

TISA VS CLIMATE ACTION

TRADING AWAY ENERGY DEMOCRACY



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About the Publisher: Public Services International (PSI) is a global trade union federation representing 20 million working women and men who deliver vital public services in 154 countries. PSI champions human rights, advocates for social justice and promotes universal access to quality public services. PSI works with the United Nations system and in partnership with labour, civil society and other organisations [www.world-psi.org].

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FOREWORD

Energy is possibly the global economy's most strategic sector given its implications for national security, economic growth, social stability, and ecological sustainability.

Yet 80% of the world's primary energy comes from fossil fuels that emit greenhouse gases.

If humanity is to avert the worst extremes of the climate crisis, we must all reduce our dependence on fossil fuels, rapidly and dramatically. This was recognised by UN Member States in the December 2015 Climate Agreement.

Yet, at the very time that Member States were negotiating the Paris Climate Agreement¹, their trade negotiators were meeting in Geneva to secretly forge a new Trade in Services Agreement (TiSA) covering Energy Related Services (ERS).

The climate crisis is recognized as the free market's single largest failure, and there are few who think that markets have the tools needed to solve the deepening climate crisis. Yet, TiSA's ERS aims to strengthen the market and limit the space for government policy and regulation in the energy sector.

Governments preparing to implement the Paris Agreement may find their trade ministers undermining their efforts in the TiSA negotiations.

We only know about this because Wikileaks leaked the chapter. PSI was proud to release the first analysis that showed the deal could expand fossil fuel exploitation, exacerbating climate change.

Reviving a proposed framework first floated a decade ago during the United States' Bush-Cheney administration known as "Halliburton's WTO Agenda,"² TiSA's proposed new deal will recklessly undermine urgent work to reduce dangerous carbon emissions, create clean energy jobs, and increase energy security for people everywhere.

Among the most inappropriate ideas included in TiSA's ERS proposal are to:

- establish as Article 1 a principle of "technological neutrality" whereby commitments would extend across all energy sectors regardless of the fuel source or technology, denying regulators the right to distinguish solar from nuclear, wind from coal, or geothermal from fracking;
- reduce states' sovereignty over energy resources (regardless of Article V's declaring otherwise) by requiring states to establish free markets for foreign suppliers of energy related services thereby removing the right to nurture infant industries and ensure domestic economic benefits from exploiting energy resources.
- shift political power over energy and climate policies from people using their governments for shaping fair and sustainable economies to global corporations using TiSA for restricting governments from regulating energy sources, markets, companies, and industry infrastructure.

The purpose of this analytical paper is to explain the proposed TiSA Annex's potential implications for climate and energy policies.

The results are disturbing and we urge governments to abandon the fossilized paradigm of the secret so-called 'free trade' deals and corporate control, and to build instead a clean, fair energy future for all.

Rosa Pavanelli

General Secretary

Public Services International

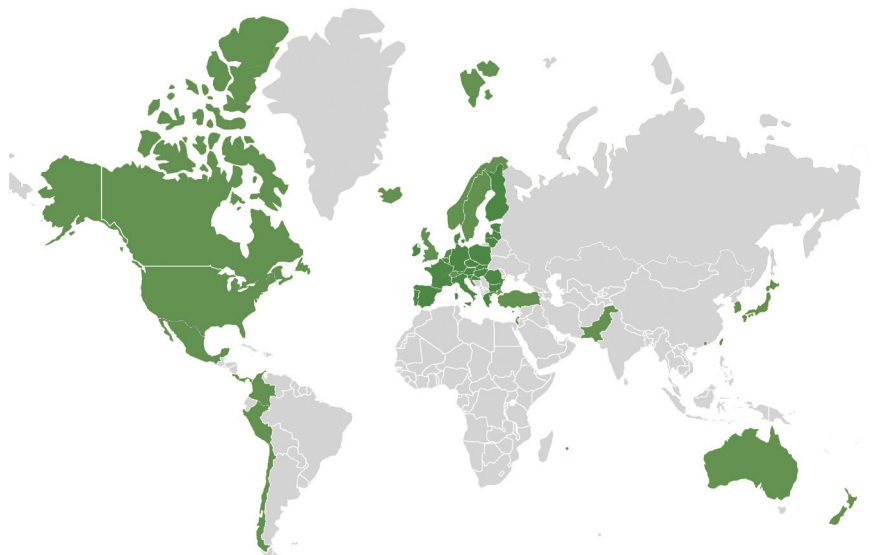
BRIEF BACKGROUND ON THE WTO, TiSA AND ENERGY

