissioned SIA concludes that TiSA is not expected to have any direct impacts on public services.

But these conclusions differ from those of many, including TiSA negotiators, who view the Core Text wording as being insufficient to exclude public services such as water from TiSA. One reason is that services which are supplied for any form of remuneration could be regarded as being supplied on a commercial basis, and thus not fall within the exclusion. Indeed, expert commentators disagree on whether ‘commercial’ applies only to services conducted for a profit or includes user charges, non-profit cost-recovery and taxpayer-subsidised services.[[65]](#footnote-66) Others say that TiSA’s exclusion only covers governmental activities which can be considered core sovereign functions such as military, police or firefighting services.[[66]](#footnote-67)

As this question has never been definitively settled, it would be wise for Mauritius and others to seek to ensure that this provision be clarified in TiSA and for a where trade in services are under discussion, so as to make it indisputable that the exclusion applies also to private suppliers of public services such as a private operator in Mauritius’ potable water sector.

#### Public service carve-out in the schedule

In addition to seeking to resolve the governmental authority question, it is wise for a country to provide, as other countries have done in services trade agreements, that it reserves the right to adopt or maintain any measure with respect to services provided directly or indirectly by Government for a public purpose, including public utilities.[[67]](#footnote-68) According to some, such wording is sufficient to enable the government to regulate in such a way as to ensure that a private service provider meets the country’s right to water public policy, whether that service provider is foreign or not. If so, including such a carve-out in its schedule would also enable Mauritius to bring potable water distribution and maintenance into public hands after the end of a privatization contract period should it wish to do so.

But views differ on whether this wording can effectively exclude a water sector with a private operator from TiSA’s scope. The EU’s TiSA offer sets out a far more detailed carve-out for public services, which includes an explicit market access limitation on all sectors regarding public utilities. Yet commentators express concern that even the EU’s TiSA offer is not sufficient. One part of the EU offer’s public services carve-out is a clause – known as the “public utilities” clause – which specifies that “services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.” This “public utilities” clause only applies to commercial presence though, and covers only parts of the market access obligation, such as the prohibition of monopolies and exclusive service suppliers.[[68]](#footnote-69) Public services carve-out clauses should thus be carefully crafted to ensure that a government can retain the policy space necessary for developing capacity of national companies, and to bring a privately operated service sector back into public hands if necessary.

TiSA’s so-called “standstill” clause[[69]](#footnote-70) is another potentially harmful clause, as it would lock governments into the level of liberalization in place when TiSA comes into effect. This means that if Mauritius does not clearly exclude the water distribution sector from national treatment and market access obligations and a water distribution and maintenance contract is in the hands of a foreign private operator when TiSA comes into force, it would not subsequently be able to bring the sector back into public hands.[[70]](#footnote-71) Given that the affermage contract, if it does go ahead, will be Mauritius’ first experience with a private operator in the water distribution system, it would be judicious to be able to take stock of the experience at the end of the contract period and make an informed decision as to whether to continue with a partly-privatized system. This future flexibility is all the more relevant given Mauritius’ stated desire to maintain the right to take measures to promote the development of local service suppliers without these measures having to be extended to foreign service suppliers.

Another reason for not concluding that TiSA will not impact on public services is that the agreement covers many services that underpin the operation of public services like water distribution. These include business process management services (financial transaction processing, help desks or customer services), office administrative services (such as reception, billing and record keeping, personnel and mail services) and collection agency services (collection of utility bills and recovery of or purchase of delinquent accounts) not to mention engineering and project management services for water supply and sanitation works.[[71]](#footnote-72) This demonstrates that any country wishing to keep control over the functioning of a public service sector must ensure that it limits the market access and national treatment openings it makes in a very broad range of sectors.

### Can the State regulate services related to potable water distribution?

The objective of TiSA’s limits on domestic regulations is to help foreign businesses find out what regulations apply and to create a clear and transparent procedure for introducing new regulations. TiSA’s Core Text contains a recognition of Parties’ right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their policy objectives. But what TiSA refers to as the *right* to regulate is in fact a *duty* to regulate under human rights law. A State that does not take steps to establish a regulatory framework in line with human rights standards, or that fails to ensure that the minimum essential level of access to potable water is enjoyed by everyone, will not be compliant with its human rights obligations.[[72]](#footnote-73)

Moreover, analysts note that TiSA’s right to regulate provision is, (like that of GATS), deceptive as the agreement can restrict the *ways* in which governments are permitted to regulate services[[73]](#footnote-74) and may not prevail if the disciplines themselves constrain States’ ability to regulate.[[74]](#footnote-75) Strong concern has been expressed that the right to regulate provision is not sufficient to allow TiSA parties to introduce or revise legislation or policies that would be desirable from a social or human rights perspective.

TiSA’s Domestic Regulation Annex (DRA), for example, sets out a range of grounds on which measures or requirements can be challenged, even if these are transparent and do not discriminate between local and foreign service providers. It requires governments to demonstrate that measures,[[75]](#footnote-76) standards or regulations are based on objective and transparent criteria, and that they “are not more trade restrictive than are required to achieve [their] policy objectives.” In addition, the draft DRA suggests that procedures must be “reasonable and not in themselves unduly impair or delay the provision of the service.” The legal meaning of terms like “not more trade restrictive,” “reasonable” and “unduly delay” in this context are not clear[[76]](#footnote-77) which opens up the risk that a regulation, such as an emergency measure aimed at ensuring water quality after flooding could be challenged and resolved in a private company’s favour rather than with the interests of the public in mind.

In the TiSA negotiations, Turkey has proposed that the DRA allow Parties to exercise their right to introduce or maintain regulations in order to ensure provision of public services. This proposal has not met with enthusiastic response. But it is a feasible approach, as evidenced by the Domestic Regulation Annex of the trade agreement between the European Free Trade Area and Hong Kong, which explicitly allows for regulation of universal services.[[77]](#footnote-78)

As noted, a range of service sectors (such as business management services) are relevant to maintaining and operating water distribution, and are unlikely to be considered public services. Unless it specifies clearly the scope of its commitments in all the relevant service sectors in its schedule, Mauritius could be precluded from introducing future regulations in these sectors to further public interest objectives. That it is possible to maintain the necessary regulatory flexibility is illustrated by the fact that in its TiSA offer, Switzerland has entered a limitation on national treatment regarding construction and related engineering services, indicating that it excludes from national treatment “measures with respect to the installation and assembly work related to gas, water and electricity meters, gas pipelines, electricity and main water lines.”

### Subsidising access to water and ensuring universal access

Two measures that the Mauritian Government currently implements in favour of the right to water are grants for low income families to purchase water tanks and the exemption from water charges for households with low levels of water consumption.[[78]](#footnote-79) Would TiSA enable the such measures after a private operator has been granted a contract for water distribution? The answer is probably yes.

One option for doing so would be for Government to provide these grants directly to consumers, if the private operator does not maintain preferential rates for low-income households. This could change the way that households with low water consumption levels are billed but, if done properly, would achieve the same objective, which is to enable low-income households to have affordable access to water.

Another way would be to require, in the affermage contract, that the private operator ensure universal access to water, and to determine the levels of prices it can charge, particularly for poorer segments of the population. This could possibly be considered a licensing requirement and therefore could come under TiSA’s Domestic Regulations Annex, in which case Government must carefully consider how to ensure that its scheduling of all the relevant service sectors allows it to set universal access and pricing conditions in the contract. Similar reasoning would apply for Government to ensure, as it has promised, that there will be no job losses when operation and maintenance of the water distribution system is handed over to a private operator.

### Non-Mauritian providers in the water sector

In negotiations like those for TiSA, Mauritius might be asked to offer market access commitments relating to water supply, for instance in engineering and project management services for water and sanitation, water plumbing and drain laying, or water well drilling. As already mentioned, these and other sectors covered by TiSA such as technical testing, pipeline transport, logistics, financing and billing systems, under which national treatment is assumed to be covered under TiSA unless specifically excluded, could also give a foreign company access to important parts of the country’s water infrastructure. Under TiSA rules, giving commercial partners market access precludes parties from imposing limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment, unless such limits have been anticipated, proposed and agreed to in advance.

The EU has entered horizontal market access limitations on all sectors for “services considered as public utilities at a national or local level,” which “may be subject to public monopolies or to exclusive rights granted to private operators.” It also exempts certain publicly financed services from market access and national treatment obligations.[[79]](#footnote-80) Specifically, the EU has entered a reservation relating to environmental services, specifying that for all four modes of delivery, it can maintain limitations on national treatment, local presence and local management with respect to the provision of services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the provision of drinking water, and water management.[[80]](#footnote-81) Switzerland has also entered market access limitations under environmental services, specifying that it excludes services offered by public utilities whether owned and operated by municipalities, cantons or the federal government, or contracted out by them. Mauritius would do well to enter similar limitations in its schedule, with regard to all public utilities and services.

# V Employment and the Right to Work

There are many ways in which new trading patterns could have – positive or negative – impacts on the right to work. This section analyses ways that TiSA might impact on discrimination in the workplace, on income inequality and on skills development. [[81]](#footnote-82)

## The right to work

The right to work includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept. The most detailed expositions of the right are found in the CESCR General Comment on the Right to Work[[82]](#footnote-83) and the African Commission on Human and Peoples’ Rights Guidelines and Principles on Economic, Social and Cultural Rights.[[83]](#footnote-84) According to these, work must be decent and must provide an income that allows workers to support themselves and their families. **The right to work also** involves ensuring an adequate education system, as well as technical and vocational guidance and training programmes. It requires States to have services to assist and support individuals to enable them to identify and find employment. Recognition of the right to work is reinforced by Sustainable Development Goal 8 (SDG8) through which States agree to promote “sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.”

In addition to States’ immediate obligation **to “take steps” towards the realization of the right to work, they must ensure non-discrimination in access to work (which might also require affirmative action to ensure de facto non-discrimination), and must monitor the situation with regard to realization of the right.**[[84]](#footnote-85)It also embodies the notions of acceptability and quality*,* notably workers’ rights to just and favourable conditions of work, safe working conditions, the right to form trade unions and the right to freely choose and accept work.[[85]](#footnote-86)

The right to work is not an absolute and unconditional right to obtain employment. Rather it entails an obligation on the State to adopt and implement a national employment strategy and plan of action. [[86]](#footnote-87) **The right does not preclude policy choices that might involve adjustment and job losses, so long as these do not involve discrimination, do not make the situation of the most vulnerable worse, and are accompanied by measures to facilitate transition.**

## The right to work in Mauritius

### Legal framework

Mauritius has bound itself to uphold the right to work through domestic law and through international instruments. (See Figure 2). As noted, it has ratified most of the relevant human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples’ Rights (Banjul Charter), and the International Labour Organisation’s (ILO) eight **fundamental Conventions**.

Mauritius has a range of legislation, programmes and schemes to implement the right to work. The Employment Rights Act[[87]](#footnote-88) is the primary piece of legislation that governs the employment relationship in Mauritius. The Act (with the Employment Relations Act) constitutes the minimum floor of rights governing terms and conditions of employment for all workers. The Constitution sets out the right to non-discrimination. Other instruments include general policy instruments and regularly updated employment generation polices linked with the Government’s economic development priorities and the country’s evolving needs, as evidenced for instance by the National Employment Act 2017 (NAE). The government also implements measures to address unemployment, programmes addressing lack of adequate skills, and supporting Mauritians seeking work abroad or Mauritians wishing to return.

The government deploys efforts to ensure it is aware of the situation with regard to the right to work in the country. Statistics Mauritius gathers and publishes regularly-updated detailed data. Further, the NAE provides for the creation of a National Employment Department empowered to collect and analyse data on employment-related matters in order to respond to the needs of the labour market.[[88]](#footnote-89) A range of accountability mechanisms are available to people who consider that their right to work has been violated such as the Employment Relations Tribunal and the Equal Opportunities Commission. Enjoyment of the right to work in Mauritius

Labour problems remain in Mauritius. The country shows up poorly in the International Trade Union Confederation (ITUC)’s annual index of working conditions around the world, which situates Mauritius in the third (out of five) categories – based on the finding that workers experience regular violations of rights.[[89]](#footnote-90) Concerns raised by international bodies include child labour, human trafficking, insufficient protection of trade union rights and ineffective enforcement of the Occupational Safety and Health Act. [[90]](#footnote-91) This section will not discuss these concerns; its purpose is to focus on those areas identified in the screening and scoping phases of the HRIA.

### Skills

As the economy has transitioned towards services, employment in professions requiring medium to high skill levels has grown significantly, with a decline in demand for workers with low educational attainment. But supply of highly educated workers has not met demand. The information and communication technology (ICT) and financial sectors report especially large labour and skills shortages. Whilst some workers lack the skills employers need, the share of overeducated workers aged 15–29 doubled between 2006 and 2015, with women spearheading the trend.[[91]](#footnote-92)

The skills mismatch is of human rights concern in that it contributes to widening the gap between rich and poor, and in that it can impair the productive potential of youth and thus have negative influence in lifetime patterns of employment and pay.[[92]](#footnote-93) In addition, lack of a highly qualified labour force can hinder economic development.

Skill mismatches have received renewed attention recently. The Government operates training and skilling programmes including scholarship grants, textbook subsidies, the Youth Employment Programme (YEP) and the National Skills Development Programme. Unfortunately though, these schemes appear limited in coverage, fragmented and uncoordinated.[[93]](#footnote-94) Moreover, there seems to be little monitoring of their impact.

### Inequalities

Mauritius has enjoyed substantial economic growth in the last decades but at the same time inequalities have widened. Mauritius’ Human Development Index (HDI) value is high, but its inequality-adjusted HDI (IHDI) brings the country’s ranking down by over 13 %.[[94]](#footnote-95) As noted, changes in the economic structure since the beginning of the century reward highly skilled individuals, whilst less-educated individuals have suffered decreases in their wages. In addition to deteriorating real wages, the lowest quintile had higher unemployment rates and a larger share of low-wage earners, leading to widening disparities.[[95]](#footnote-96)

UN Human Rights mechanisms have noted inequality’s inconsistency with human rights, on the grounds that it is closely related to discrimination, because it can stifle equal opportunity, can lead to laws and regulations that favour the powerful, can slow the pace of poverty reduction and create intergenerational poverty traps.[[96]](#footnote-97)

The EU-commissioned SIA mentioned Mauritius as one of the TiSA countries set to benefit most from the agreement in terms of wages, GDP and consumer prices. It found that with a projected rise of 0,9%, wages for low-skilled workers may rise more than for medium- and high-skilled workers (both 0,4%).[[97]](#footnote-98) Although the changes are minimal they would be a small step towards reducing inequality, if the projections are borne out in practice.

Meanwhile, Mauritius has taken steps to address wage inequalities, for instance through the education-related schemes mentioned above even if these appear to have insufficient coverage and to be only moderately pro-poor in the distribution of their benefits. [[98]](#footnote-99) The introduction of a minimum wage, in 2018, is likely to have more impact on inequality and poverty reduction, consistent with Mauritius’ human rights obligations.[[99]](#footnote-100) In formulating its level, income inequality, poverty and the living conditions of low paid workers were taken into account.[[100]](#footnote-101)

### Vulnerable groups

Gender inequality is significant in Mauritius; the Global Gender Gap Index (GGI) ranks the country 109th out of 149 countries.[[101]](#footnote-102) Labour market participation is lower amongst women, and unemployment is higher. Unemployed women are generally more qualified than their male counterparts. Women tend to draw lower wages than men across all occupations,[[102]](#footnote-103) with a widening gender wage gap in recent years. A 2017 revision of the Employment Rights Act introduced equal remuneration provisions,[[103]](#footnote-104) but these have not yet reduced the wage gap, a considerable portion of which remains unexplained.

Other laws and initiatives seek to promote women’s entry into the labour force, to reduce their level of unemployment[[104]](#footnote-105) and promote equal treatment between men and women. These include the Back to Work Programme[[105]](#footnote-106) and a policy announced in the 2017-8 Budget to encourage firms to allow their employees to work from home.[[106]](#footnote-107) These could have positive impacts, as factors that have been identified as affecting women’s low labour market participation, high unemployment and the gender wage gap include inflexible working hours, inadequate childcare options or discriminatory hiring practices.[[107]](#footnote-108)

The right to non-discrimination is set out in sections 3 and 16 of the Constitution of Mauritius. This could however be improved upon; it does not set out disability as a prohibited ground for discrimination and it still uses sexist, male-only, language. The 2012 Equal Opportunities Act further aims to protect against discrimination through prohibiting both direct and indirect discrimination on a range of grounds such as age, caste, creed, impairment, place of origin, political opinion, sex, or sexual orientation. The Act applies to the public and private sectors in various areas including employment.[[108]](#footnote-109)

### Foreign workers

The number of foreign workers in Mauritius has increased in recent years, exceeding 29,000 in 2018.[[109]](#footnote-110) Migrant workers have taken many blue-collar jobs in Mauritius, filling vacancies in occupations that no longer appeal to Mauritian job-seekers, particularly in the textile and construction sectors, mostly for low-skilled jobs.[[110]](#footnote-111) About 40 % of these migrant workers come from Bangladesh, smaller numbers come from India, China and Madagascar with a few from Algeria, Burundi, Haiti or elsewhere.