Oil is the world's most traded commodity, yet energy issues have historically been ignored by world trade rulemakers. WTO core principles generally prohibit export restraints, discourage import measures (especially environmental), require nations to reduce domestic consumption in proportion to any decreases in exports, and impede efforts to reduce carbon—as a good or as an energy service³.

WTO's existing General Agreement on Trade in Services (GATS) does not allow measures to conserve natural resources in its Article XIV on General Exceptions, as does the WTO's General Agreement on Tariffs and Trade (GATT), making the current, trade-in-services paradigm inherently insensitive to ecological sustainability issues.⁴

While TiSA talks are technically taking place outside of the WTO, GATS's existing principles for trade-in-services are already built into the text TiSA parties are tabling, making it even more hostile to ecological imperatives⁵. Deputy United States Trade Representative, Michal Punke, testified before the House Ways and Means Subcommittee on Trade that TiSA is a top initiative to spur more multilateral talks on services in the WTO.⁶ TiSA's ultimate destination is even more apparent given that the most recent round of negotiations took place in the WTO's own offices, as reported October 13, 2015 by Bryce Baschuk of *BNA Snapshot*.

23 WTO members are taking part in the TiSA talks: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States, as well as the EU (28 member countries).



The Bush-Cheney Administration's National Energy Policy Development Group organized and led by Enron executives, called in its seminal May 2001 report for "the U.S. Trade Representative, to support a sectoral trade initiative to expand investment and trade in energy-related goods and services that will enhance exploration, production, and refining, as well as the development of new technologies."⁷ They then spent the decade trying to push it through while attempting regime change in two of the world's most oil-rich nations, specifically via the invasion of Iraq⁸ and supporting the overthrow of elected officials in Venezuela.⁹ Efforts by labor and environmental groups to inform and inspire opposition to the proposed GATS Energy Services agenda resulted in key energy-exporting governments refusing to participate in talks on energy services specifically. The subject remains to this day a non-starter at WTO in Geneva.

The Obama Administration appeared to be blindly importing Bush's previous proposals into its own trade policy "reform" platform as of the June 2010 talks in San Francisco for the TransPacific Partnership.¹⁰ No specific energy services sectoral agreement is included in TPP's currently agreed text yet,¹¹ U.S. industry has formally signaled its support.¹²

While TiSA's 2016 proposed text for ERS is still very much supported by big US energy services companies, other nations with significant export interests in energy services. Specifically Norway (oil) and Iceland (geothermal) are acting as top advocates, adding social and environmental cover for the original agenda of reducing democratic control over energy policy.

Unlike GATS, TiSA does not include any OPEC nations, nor Russia, but it does include other dirty energy giants like Canada (tar sands), Australia (coal), and the United States (all of the above).¹³ The U.S. aim with TiSA is to establish a "high standard" agreement within WTO that other energy exporting nations can later adopt.

With an agenda broader than "dirty energy," the larger objective is to liberalize energy-related services including a range of distribution services including grids and pipelines. Further scrutiny is needed in order to avoid understating the threat by focusing only on dirty energy and climate concerns.

PROPOSED TiSA TEXT ON ENERGY RELATED SERVICES

The TiSA proposal by Norway and Iceland would be the basis of negotiations for an Annex on Energy Related Services, much like the Annexes on other strategic sectors such as Financial Services, Electronic Commerce, Telecommunications, or Maritime Transport, that have been previously leaked by Wikileaks.¹⁴

Energy Related Services would also be disciplined in TiSA Members' Schedules, where they list the energy related services to which they commit to the TiSA's market access disciplines on a positive basis.

In addition, the ERS Schedule would include ERS for which the country takes exceptions to TiSA's National Treatment provisions, as they are scheduled on a negative basis. This means that all future energy related services (that have not yet been developed), would be subject to the same rules because they could not be listed as an exception today.

The following is a point-by-point breakdown explaining each of the proposed provisions for free trade in Energy Related Services in the Annex, where official text (*in italics*) is followed by analysis of its potential implications for energy and climate policy making.

TiSA'S "TECHNOLOGICAL NEUTRALITY" REVERSES ROLE OF REGULATORS

Article I – Scope

"This Chapter shall apply to measures affecting trade in energy related services, irrespective of the energy source dealt with, technology used, whether the energy source is renewable or non-renewable, and whether the service is supplied onshore or offshore."



Beat Strasser/CC

TiSA's proposed text¹⁵ states in Article 1 above that its scope shall apply to all energy sources and types of technology, leaving the interested public and its elected policymakers unable to encourage renewable energy over non-renewable, clean over dirty, or local over imported services¹⁶.

Trade talks first saw the principle of “technological neutrality” established in the WTO’s 1996 Agreement on Telecommunication Services to stop emerging technologies from being discriminated against, such as cable versus cellular versus satellite.¹⁷

TiSA’s extension of this same principle to all energy sectors makes for a blinding approach to policymaking to perhaps the economy’s most sensitive sector at a time when humanity must urgently make an historic shift to low-carbon energy sources

to avoid global climate catastrophe.

States that are trying to shift supplies from, say, imported coal to local solar, must extend any measures made in one sector to all others.

For example, Mexico restricts, by its constitution, foreign companies in the petroleum sector, yet they are trying to open up to foreign investment and technology in their wind and solar sectors.¹⁸

Despite the country’s turbulent revolution over petroleum politics which carry through and are still present. TiSA’s approach could make Mexico apply the same rules to all energy sectors evenly, thereby keeping countries from encouraging foreign participation in one area of activity they are eager to expand (i.e., renewables) while discouraging or even prohibiting it in others (i.e., oil).

Mexico may welcome more foreign investment or expertise in its offshore wind sector yet TiSA might make Mexico also grant equal access to foreign oil services companies, even though Mexico may have domestic or multilateral climate commitments to scale back this sector due to its high carbon emissions.

Imagine if Mexico’s post-Paris climate action package used “just transition” measures to support oil workers by removing restrictions for foreign service suppliers in renewables. Keeping such controls in place for oil could buffer domestic oil employees from foreign competition in a sector with diminishing opportunities since climate science says Mexico must rapidly reduce its oil output. Would TiSA prohibit measures safeguarding jobs for nationals of countries owning oil, or encouraging and ensuring domestic employment?

Technological neutrality may not outright prohibit countries from taking every measure to urgently switch energy sources; however, imposing

such principles inherently reduces the range of measures policymakers have available to prudently usher in any ambitious and equitable shift to sustainable supplies.

EVERY ACTIVITY INVOLVED IN ENERGY INCLUDED IN TiSA

Article II – Definitions

“For the purpose of this Chapter:

1. a) *«energy related services» means services incidental to exploration, exploitation, development, productions or distribution of energy or energy resources to the extent such services are supplied to energy companies, directly or indirectly through their contractors or sub- contractors;*
2. b) *energy companies means persons holding the right to undertake exploration, exploitation, development, productions or distribution of energy or energy sources.*



Chrisna - Renewable Barbed Wire /CC

TiSA's proposed Article II would apparently apply to all activities (services) involved in exploiting energy resources, including all steps in the production process of fossil fuels, from exploration, refining, to distribution. TiSA's definition of energy services spans the Central Product Classification, or CPC, the United Nations' classification system "based on the physical characteristics of goods or on the nature of the services rendered."¹⁹

TiSA's definition of "energy companies" clearly covers the persons responsible for exercising exploitation rights over the resources, otherwise known as ownership.