There are strict requirements for issuing work permits for low-skilled migrant workers. In contrast, in the ICT sector there are no requirements for companies to employ local staff instead of foreigners nor is there a percentage of local staff to be recruited.[[111]](#footnote-112) Further, the minimum salary threshold for the grant of ICT-related Occupation Permits (OP) is significantly less than that applied to other sectors given ICT’s huge potential for Mauritius and the lack of suitable Mauritian applicants for ICT jobs. Skilled workers are allowed to be accompanied by family members, contrary to low-skilled migrant workers.

The same labour standards apply in Mauritius for foreign as for local employees of Mauritian companies. However, low-skilled migrant workers are at higher risk of experiencing low labour standards than Mauritian nationals[[112]](#footnote-113) or than foreign high-skilled workers. Low-skilled migrant workers cannot freely access the labour market or switch employers.[[113]](#footnote-114) They are vulnerable to pressure not to unionize or to not express dissatisfaction with their work or living conditions, and cases of abuse are regularly reported.[[114]](#footnote-115) A governmental Special Migrant Workers’ Unit carries out inspection visits at workplaces where migrant workers are employed. Between 2010 and 2015, 3,790 inspections or enquiries were carried out, some 1,635 complaints from migrant workers were dealt with, and over 16 million Rs recovered on their behalf.[[115]](#footnote-116)

## Risks and Opportunities of TiSA

TiSA, like GATS, is silent on social protection and work conditions and is not expected to include a dedicated chapter on social standards, as some recent trade agreements have. Trade agreements’ provisions for labour migration have largely ignored the issue of workers’ rights. One reason is the concern that labour standards could undermine the competitive advantage that some countries enjoy relating to labour costs. The possible impact of TiSA on work conditions would thus mainly operate indirectly, through the economic and social adjustment brought about by increased service trade, by the increasing need for high-skilled personnel required for Mauritius to be a high value-added service economy, or through possible limitations to regulation that TiSA could bring.

### Would TiSA ratification increase competition for jobs, thus putting downward pressure on labour standards?

A recurrent concern expressed in Mauritius about TiSA was that it would create competition between foreigner and locals for jobs in the country, and thereby also exert downward pressure on labour standards.

#### Competition for jobs

##### Employees

For the purpose of this analysis, it is necessary to distinguish between foreign employees of Mauritian employers, and foreign employees of non-Mauritian service providers. As the same labour standards apply to local and foreign employees of any company registered in Mauritius, foreign employees should not cost less to an employer in terms of wage, benefits or other work-related rights. Currently the many foreign workers in blue-collar jobs in Mauritius are attractive to employers because there are few local applicants for these jobs, because they are more prepared to take on overtime work than Mauritian workers are, and tend to take less time off work for “normal life” reasons such as a child's first day at school. As Mauritians are not seeking these jobs, there is no indication that competition exists between Mauritians and foreigners for the jobs that low-skilled professionals are occupying, and any such competition would be limited by the ratio of local to expatriate workers that is required for granting of a work permit, and by ongoing efforts by governmental labour inspectors to protect migrant workers’ rights. Moreover, as will be discussed below, it is highly unlikely that TiSA would result in increased movement of low-skilled service suppliers under Mode 4. Thus, despite the cases of abuse of migrant workers’ rights, there appears to be little cause for concern that TiSA might result in lowering of labour standards or unfair competition between foreign and local workers.[[116]](#footnote-117)

The local/foreign worker ratio is less stringent for medium- to high-skilled foreign workers. Nevertheless, there seems to be little cause to believe that foreign skilled workers compete with Mauritians or lower labour standards, at least not for the time being, even if foreign high-skilled workers tend to draw higher salaries and enjoy better working conditions than many Mauritians. In fact, the better working conditions that skilled foreign workers command could act as an incentive – to individuals to seek to attain higher levels of education, and to the government to continue to improve its investment in skills development amongst Mauritians. Better skills amongst the local workforce would contribute to realization of the right to work, would add to Mauritius’ attractiveness to foreign investors and would be in Mauritius’ economic interest.

Thus, if accompanied by the right mix of incentives as well as well-designed education, training and skilling, it is unlikely that TiSA would put downward pressure on the working conditions in high skilled sectors either. On the contrary, subject to the provisos indicated below,[[117]](#footnote-118) TiSA could stimulate improvements in availability of better-paid jobs for Mauritians and result in positive yields from the economic and social perspective.

##### Contractual service suppliers and independent professionals

A different analytical framework applies as regards foreign workers who are Contractual Service Suppliers (CSS) (or employees of a CSS) or Independent Contractors. A CSS is not currently obliged to be incorporated in Mauritius. In the situation where the service supplier may is based in another country it would not be bound by Mauritian labour laws. Rather, Mauritius-based employees of a foreign CSS would be covered by that country’s labour laws. If that country’s standards regarding working conditions or minimum wages are lower than those in Mauritius, this could result in different, lower labour standards applying to CSS workers, and result in unfair competition for Mauritian workers and possibly undermining the minimum standards that have been set by statute or collective agreement.[[118]](#footnote-119)

Indeed, the main human rights-based concern about liberalization of movement of people providing services is that broad categories of workers who currently enjoy labour rights could be rebranded as “service suppliers” and employed under contracts offering weaker labour protection and lower wages. Another concern is that in scheduling a service sector, a TiSA party could be precluding itself from requiring foreign service suppliers that want to provide services in the scheduled sector to seek suitably trained workers locally.[[119]](#footnote-120)

That having been said, it is unlikely that TiSA would lead to large-scale movement of service suppliers in low-skilled sectors to Mauritius from countries that have lower labour standards, certainly not in the short-term. There are various reasons for this. First, in the overwhelming majority of cases Mode 4 commitments facilitate the movement of highly-skilled professionals in specialised fields such as management consulting, engineering or medical services. Further, Mauritius, like most countries, requires a Business Visa for independent contractors or intra-corporate transferees.[[120]](#footnote-121)

Only a few of the sectors where TiSA parties have offered market access to foreign providers could conceivably be open to low-skilled workers. In fact, some TiSA parties’ offers explicitly limit Mode 4 market access to high-skilled professionals.

Second, a country is free to make Mode 4 commitments “unbound”, which allow it to retain the freedom to introduce or maintain measures inconsistent with TiSA market access or national treatment obligations. In other words, if Mauritius does not bind its Mode 4 commitments, it will be able to continue to limit foreign service providers, in both skilled and in unskilled sectors. In addition, TiSA parties can make national treatment limitations, through specifying that they reserve the right to adopt or maintain any measures with respect to the supply of a service through presence of natural persons, including immigration, temporary entry or stay. If Mauritius ensures that its schedules of commitments provide for these flexibilities – whether under TiSA or other service trade agreements – it would retain the policy space it needs to limit access of foreign professionals to certain sectors in the future, for instance if competition between foreign high-skilled CSS workers or Independent Contractors and Mauritian workers became problematic for Mauritius, either in terms of lowering labour standards or in terms of depriving adequately skilled Mauritians of jobs in their own country.

Other TiSA parties retain policy space in this area. The EU’s GATS schedule provides that 'laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements', and the United States and Switzerland have scheduled similar provisions.[[121]](#footnote-122) Switzerland’s TiSA offer further requires Mode 4 suppliers of certain services to have commercial presence in Switzerland.[[122]](#footnote-123) In parallel, some countries like Switzerland have instituted measures to accompany cross-border movement of workers (liberalized in the Swiss case through agreements with the European Union) in order to maintain labour standards and wages, and to protect local and foreign workers against social dumping.[[123]](#footnote-124)

Third, TiSA parties are for the most part countries which have labour protections in place, and most score better than Mauritius in terms of protection of workers’ rights, which reduces the risk of social dumping through further opening Mauritian services sectors to foreign CSS and Independent Contractors. Nonetheless, some TiSA parties do have lower wages and less favourable labour standards than Mauritius. This, and the fact that TiSA negotiators’ intention is to extend TiSA to all WTO members many of whom have lower standards than Mauritius, points to the need for caution on the part of Mauritian negotiators for the long-term, even if in the near future there appears to be little risk of social dumping via TiSA.

A Mode 4 precondition commonly found in service trade agreements may – albeit probably unwittingly – be pro-worker. This is countries’ right to use Economic Needs Tests (ENT) and/or Labour Market Tests before issuing work permits to temporary foreign workers. As well as giving a fair opportunity to local workers, such tests may also be in the long-term interest of the migrant workers, as they permit employers to hire foreign workers only when there is a genuine shortage of local workers, thereby preventing them from making local workers compete against foreign workers. This becomes all the more important as neither TiSA nor GATS include an emergency safeguardmechanism which would allow Parties to temporarily close markets to unexpected surges of services inflows, including of natural persons who are service suppliers.[[124]](#footnote-125)

#### Labour standards

The above section has pointed to some aspects of whether TiSA could result in lowering labour standards through competition between Mauritian and foreign workers. This section examines whether Mauritian labour standards imposed on foreign service suppliers could be open to challenge under TiSA.

Two aspects to the concern that TiSA could affect labour standards will be considered here. The first is whether wage parity requirements could fall foul of TiSA’s Article I-4 provision, through modifying the conditions of competition in favour of Mauritian services or service suppliers as compared to like services or service suppliers of another TiSA country where wages are lower. This question has arisen in the WTO. There, developing countries point out that their comparative advantage in services provision lies in their lower wages,[[125]](#footnote-126) and have therefore argued that wage parity requirements alter the conditions of competition, even if they are formally identical treatment.[[126]](#footnote-127) Again this argument may not have huge sway with regard to service providers from another TiSA party in Mauritius, as most of the other parties have comparable or higher wage levels.[[127]](#footnote-128) But this is not the case for all current TiSA parties, and as future TiSA parties may include countries with lower wages, it is worth being attentive to this question as negotiations unfold.

Second, there is a slight risk that labour standards, even those that apply equally to local and foreign providers, might be considered a technical standard (which relates to the characteristics of a service and the permitted ways of delivery) under TiSA and thus be restricted under the Agreement. Even though sources close to the TiSA negotiations doubt that the DRA would apply to labour standards, for greater certainty, Mauritius might wish to specify in its schedule that relevant labour standards continue to apply.

### Would TiSA reduce the government’s ability to facilitate access to work by vulnerable groups?

The Mauritian government should ensure that TiSA, and particularly its DRA, do not restrict measures in favour of employment for vulnerable groups in Mauritius. There is a risk that measures such as those provided by the Training and Employment of Disabled Persons Act could fall foul of TiSA. However, as positive discrimination measures apply to both Mauritian and foreign service providers, and would be unlikely to be considered a licensing requirement or a technical standard, the risk is slight. Nevertheless, the Mauritian government might be well advised to enter a horizontal provision in its schedule to allow it the flexibility to maintain and introduce such measures in any sector.

With regard to discrimination against women, it is worth noting that Canada has proposed that DRA provisions relating to licensing requirements and procedures, qualification requirements and procedures (and possibly technical standards) provide explicitly for a requirement that the Party shall ensure that such measures do not discriminate against individuals on the basis of gender. Additionally, Canada has specified that the DRA provisions should not apply to reasonable and *bona fide* circumstances of discrimination, nor to affirmative action policies aimed at disadvantaged persons.

### Would TiSA limit efforts for skills-development in Mauritius?

In the medium to long-term, a fruitful approach to ensuring availability of suitably skilled staff is to ensure that the education and training system equip Mauritians with the needed qualifications.[[128]](#footnote-129) It would therefore be important, in any services trade agreement, to condition any Mode 4 market opening offers on the requirement that the foreign service provider share knowledge and experience with Mauritian professionals to build local skills and know-how. In addition, consideration should be given to the practical details of how this condition would be applied, and how compliance with it be measured.

Mauritius’ schedule could include a provision that, for intra-corporate transferees, the employer be required to appoint a Mauritian counterpart to be trained by the foreign national person during the posting in Mauritius. This would be one way of operationalizing the knowledge-sharing condition, as could be a provision that a limitation on Mode 3 market access be imposed for service providers in all applicable sectors, limitations which would allow for a margin of preference for government projects including for foreign establishment if they employ a defined percentage of local labour. Another means would be to require professional staff of foreign establishments in the software implementation and database services sectors with commercial presence in Mauritius to consist of at least 50 % of Mauritians. Such local employment requirements have been strongly contested in TiSA negotiations. Indeed, the EU has asked Mauritius to “consider reducing the local professional staff threshold in software implementation, data processing, and database services.”[[129]](#footnote-130) However, countries like Mauritius should insist on being able to include such skill and employment-promoting provisions as a way of maintaining their employment and upskilling policies.[[130]](#footnote-131)

# VI Emigration of Mauritians: Brain-drain or Opportunity?

One of Mauritius’ offensive interests in the TiSA negotiations is access to the labour market of other TiSA parties for Mauritian professionals as well as for lower-skilled workers. But, given experience with services trade liberalization so far, what can Mauritius expect to obtain through TiSA Mode 4 for its workers?

### Mauritians abroad

Some 195,000 Mauritians were estimated to be residing overseas in 2017,[[131]](#footnote-132) including a high proportion of Mauritian students abroad for their university education,[[132]](#footnote-133) with particularly large Mauritian diasporas in Australia, Britain, France, Canada, South Africa and Italy.[[133]](#footnote-134) Migration has mostly been a private venture[[134]](#footnote-135) even though the Mauritian government has sought labour agreements with several countries.[[135]](#footnote-136) Mauritius and the Seychelles, for instance, have agreed MoUs concerning the recruitment of Mauritian doctors and teachers to work in Seychelles, and the Mauritian government is actively seeking agreements with other countries – such as Botswana or Lesotho – for migration arrangements for skilled, particularly medical, personnel from Mauritius. Agreements with Italy and Canada seek to favour “circular migration,” through offering opportunities for Mauritians abroad to invest, develop enterprises, and use their newly acquired skills from abroad upon their return to Mauritius.[[136]](#footnote-137)

A positive aspect of outmigration for Mauritius is the value of remittances: in the fourth quarter of 2017 remittances were of a level comparable to income from cane sugar exported during the same period.[[137]](#footnote-138) It also offers opportunities for professions like medicine, in which the number of Mauritian graduates exceeds the number of available jobs. A downside is that Mauritius is affected by brain drain and brain waste.

Some Mauritians may be abroad on work, student or resident permits, others may be Contractual Service Suppliers, Independent Professionals or Intra-Corporate Transferees – but there is no computation of whether their employment in third countries has happened under Mode 4 or under other schemes.[[138]](#footnote-139) This is similar worldwide: the WTO reports that the number of people who have moved under Mode 4 is not known.[[139]](#footnote-140)

## Will TiSA open employment possibilities for Mauritians abroad?

Consideration of what Mauritius could obtain through Mode 4 from other TiSA Parties for its workers can be broken down into two questions: (1) is TiSA is a promising avenue for opening access to TiSA parties’ labour markets? And (2) will such openings offer Mauritians access to employment in other countries over and above opportunities that currently exist?

The simple answer to the first question is no. Developing countries’ efforts to obtain Mode 4 concessions in WTO services negotiations has met with little success to date;[[140]](#footnote-141) experts agree that “liberalization under Mode 4 always tends to be an uphill battle, regardless of the overall economic benefits.”[[141]](#footnote-142) Moreover, experience under the WTO’s GATS clearly shows that Mode 4 has very limited impacts on labour migration. One reason is that service trade agreements only cover *temporary* movement of service suppliers, and TiSA is no exception. Another explanation lies in the political sensitivities associated with the physical presence of foreign workers in most countries.

In addition, as already noted, countries have tended to limit Mode 4 access to their labour markets to skilled workers: around 80% of GATS Mode 4 commitments are for skilled workers and only 20% for low skilled workers.[[142]](#footnote-143) A cursory glance at the offers of Norway, the EU and Switzerland suffices to confirm that TiSA will likely replicate that situation. All the openings the schedules of their draft offers are “unbound” (i.e. can be limited at any time) except for narrowly defined groups of workers such as senior executives or specialists who are not available domestically and then only for limited duration of stays (up to three or four years). Furthermore, as already mentioned, some TiSA parties reserve the right to require commercial presence or other types of local presence as a condition for Mode 4 opening to foreign workers in some sectors.

Additional barriers affecting Mode 4 migration are visas, qualification or professional certification requirements, licenses or limitations on foreign ownership*.*[[143]](#footnote-144)TiSA replicates these: its draft Annex on Movement of Natural Persons allows limiting entry to foreign professionals through visa requirements. Further, TiSA permits discriminatory use of visa requirements,[[144]](#footnote-145) in other words, it allows parties to require visas for nationals of some countries but not for others, specifying that such visa requirements need not be scheduled as market access limitations and shall not be regarded as nullifying or impairing benefits under a specific commitment. This is reinforced by the fact that some countries’ TiSA offers require nationality to practice independently, as is the case for veterinary, dental and medical services in Switzerland.