Art. II's purpose appears to be casting the regime's coverage as widely as possible over the entire energy sector whereby classifying any and all activity as now subject to new trade disciplines as decided under TiSA.

Despite TiSA's definition recognizing ownership over energy resources, the proposed ERS text effectively requires countries to establish unregulated services markets for foreign suppliers "to the extent such services are supplied to energy companies," thereby ensuring unrestricted access to private players when exploiting energy resources, regardless of nationality.

FREE FRACKING FOR EVERYONE, EVERYWHERE

Article III – Cross-border trade

“1. Each Party shall undertake commitments without limitations to permit cross-border supply as described in Article I-1, 2 (a) and (b) of energy related services to the extent they belong under the following CPC categories:

- - architectural services [CPC 8671],
- - engineering services [CPC 8672],
- - integrated engineering services [CPC 8673],
- - management consulting services [CPC 865],
- - services related to management consulting services [CPC 866],
- - site formation and clearance services [CPC 5113] (including geothermal drilling services),
- - maintenance and repair of equipment [CPC 633 + 8861 - 8866] and
- - construction and related engineering services [CPC 51]

2. Subject to any terms, limitations, conditions, and qualifications set out in its Schedule, each Party shall permit cross-border supply of energy related services to the extent they belong under the following CPC categories:

- - rental/leasing services without operator related to ships [CPC 83103],
- - rental/leasing services without operator related to other transport equipment [CPC 83101+83102],
- - rental/leasing services without operator related to other machinery and equipment [CPC 83106+83109], - technical testing and analysis services [CPC 8676],
- - services incidental to mining [CPC 883, 5115],
- - related scientific and technical consulting services [CPC 8675],
- - environmental services [CPC 94],
- - other lodging services n.e.c [CPC 64199] (lodging offshore),
- - maritime domestic transport services [CPC 7212],
- - maritime towing and pushing services [CPC 7214] and
- - bulk storage services of liquids or gases [CPC 7422].”

TiSA participants’ commitments are either “without limitations” (Article III.1) or “set out in its Schedule” where terms, limitations and conditions (Article III.2) are eventually targeted for elimination.

Applying such disciplines to the cross-border trade in services would expand corporations' existing powers under WTO to use trade rules to stop solutions to today's persistent unemployment and dirty energy development, even at sub-national levels where regional and local governments often drive change through policy-making.

Jurisdictions aiming to address the ecological and equity crises by acting to both expand clean energy and generate local jobs could quickly bump into TiSA's rigid trade rules that would, if advanced, bind the hands of policymakers.

As recently reported in Canada's top daily, *The Globe and Mail*, "Japan and the European Union filed complaints against Ontario, saying the province's program broke international trade law by unfairly pressuring producers of clean energy to buy hardware and services from companies located in the province."²⁰

TiSA's completion of an ERS Annex could, for example, prevent governments from prioritizing contracts with companies who hire local labor, undermining the generation of jobs domestically and the development of a national workforce. Even though foreign firms may sometimes source locally (from engineering to ditch-digging, from solar panel installation to wind turbine maintenance), TiSA seems written to shift further power to these same foreign firms to give them the full flexibility to hire whomever they want.

Nigeria's 2010 Local Content Act is precisely the sort of legislation that TiSA's demandeurs want disciplined since the law favors local Nigerian companies to be given first consideration over foreign firms when governments are contracting goods and services for the energy sector.²¹ The law is a logical and legitimate reaction after decades of Nigerians seeing their state funds go to foreign firms at the expense of domestic actors.

"Local content" often refers to goods only, however, "Acting President Goodluck Jonathan directed

Service suppliers could then challenge the terms placed on energy companies, for example, requiring foreign service suppliers to hire local labor and source local content (due to National Treatment rules), or install the latest methane-capturing technology, or even ban fracking (due to Market Access rules).