Whether Mode 4 really matters in the international movement of workers is a moot point. Mode 4 flows are estimated at less than 5% of world services trade.[[145]](#footnote-146) However, as noted, not all labour migration is accounted for under Mode 4 statistics; most international labour migration takes place via other arrangements, as evidenced by the fact that countries that employ large numbers of migrant workers have not taken any GATS Mode 4 commitments. Saudi Arabia, for example, has not made any commitments under “Services provided by midwives, nurses etc” yet has a huge number of foreign health workers. Likewise, thousands of Filipino nurses and midwives travel to the US yet the US has not entered any Mode 4 commitment relating to services provision in these areas.[[146]](#footnote-147)

Mauritian citizens have visa-free entry to over 100 countries; the country’s passport comes 24th in the Passport Power Rank.[[147]](#footnote-148) This of course does not give a right to obtain work in other countries, but, together with the high number of Mauritians working abroad, indicates that Mauritians wishing to find employment elsewhere have more direct avenues than Mode 4 arrangements to do so. It thus appears unwise to expect TiSA to offer Mauritians much access to employment in other countries over and above opportunities that already exist.

# VII Brief Considerations on Transparency and Participation

One of the most vociferous criticisms of TiSA is that it has been negotiated in secret.[[148]](#footnote-149) Draft texts – and governments’ positions on these – are not supposed to be released until five years after negotiations end.[[149]](#footnote-150) Lack of transparency is cited as one of the reasons that Uruguay withdrew from the TiSA negotiations[[150]](#footnote-151) and may also have caused Paraguay’s withdrawal.

Meanwhile, the fact that the EU, Switzerland and Norway have made their offers and other TiSA documents public show that transparency is possible.[[151]](#footnote-152) From a human rights perspective, it is compulsory. Human rights law requires that States enable participation in and transparency of, policy-making as well as access to information. These obligations are set out in international human rights treaties that Mauritius is a party to, such as the International Covenant on Civil and Political Rights and the Banjul Charter.

Freedom of expression is enshrined in the Constitution of Mauritius, but legal and systemic constraints to this freedom exist, such as the lack of a freedom of information law.[[152]](#footnote-153) The government’s human rights action plan acknowledges that the right to freedom of expression does not, but should, cover access to official information.[[153]](#footnote-154) Meanwhile, the National Human Rights Commission’s mandate precludes it from addressing complaints relating to lack of access to official information, or complaints relating to the right to participate in policy-making, unless the complainant can show that inability to participate was due to discrimination on one of the grounds recognized in Mauritian law.[[154]](#footnote-155) The Commission has publicly stated its regret for this limitation on its mandate.[[155]](#footnote-156)

Access to information is inherent to transparency and is closely linked with participation. Lack of transparency also poses risks from a treaty interpretation perspective. The 1969 Vienna Convention on the Law of Treaties states that when treaty terms are ambiguous or lead to an unreasonable result, parties may consult supplementary means of interpretation, including the preparatory work for the treaty.[[156]](#footnote-157) If this work is not public, treaty interpretation can be hindered.

Trade ministries the world over tend to invite constituencies already involved in trade to consultations about new trade agreements, and overlook other governmental ministries, affected communities and stakeholders. The Mauritian government has held consultations about TiSA. The vast majority of participants came from government, parastatals or the private sector; only a handful were from academia, NGOs or trade unions.

Effective participation presupposes that concerned groups and individuals possess the necessary information to appraise the agreement in question, and the capacity to participate. This can be a challenge, particularly for an agreement as wide-ranging and complex as TiSA. But given the potential benefits, the time and resource investment required is worthwhile. Moreover, it can contribute to capacity-building on matters of policy more broadly as well as on human rights processes and procedures.[[157]](#footnote-158)

Bringing a range of perspectives to trade policy formulation tends to result in policies that are more responsive to society’s needs. It can ensure that the needs of the most marginalised groups are considered in negotiations and thus, according to the World Bank, foster an inclusive and balanced economy.[[158]](#footnote-159) Broad participation also contributes to non-discriminatory policy-making, and to taking stock of the situation of a range of groups before implementing new economic measures, consistent with the obligations to monitor and to take **deliberate, concrete and targeted steps towards realization of human rights**. Keeping stakeholders abreast of developments in the negotiations promotes buy-in and mitigates opposition to the outcome, thus doing so in TiSA negotiations would support the agreement’s social legitimacy.[[159]](#footnote-160)

An additional positive aspect of transparency and participation is the garnering of support – domestically and internationally – for efforts in favour of human rights when these are put into question by other TiSA parties. The EU for instance, asked Mauritius to narrow its requirements “on local presence, local management and board of directors, local labour, local content and other performance requirements” and to “consider reducing the local professional staff threshold in software implementation, data processing, and database services.”[[160]](#footnote-161) These are important elements for realizing the right to work and other human rights in Mauritius. As all TiSA negotiating Parties have ratified the main international human rights treaties (See Figure 2) their international law obligations preclude them from entering into international agreements that would make it harder for other countries to uphold their human rights commitments.[[161]](#footnote-162) Thus in this situation, transparency would help hold the EU accountable to its human rights obligations which in turn would permit Mauritius to maintain its human rights efforts through maintaining policy space relating to development of capacities and skills locally.

# VIII Conclusions

The analysis presented above demonstrates how a human rights-based approach can provide a legal and analytical framework for guiding development and implementation of trade-related policy. Although the analysis focused on possible impacts of Mauritius’ offers and requests in the context of TiSA, it is equally applicable to other African countries, and to other international economic negotiating processes.

Mauritius’ strategy of liberalizing trade in services is well on track to provide positive results from an economic and social perspective. However, this leaves open the question as to whether TiSA, or other trade and investment agreements which so starkly reduce regulatory policy space, are the best avenue for pursuing these goals. Mauritius has built its success on its strong infrastructure, investment in its welfare state and human capital and on its ability to regulate and innovate. It should maintain the capacity to adapt and strengthen these further in the future.

In order for Mauritius to secure a positive outcome from TiSA and other services trade negotiations, it will need to work hard to ensure that the wording of the agreement does not open it to future restrictions in, say, the way in which the country wants to organize provision of essential public services. It will also need to exert itself to ensure that its schedule is sufficiently finely crafted to accord with the country’s policy priorities. Coming up with a revised schedule that takes into account all present and future economic, political and societal considerations, as well as the ripple effects of a commitment in one sector on another sector, will be highly time- and resource-consuming, even before the schedule is opened to negotiation with other negotiating parties.

The complexity of the issues involved in these negotiations plead in favour of bringing as broad a range of experience and expertise to the formulation of negotiating positions as possible. The human rights community as well as other actors who are not usually present in high-level economic policy discussions, such as disabled communities, women’s groups and those working with people living in poverty (whose work often fulfils a human rights purpose although they may not brand it as such), can inform trade policy-makers about potential impacts of a trade agreement for their activities and on their constituencies.

This HRIA found that TiSA’s potential risks are not those expressed by the civil society critics of the draft agreement. The HRIA also showed that TiSA may bring high costs for Mauritius in ways that the government may not have anticipated, whilst at the same time not yielding the benefits that have been articulated.[[162]](#footnote-163) This permits the tentative conclusion that meaningful exchanges of views could result in more robust policy positions, which would be well worth the required investment of time and resources.

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2. ICTSD, Mauritius, first African country to join TISA negotiations, Bridges Africa (11 March 2015). [↑](#footnote-ref-3)
3. To carry out the impact assessment the author had access to documents of a confidential nature. This article does not contain anything that divulges their content. Some of the recommendations that this article makes are already included in Mauritius’ 2nd revised TiSA offer, others are not. [↑](#footnote-ref-4)
4. James Meade, a Nobel Prize laureate in economics famously predicted that “Mauritius faces ultimate catastrophe.” J. Meade, Report to Government of Mauritius (1961). [↑](#footnote-ref-5)
5. A. Zafar, *Mauritius: An Economic Success Story*, AfricaSuccess Stories, Working Paper, Washington D.C: World Bank (2011). [↑](#footnote-ref-6)
6. UNDP, *Human Development Indices and Indicators*: *2018 Statistical Update. Mauritius.* <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MUS.pdf> (accessed 17 September 2019). [↑](#footnote-ref-7)
7. B. and E. Dommen, *Mauritius: an island of success*, James Currey (1999); A. Zafar, *op.cit*; V. Tang, T. Shaw & M. Holden (eds), *Development and Sustainable Growth of Mauritius*, Palgrave Macmillan (2019). [↑](#footnote-ref-8)
8. K. Hanson, V. Tang & H. Muguto, The Service Export-Led Growth Hypothesis in Mauritius, in V. Tang et al (eds), supra note 6*,* at 172. [↑](#footnote-ref-9)
9. IMF, Press Release, Executive Board Concludes Article IV Consultation with Mauritius (23 April 2019). [↑](#footnote-ref-10)
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11. C. Dommen (2005) *Are You Being Served? How the WTO’s Agreement on Trade in Services Can Affect Human Rights*, <https://www.academia.edu/36226470/Are_You_Being_Served_How_the_WTOs_Agreement_on_Trade_in_Services_Can_Affect_Human_Rights_1> (accessed 11 October 2019). [↑](#footnote-ref-12)
12. B. Matthews, E. Wayne & C. Pan, *Trade in Services Agreement: A Way Out of the Trade War?* Atlantic Council (23 July 2018). [↑](#footnote-ref-13)
13. European Commission, *Trade in Services Agreement (TISA) Factsheet* (2016) <https://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154971.doc.pdf> (accessed 11 October 2019). [↑](#footnote-ref-14)
14. W. Raza, B. Tröster & R. von Arnim *ASSESS\_TiSA: Assessing the Claimed Benefits of the Trade in Services Agreement*, Austrian Foundation for Development Research (2018) at 9. [↑](#footnote-ref-15)
15. Trade in Services Agreement, *Draft Provisions* (21 June 2016), <https://wikileaks.org/tisa/document/20160621_TiSA_Core-Text> (accessed 11 October 2019) [↑](#footnote-ref-16)
16. Trade in Services Agreement, *Draft Provisions*, Article I-3: Market Access. [↑](#footnote-ref-17)
17. See Switzerland, State Secretariat for Economic Affairs SECO, *Questionnaire by Switzerland on Standstill and Ratchet* (2013); Uni Global Union, *TiSA - Foul Play* (2017). [↑](#footnote-ref-18)
18. G. Erasmus, Trade in Services under the AfCFTA and Domestic Regulation, Tralac Trade Brief (2019). [↑](#footnote-ref-19)
19. APEC, APEC Non-binding Principles for Domestic Regulation of the Services Sector (13 November 2018). See also WTO, Working Party on Domestic Regulation, Report of the Meeting held on 5 December 2018, Note by the Secretariat, WTO Doc. S/WPDR/M/74 (13 February 2019) at 5-6. [↑](#footnote-ref-20)
20. WTO, News, WTO Members Hold Latest “Cluster” of Services Meetings (21 March 2019). [↑](#footnote-ref-21)
21. European Commission, News Archive, *59 WTO partners step up commitments to help service suppliers*,  23 May 2019, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2021> (accessed 11 October 2019); K. Mohamadieh, *Disciplining Non-Discriminatory Domestic Regulations in the Services Sectors: Another plurilateral track at the WTO* (October 2019). See also D. R. Kanth, *EU, Australia table draft MC12 statement on domestic regulation*, SUNS #8893 (24 April 2019), available at<https://www.twn.my/title2/wto.info/2019/ti190419.htm> (accessed 11 October 2019). [↑](#footnote-ref-22)
22. WTO, Public Forum, *What is the Role of Domestic Regulation Disciplines in a Time When Services are the Next Trade Frontiers?* (October 2019), <https://www.wto.org/audio/pf19Session18.mp3> (accessed 11 October 2019). [↑](#footnote-ref-23)
23. See European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (2015). [↑](#footnote-ref-24)
24. Critics of the economic projections most commonly used in trade negotiations object that they assume full employment and constant income distribution in all countries whilst excluding some of the major risks of trade liberalization. See in particular J. Capaldo & A. Izurieta, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement*, GDAE Working Paper (2016). [↑](#footnote-ref-25)
25. World Bank & Nordic Trust Fund, Study on Human Rights Impact Assessments: A Review of the Literature (2013) at 23. [↑](#footnote-ref-26)
26. See C. Dommen (2001) The Covenant on Economic, Social and Cultural Rights: A Treasure Chest of Support for Developing Countries’ Concerns in the World Trade Organization?, 5(1-3) *Bridges Between Trade and Sustainable Development*, 21-22, <https://www.ictsd.org/sites/default/files/downloads/bridges/bridges5-1.pdf> (accessed 11 October 2019). [↑](#footnote-ref-27)
27. UN, Human Rights Council, Guiding principles on human rights impact assessments of trade and investment agreements (2011) UN Doc. A/HRC/19/59/Add.5. [↑](#footnote-ref-28)
28. UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 3 The Nature of States Parties Obligations*, (1991) UN Doc. E/1991/23, annex III. [↑](#footnote-ref-29)
29. UN Human Rights Council, *Guiding principles on human rights impact assessments* *of economic reforms*(2018) UN Doc. A/HRC/40/57, Principles 9 & 10. [↑](#footnote-ref-30)
30. See UN Human Rights Council, supra note 26; European Commission, Handbook for trade sustainability impact assessment, 2nd edition (2016); and European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (2015). [↑](#footnote-ref-31)
31. Mauritius, Ministry of Foreign Affairs, Regional Integration and International Trade, *Trade In Services Agreement* (2016) http://foreign.govmu.org/English/Documents/Trade%20in%20Services%20Agreement%20Brief.pdf (accessed 17 September 2019). [↑](#footnote-ref-32)
32. Ecorys/CEPR, *Trade SIA in support of negotiations on a plurilateral Trade in Services Agreement* (2017). This Impact Assessment considered how TiSA could affect economic, social, human rights, and environmental issues in the EU and in selected other countries. It has however been criticized on a number of grounds, including for not adequately considering the costs and benefits of regulations and for not taking into account Mode 3 liberalization, which accounts for 60% of global services trade. See W. Raza *et al.* supra note 13. [↑](#footnote-ref-33)
33. W. Raza et al. supra note 13*.* [↑](#footnote-ref-34)
34. C. Dommen, supra note 10; J. Kelsey, Legal Analysis of Services and Investment in the Cariforum-EC EPA: Lessons for Other Developing Countries, South Centre Research Paper (2010). [↑](#footnote-ref-35)
35. R. Adlung, The Trade in Services Agreement (TISA) and Its Compatibility with GATS: An Assessment Based on Current Evidence, 14 *World Trade Review* (2015), 617-641; Pierre Sauvé (2014) *The Trouble with TiSA*, [www.intracen.org/article/The-trouble-with-TiSA](http://www.intracen.org/article/The-trouble-with-TiSA) (accessed 11 October 2019) [↑](#footnote-ref-36)
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37. UNCTAD, *Services, development and trade: The regulatory and institutional dimension*, (2016) UN Doc. TD/ B/C.I/MEM.4/11; G. Gari (2016) Is the WTO’s Approach to International Standards on Services Outdated? 19 *Journal of International Economic Law*, 2016, 589–605; Voon, Balancing Regulatory Autonomy with Liberalisation of Trade in Services, *Melbourne Journal of International Law* (2017); M. Kisto Determinants of Foreign Direct Investment in Mauritius: Evidence From Time Series Data 6(8) *International Journal of Scientific and Technology Research* (2017). [↑](#footnote-ref-38)
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39. World Bank, Mauritius: Inclusiveness of Growth and Shared Prosperity (2015). [↑](#footnote-ref-40)
40. UN, Common core document forming part of the reports of States parties – Mauritius (2016) UN Doc. HRI/CORE/MUS/2016; UN Development Programme, Human Development Index (2016); World Economic Forum, Global Gender Gap Report (2017). [↑](#footnote-ref-41)
41. UN, Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012); UN Human Rights Council, supra note 26. [↑](#footnote-ref-42)
42. UN CESCR, *General Comment No. 15: The Right to Water*, (2002) UN Doc. E/C.12/2002/11, para. 2. [↑](#footnote-ref-43)
43. UN CESCR, General Comment No. 3 The Nature of States Parties Obligations; UN CESCR, Statement of the CESCR on the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant (2007). [↑](#footnote-ref-44)
44. UN CESCR, *General Comment No. 15: The Right to Water*, paras 24 and 27; see also F. Sultana and A. Loftus (2015) The Human Right to Water: Critiques and Condition of Possibility, 2 *WIREs Water,* 2015, 97–105. [↑](#footnote-ref-45)
45. UN General Assembly (2010) *The human right to water and sanitation*, UN Doc. A/64/L.63/Rev.1, https://undocs.org/en/A/RES/64/292 (accessed 17 September 2019). [↑](#footnote-ref-46)
46. Mauritius (2017) *Fifth periodic report to the* UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/MUS/5, paras 110-112, and 123. [↑](#footnote-ref-47)
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48. Statistics Mauritius, *SDG Database 2010-2018*, [http://statsmauritius.govmu.org/English/StatsbySubj/Pp./SDGs.aspx](http://statsmauritius.govmu.org/English/StatsbySubj/Pages/SDGs.aspx) (accessed 17 September 2019) [↑](#footnote-ref-49)
49. See Republic of Mauritius, Prime Minister’s Office *Human Rights Action Plan* (2012) <http://humanrights.govmu.org/English/Documents/HR%20Action%20Plan%202012-2020%20small.pdf> (accessed 17 September 2019) at 19; UN Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights – Mauritius* (2013) UN Doc. A/HRC/WG.6/17/MUS/2. [↑](#footnote-ref-50)
50. Statistics Mauritius, *Infrastructure Statistics 2007-2017*, <http://statsmauritius.govmu.org/English/StatsbySubj/Pages/Infrastructure.aspx> (accessed 17 September 2019) [↑](#footnote-ref-51)
51. Central Water Authority, *Annual Report 2015* <http://cwa.govmu.org/Documents/Annual%20Report/CWA%20Annual%20Report%202015.pdf> (accessed 29 August 2019). [↑](#footnote-ref-52)
52. X. Maugueret, Central Water Authority: un partenaire stratégique d’ici à la fin de l’année, *L’Express* (28 mars 2018); E. Bastien, Eau: la catastrophe d’ici août, *L’Express* (5 avril 2019). [↑](#footnote-ref-53)
53. Central Water Authority, *Annual Report 2015.* [↑](#footnote-ref-54)
54. Ibid. [↑](#footnote-ref-55)
55. K. Pavelich, Water Privatization: A Threat to Human Rights? 5(0) *Global Societies Journal* (2017). [↑](#footnote-ref-56)
56. Statistics Mauritius, *Household Budget Survey 2017*, http://statsmauritius.govmu.org/English/StatsbySubj/Pages/HouseholdBudget.aspx (accessed 29 August 2019). [↑](#footnote-ref-57)
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60. Republic of Mauritius, *News: Water Sector Reform: Government to implement recommendations of the World Bank* (7 February 2017) <http://www.govmu.org/English/News/Pages/Water-Sector-Reform-Government-to-implement-recommendations-of-the-World-Bank.aspx> (accessed 11 October 2019). [↑](#footnote-ref-61)
61. At the time of writing TiSA negotiations were suspended and water distribution in Mauritius was in public hands. This analysis largely assumes that a private operator will have been appointed to operate and maintain Mauritius’ CWA potable water distribution system before the entry into force of TiSA. [↑](#footnote-ref-62)
62. See inter alia, [S. Estrin](javascript:;) & [A. Pelletier](javascript:;), Privatization in Developing Countries: What Are the Lessons of Recent Experience? 33(1) *The World Bank Research Observer* (February 2018), 65–102; K. Pavelich*,* supra note 54. [↑](#footnote-ref-63)
63. TiSA *Core Text*, Article I-1.3. This is the same wording as GATS Article I, and essentially the same as the provision in other agreements on services trade, such as the (CP)TPP. See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (2018) Chapter 10 – Cross-Border Trade in Services, Article 10.1: Definitions. [↑](#footnote-ref-64)
64. Ecorys/CEPR, supra note 31, at 64. Moreover, the EU’s rhetoric differs from its practice in the TiSA negotiations: it has requested commitments from other TiSA Parties in public services sectors including postal services, environmental services (e.g. sewage services, waste collection and refuse disposal) and energy-related services. [↑](#footnote-ref-65)
65. J. Kelsey, supra note 33, at 29. See also P. Sauvé, *Trade, education and the GATS: what’s in, what’s out, what’s all the fuss about?* Paper prepared for the OECD/US forum on trade in educational services (2002) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.505.8096> (accessed 17 September 2019). Sauvé wrote that “public/private frontiers are inherently murky, vary significantly across countries and sectors, and are subject to change as markets, political dynamics and technology evolve.” [↑](#footnote-ref-66)
66. E. Vilup, The Trade in Services Agreement (TISA): An end to negotiations in sight? European Parliament (2015). [↑](#footnote-ref-67)
67. As Norway has done in its 2nd revised offer. TISA, *Norway – Second revised Offer* (21 October 2016) especially at 5 and 9. <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/handelspolitikk/tisa/tisa-norway-second-revised-offer-211016-clean-003.pdf> (accessed 11 October 2019). [↑](#footnote-ref-68)
68. M. Krajewski, *Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements*, Chamber of Labour Vienna and the European Federation of Public Service Unions (2016); see also Vilup, op. cit. [↑](#footnote-ref-69)
69. TiSA *Core Text*, Article II-2.2. This is to be read together with the so-called “ratchet” clause in Article II-2.3. [↑](#footnote-ref-70)
70. Or if it did, it would be liable for damages for non-compliance with TiSA. [↑](#footnote-ref-71)
71. See UN Department of Economic and Social Affairs Statistics Division, *Central Product Classification (CPC) Version 2.1* (2015) https://unstats.un.org/unsd/classifications/unsdclassifications/cpcv21.pdf (accessed 11 October 2019). See also J. Kelsey, *Serving Whose Interests? The political economy of trade in services agreements* (2008) at 135. [↑](#footnote-ref-72)
72. UN Human Rights Council (2017) Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, UN Doc. A/HRC/36/45. [↑](#footnote-ref-73)
73. J. Kelsey supra note 33 at 17. [↑](#footnote-ref-74)
74. K. Mohamadieh, supra note 20 at 4. [↑](#footnote-ref-75)
75. An additional concern is the very broad way in which measures has been defined under GATS. See General Agreement on Trade in Services, Articles I.3 and XXVIII(a). See also the decision of the WTO Dispute Settlement Panel in *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R/ECU, 22 May 1997, at 367. [↑](#footnote-ref-76)
76. ITUC, All About TiSA: What you didn’t know about the Trade in Services Agreement (2016) at 9; K. Mohamadieh, supra note 20, at 7-9. [↑](#footnote-ref-77)
77. *Free Trade Agreement Between the States of the European Free Trade Association and Hong Kong, China* (2011) Annex VII Disciplines on Domestic Regulation, [www.efta.int/free-trade/free-trade-agreements/hong-kong](http://www.efta.int/free-trade/free-trade-agreements/hong-kong) (accessed 11 October 2019). [↑](#footnote-ref-78)
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79. M. Krajewski, supra note 67, at 4-5. [↑](#footnote-ref-80)
80. European Commission, *Schedule of specific commitments and list of MFN exemptions (Revised EU TiSA Offer*) (2016) <http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154590.pdf> p. 26 (accessed 11 October 2019) at 12. [↑](#footnote-ref-81)
81. It does so primarily through the prism of the right to work, even if many other human rights – such as the right to non-discrimination, rights of persons with disabilities, women’s rights, the right to an adequate standard of living and the right to education – are also relevant. [↑](#footnote-ref-82)
82. UN CESCR, General Comment No. 18: The Right to Work (2006) [↑](#footnote-ref-83)
83. African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011) paras 56-59. [↑](#footnote-ref-84)
84. See ICESCR Article 6.2. ILO Convention No. 111, which Mauritius has ratified, provides that States parties should “declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.” [↑](#footnote-ref-85)
85. UN CESCR, General Comment 23: The Right to Just and Favourable Conditions of Work (2016). [↑](#footnote-ref-86)
86. *Ibid.,* paras 56-59. The strategy and plan of action should be based on, and address, the concerns of all workers and the unemployed. [↑](#footnote-ref-87)
87. Republic of Mauritius, Ministry of Labour, Industrial Relations, Employment and Training, *Employment Rights Act 2008 and Regulations* (2018) [↑](#footnote-ref-88)
88. Government of Mauritius (2018) *News: Labour Minister launches National Employment Policy Formulation workshop*, May 2018, http://www.govmu.org/English/News/Pages/Labour-Minister-launches-National-Employment-Policy-Formulation-workshop-.aspx (accessed 30 September 2019) [↑](#footnote-ref-89)
89. ITUC, *Global Rights Index* (2019), <https://www.ituc-csi.org/RI19> (accessed 11 October 2019) [↑](#footnote-ref-90)
90. See inter alia UN CESCR (2019) *Concluding observations on the fifth periodic report of Mauritius*, UN Doc. E/ C.12/MUS/CO/5; UN Committee on the Rights of the Child (2015) *Concluding observations – Mauritius*, UN Doc. CRC/C/MUS/CO/3-5; ILO, *Normlex – Mauritius, Examination by the supervisory bodies* (2018). [↑](#footnote-ref-91)
91. World Bank (2017) Mauritius – Addressing Inequality through More Equitable Labor Markets, at 13-15 & 27. [↑](#footnote-ref-92)
92. *Ibid.* at 101. [↑](#footnote-ref-93)
93. World Bank, supra note 38. [↑](#footnote-ref-94)
94. UNDP, *Human Development Indices and Indicators*: *2018 Statistical Update. Mauritius*. [↑](#footnote-ref-95)
95. World Bank, supra note 38 at 11, 85 and 86. [↑](#footnote-ref-96)
96. UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/26/28 (2014). [↑](#footnote-ref-97)
97. Ecorys/CEPR, supra note 31, at 68 and 103. [↑](#footnote-ref-98)
98. World Banksupra note 38. [↑](#footnote-ref-99)
99. It appears already to have had such effect, as reported in National Wage Consultative Council, *Report on the Impact of the Introduction of the National Minimum Wage* (2019) at 3. [↑](#footnote-ref-100)
100. National Wage Consultative Council, Introduction of a National Minimum Wage for the Republic of Mauritius (2017)