Le Haricot/CC

that exclusive consideration should henceforth be given to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute jobs in the Nigerian Oil and Gas Industry.”

While Nigeria’s local content law may already violate GATT on grounds of National Treatment, TiSA appears aimed at setting forth rules against what people can and can not do via their governments to ensure domestic benefits from foreign participation in energy exploitation.

Nigeria is not now party to TiSA talks, the “plurilateral” agreement’s aim is to establish a “strong standard” for liberalization of services that eventually applies to all WTO Members, so TiSA proposed rules could deem Nigeria’s law as in violation as discriminatory against foreign firms.

NEW FREEDOMS FOR FOREIGN INVESTORS IN ALMOST EVERY AREA

Article IV - Commercial presence

“1. Each Party shall undertake commitments without limitations to permit supply through commercial presence of energy related services to the extent they belong under the following CPC categories:

- - architectural services [CPC 8671],
- - engineering services [CPC 8672],
- - integrated engineering services [CPC 8673],
- - management consulting services [CPC 865],
- - services related to management consulting services [CPC 866],
- - technical testing and analysis services [CPC 8676],
- - services incidental to mining [CPC 883, 5115],
- - related scientific and technical consulting services [CPC 8675],
- - site formation and clearance services [CPC 5113] (including geothermal drilling services),
- - maintenance and repair of equipment [CPC 633 + 8861 - 8866],
- - construction and related engineering services [CPC 51],
- - environmental services [CPC 94],
- - other lodging services n.e.c. [CPC 64199] (lodging offshore) and
- - bulk storage services of liquids or gases [CPC 7422].

2. Subject to any terms, limitations, conditions and qualifications set out in its Schedule, each Party shall permit supply through commercial presence of energy related services to the extent they belong under the following CPC categories:

- - rental/leasing services without operator related to ships [CPC 83103],
- - rental/leasing services without operator related to other transport equipment [CPC 83101+83102],
- - rental/leasing services without operator related to other machinery and equipment [CPC 83106+83109],
- - maritime domestic transport services [CPC 7212] and
- - maritime towing and pushing services [CPC 7214]. “

“Commercial presence” is tradespeak for the right of foreign investors to directly establish themselves in a certain country, conferring new rights on the foreign investors to do business in country. *Not only would TiSA convey this right to establish an energy-related company, it would ensure that regulation of that company would have to be technologically neutral* Article IV above would establish such rights without applying any limits or restrictions in the service sectors listed in Paragraph 1.

Paragraph 2 would also establish the right of commercial presence in the service sectors listed, although these signatory countries would be allowed to place specific “terms, limitations, and conditions” on the foreign investors in the countries’ ‘Schedule,’ which would eventually be reduced or removed through subsequent rounds of negotiations.

TiSA’s targeting these terms is known as “ratcheting,” a process aiming to constantly and continuously liberalise more and more of each specific service sector until foreign investors and foreign service suppliers are free from regulation to act as they please.

YOUR ENERGY, MY MARKET

Article V - Sovereignty over energy resources

“1. The Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that such rights must be exercised in accordance with, and subject to, the rules of international law.

2. Without affecting the objective of promoting trade in energy related services, the Agreement shall in no way prejudice the rules in the respective Parties governing the system of property ownership of energy resources.

3. Each Party continues to hold, in particular, the rights to decide the geographical areas to be made available for exploration, development and exploitation of its energy resources, the optimisa-



Jared Rodriguez/CC

tion of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and exploitation, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.”

Article V assures governments that TiSA “recognizes” sovereignty over energy trade, yet each paragraph can be read as limiting sovereignty in significant ways:

Paragraph one clarifies that sovereignty over energy resources is “subject to” international law, notably TiSA.

Paragraph two is a double negative, which can be read to mean that TiSA *does limit* rules governing property ownership if those rules affect the objective of promoting trade in energy-related services.