     at 39 and 42. [↑](#footnote-ref-101)
101. World Economic Forum, *Global Gender Gap Report 2018, Mauritius*, <http://reports.weforum.org/global-gender-gap-report-2018/data-explorer/#economy=MUS> (accessed 11 October 2019). [↑](#footnote-ref-102)
102. Statistics Mauritius, *Gender Statistics Year 2016*; UN Economic Commission for Africa (ECA), *Country Profile 2016 – Mauritius*, at 24. [↑](#footnote-ref-103)
103. Mauritius (2017) *Report to CESCR*, UN Document E/C.12/MUS/5. [↑](#footnote-ref-104)
104. See Republic of Mauritius *Three Year Strategic Plan* (2017). [↑](#footnote-ref-105)
105. Ministry of Gender Equality, Child Development and Family Welfare (2017) *Annual Report on Performance 2016/2017*, http://gender.govmu.org/English/Documents/2018/Annual%20report%202.2.18.pdf [↑](#footnote-ref-106)
106. Government of Mauritius (2017) *Mauritius: Budget 2017-2018 Highlights - Measures for Women Empowerment and Child Development*, <http://allafrica.com/stories/201706150625.html> (accessed 15 May 2018) [↑](#footnote-ref-107)
107. UN ECA, supra note 101; World Bank, supra note 90, at 15. [↑](#footnote-ref-108)
108. UN, Common core document forming part of the reports of States parties – Mauritius (2016) UN Doc. HRI/CORE/MUS/2016, paras 47-48. [↑](#footnote-ref-109)
109. Statistics Mauritius, *Digest of Labour Statistics* 2018. [↑](#footnote-ref-110)
110. World Bank, supra note 90, at 92-93. [↑](#footnote-ref-111)
111. Ministry of international trade, personal communication. [↑](#footnote-ref-112)
112. Republic of Mauritius, Prime Minister’s Office, *National Human Rights Action Plan 2012-2020*, (2012) para 160, <http://humanrights.govmu.org/English/Documents/HR%20Action%20Plan%202012-2020%20small.pdf> (accessed 11 October 2019) [↑](#footnote-ref-113)
113. Migration Data Portal, *Migration Governance Profile: The Republic of Mauritius*, 2017, <https://migrationdataportal.org/snapshots/mgi/mauritius#1> (accessed 11 October 2019). [↑](#footnote-ref-114)
114. As reported by, inter alia, S. Sookrajowa & M. Joson, An analysis of the challenges and implications of the UN migrant workers convention: the case of Mauritius, 7(2) *Migration and Development* (2018), 262-281, DOI: 10.1080/21632324.2017.1419544 [↑](#footnote-ref-115)
115. Government of Mauritius, *National Human Rights Action Plan 2012-2020* as at 30 September 2017, at 56 and 65. [↑](#footnote-ref-116)
116. Ministry of Labour, Industrial Relations, Employment and Training, *Guidelines for Work Permit Application* (2016). [↑](#footnote-ref-117)
117. Section xyz for whether TiSA could hinder efforts to transfer skills to local workers in high-skilled service sector. [↑](#footnote-ref-118)
118. Uni Global Union, supra note 16, at 27. [↑](#footnote-ref-119)
119. ITUC, supra note 75, at 10 and 12. [↑](#footnote-ref-120)
120. Although like many other countries, it does not track whether business visa applications were under Mode 4 or not. [↑](#footnote-ref-121)
121. Rolf Adlung (2009) *Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers*, WTO Staff Working Paper, <https://www.wto.org/english/res_e/reser_e/ersd200905_e.pdf> (accessed 17 September 2019) [↑](#footnote-ref-122)
122. See for instance Second revised Swiss offer, pp. 9 and 16. [↑](#footnote-ref-123)
123. Confédération suisse, Détachement et Mesures d'accompagnement