Paragraph three assures governments that TiSA does not prohibit governments from exercising several traditional roles. Yet paragraph one provides that each role is constrained by TiSA. For example, governments may continue to operate through state enterprises, but they must also permit commercial presence of foreign subsidiaries (e.g., in services incidental to mining and bulk storage of fuels).

The principle TiSA aims to establish appears to be subjugating nations’ “sovereignty over energy resources” to international trade rules that impose the antithesis of self-governance.

Despite TiSA’s declaring it respects sovereignty, popular policies like requiring public input for big projects, approving building in sensitive areas, or hiring local labor, are all stealthily made vulnerable to being attacked by the following article VI on Right to Regulate via targeting measures that are not deemed “necessary,” “legitimate,” or “objective” yet can directly impact the rate and scale of energy resource exploitation.

TiSA’s “your energy, my market” approach would effectively remove states’ authority to ensure domestic economic benefits from exploiting sovereign energy resources by requiring states to establish free markets for foreign companies who provide energy related services, such as Halliburton.

TiSA “reaffirms” state resource sovereignty but then asserts that resources shall be “subject to rules of international law” that reduce state control, then goes on to establish individual service markets for every single activity associated with energy from the U.N.’s CPC system categorizing areas of economic activities.²² TiSA mandates that service markets must be made open to foreign service providers, forcing states to forfeit

to non-domestic entities many of the essential economic benefits from exploiting publicly-owned energy resources.

These terms above are all elaborated as specific themes in another proposed TiSA annex on Domestic Regulation,²³ as explained in PSI's previous reports on TiSA,²⁴ and would reinforce proposed GATS rules.²⁵

FALSE SENSE OF SECURITY FOR “POLICY SPACE”

Article VI - Right to regulate

“1. Consistent with the provisions of this Agreement, each Party retains the right to regulate and to introduce or maintain measures affecting trade in energy related services in order to meet legitimate national policy objectives. All such measures shall be clearly defined, transparent and objective.

2. Measures by Parties relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in energy related services shall be pre-established and published, based on objective and transparent criteria and relevant to the supply of the services to which they apply.

3. Parties shall work to ensure maximum transparency of relevant processes relating to the development and application of domestic and international standards by non-governmental bodies.

4. Where technical standards are required and relevant international standards exist or their completion is imminent, each Party shall take them or the relevant parts of them into account in formulating their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of national policy objectives.”

Article VI appears to safeguard domestic decisions regulating the energy industry, whereas its intended impact is to get governments to agree to “regulate the regulators.”

Trade policy critics have noted previously that “dispute panels may discount all but exclusively commercial considerations in deciding whether regulatory criteria are objective and transparent.”²⁶

The ERS annex could put at risk licensing requirements and permits for all sorts of activities, from building pipelines and other essential infrastructure to drilling, storage, and transmission.

Many of these activities may require prior environmental assessment and mitigation measures, as well as public input and other processes, safety procedures, and policies already in place in order to ensure public benefits from services.



Ingrid Taylor/CC

TiSA's related text on Transparency requirements, Domestic Regulation disciplines, and other cross-cutting themes, link to reinforce ERS commitments.

It will be interesting to see how the US Trade Representative now applies the president's new "climate test" when considering new energy infrastructure for fossil fuels pipelines like the recently defeated Keystone XL pipeline.

TiSA's proposed text for limiting domestic regulations uses several terms (See Stumberg Box below), such as "transparent," "objective," "relevant," and "appropriate", that may sound noble but in fact are loaded with

legal implications that could result in corporations rolling back almost any measure to protect the public good. One way governments regulate services is by requiring permits or licenses for services providers before they are allowed to operate. Too often, such permits are seen by service providers as unjustified barriers to the "free trade" in services.

BOX:

TRADESPEAK TRANSLATED: RIGHT TO REGULATE

Georgetown University Law School Professor Robert Stumberg analyzed these terms in a way that they can be directly refuted—more strongly than the analogy to the Keystone pipeline decision. (see footnote 15):

--"Pre-established" is a rule against change: it could negate any regulation that is adopted after a company is created, after property is purchased, or after a company establishes market share.