     <https://www.seco.admin.ch/seco/fr/home/Arbeit/Personenfreizugigkeit_Arbeitsbeziehungen/freier-personenverkehr-ch-eu-und-flankierende-massnahmen.html> (accessed 17 September 2019) [↑](#footnote-ref-124)
124. Contrary to other agreements that allow a country to limit labour immigration if there is a sudden influx of migrant labour from the partner country, as is the case with the Swiss-EU agreement on free movement of persons. See M. Panizzon, *Trade and Labor Migration - GATS Mode 4 and Migration Agreements* (2010) at 28. [↑](#footnote-ref-125)
125. See for instance J. Bhagwati, Trade Liberalisation and Fair Trade Demands: Addressing the environmental and labour standards issues, 18(6) *The World Economy* (1995) 745–759. [↑](#footnote-ref-126)
126. Minimum wage levels tend to be accepted within the WTO though, and not challenged under services trade liberalization discussions. [↑](#footnote-ref-127)
127. Additionally, empirical studies cast doubt on the robustness of this argument. See D. Raess and D. Sari, *Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset*, Swiss Network for International Studies Research Paper (2017). [↑](#footnote-ref-128)
128. P. Hein, Options for Migration Policies in the Long Term Development of Mauritius, ILO, International Migration Papers (2004)**.** [↑](#footnote-ref-129)
129. European Union, *TiSA – bilateral market access request Mauritius* (2016), https://wikileaks.org/tisa/document/20160701\_TiSA\_Bilateral-Market-Access-Request/page-22/#pagination (accessed 11 October 2019). [↑](#footnote-ref-130)
130. W. Raza *et al*. supra note 13, at 22. [↑](#footnote-ref-131)
131. H. Marchurchand, Mauritian diaspora. The grass remains greener elsewhere, 1311 *Business Magazine* (14 November 2017). [↑](#footnote-ref-132)
132. Statistics Mauritius [↑](#footnote-ref-133)
133. IOM, Mauritius, https://www.iom.int/countries/mauritius (accessed 17 September 2019). [↑](#footnote-ref-134)
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135. Migration Data Portal, Migration Governance Snapshot: The Republic of Mauritius (2017). [↑](#footnote-ref-136)
136. IOM, Mauritius, https://www.iom.int/countries/mauritius (accessed 17 September 2019). [↑](#footnote-ref-137)
137. See Bank of Mauritius (2018) *Remittance Statistics: Third and Fourth Quarters of 2017*, <https://www.bom.mu/sites/default/files/pr_rem_17q3-q4.pdf> (accessed 17 September 2019) and Statistics Mauritius, *External Trade - 4th Quarter 2017*. See also World Bank, *Migration and Remittances Data*, <http://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data> (accessed 1 June 2018) [↑](#footnote-ref-138)
138. Ministry of Foreign Affairs, Regional Integration and International Trade (2018) Personal Communication. See also A. Jahangeer Chojoo, supra, note 133. [↑](#footnote-ref-139)
139. There is no duty under the WTO GATS to match service provider categories to visa or work permit application categories. Thus most countries have not aligned their visa categories to their GATS service provider categories. See also J. Magdeleine and A. Maurer, *Measuring GATS Mode 4 Trade Flows*, WTO Staff Working Paper, No. ERSD-2008-05 (2008). [↑](#footnote-ref-140)
140. M. Panizzon (2010) Trade and Labor Migration - GATS Mode 4 and Migration Agreements, p. 22. [↑](#footnote-ref-141)
141. R. Adlung and Roy, Turning Hills into Mountains, Current commitments in GATS and prospects for change (2005) at 6. [↑](#footnote-ref-142)
142. *Ibid*. at 6. [↑](#footnote-ref-143)
143. For illustrations of the prevalence of these, see M. Panizzon (2010) Trade and Labor Migration - GATS Mode 4 and Migration Agreements. [↑](#footnote-ref-144)
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154. National Human Rights Commission, *Annual Report* (2016). [↑](#footnote-ref-155)
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158. World Bank. *Human Rights and Economics: Tensions and Positive Relationships* (2012), at 31. [↑](#footnote-ref-159)
159. For a more detailed discussion on human rights dimensions of participation in trade policy-making, see Ensuring a human rights-consistent negotiating process in UNECA, *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective* (2017) at 118, <https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf> (accessed 17 September 2019). See also Vilup, op. cit, at 24-25. [↑](#footnote-ref-160)
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