--"Objective" has five definitions in WTO documents including "not subjective" (which undermines balancing tests for determining the public interest) and "least-trade restrictive".

--"Relevant" in the GATS context is linked with relevance to the supply of a service, which could be used to challenge measures that protect external impacts of energy services on the environment, aesthetic or cultural resources, or other sectors of a local economy.

For further examples of how the TiSA annex might clash with US utility regulation, see Stumberg's 2005 report, GATS and Electricity.

For example, U.S. President Barack Obama's recent decision to reject the permit for the controversial Keystone XL pipeline—which would carry Canadian crude oil from the tar sands of Alberta to the Gulf Coast for export globally—was heavily criticized by the pipeline's proponent, a Canadian company called TransCanada. Since the proposed pipeline would cross an international border, the U.S. issues a presidential permit, preceded by a recommendation from the State Department.

Whatever weaknesses may exist in the TransCanada investment claim, TiSA would shore them up and provide the Government of Canada, at least, with the grounds for a TiSA challenge. If TiSA is approved, the provisions above could be used to legally challenge the U.S. decision-making process as not having “maximum transparency of relevant processes” if, say, not all aspects of State's assessment were not publicly available; or if public inputs based on concerns about climate change were not considered “objective;” or if the decisions was not based on “pre-established” criteria such as climate impacts, or any factor that Canada considers to be contestable.

An analysis by Our World Is Not For Sale (OWINFS) argues that, “The proposed Annex defines technical standards (Article 3(d)) in a way that would capture not only regulation of services but as well of goods if a standard specifies the equipment that must be used in supplying a service.”²⁷ This means that, for example, governments who want fracking companies to prevent the escape of dangerous methane (a greenhouse gas much more potent than carbon dioxide) by using technologies that capture methane while fracking, TiSA's proposed text restricting Domestic Regulations could be used to stop governments from requiring companies to use such technologies.

For more thorough explanations of the potential uses of TiSA's proposed Domestic Regulations provisions, see OWINFS (first link below) and others (second link below) analyses as referenced below.

LINKS for this section:

<http://www.ourworldisnotforsale.org/sites/default/files/Analysis-TiSA-Domestic-Regulation-Annex.pdf>

http://www.world-psi.org/sites/default/files/documents/research/report_TiSA_eng_lr2.pdf

MISGUIDED MANDATE ON MONOPOLIES



Arne Huckelheim / CC

Article VII - Competition

"1. Each Party shall work to alleviate market distortions and barriers to competition in the supply of energy related services, including the distortions originating from the dominant position of [national] energy companies.

2. Each Party shall ensure that it has and enforces such laws and regulations as are necessary and appropriate to address anti-competitive conduct in the energy related services markets.

3. Each Party shall ensure that their respective competition law and policy are enforce in a transparent, timely, objective and non-discriminatory manner."

It is worth observing that this article contradicts Article V on Sovereignty over Energy Resources by directing Parties to reduce "distortions" that let local or national companies dominate competition.

Article VII could work well for clean energy in the case of, for example, California's investor-owned utilities' blocking measures that would significantly scale up renewables by "net metering."²⁸ However, the presence of the "[national]" *in brackets* reveals that this demand is strikingly similar to the Halliburton agenda from a decade ago: driven by the increasing desire of many oil services companies to penetrate the ninety percent of the planet's fossil fuel resources that are currently under state ownership.

Since TiSA members aspire to first have it adopted as a "plurilateral" agreement, and then later to bring it under the WTO for other Members to adopt, here one sees how global oil services companies aim to use it to break up the big OPEC countries' state-owned companies, as well as non-OPEC nations which also operate state owned enterprises.

Iceland's geothermal giants may have good intentions to export their expertise but it will be Halliburton and other oil service giants that benefit most from TiSA's misguided mandate that opens up massive new market opportunities to the dominant fossil fuel sector.

GOVERNMENT SPENDING AS A MAJOR MARKET

[Article VIII - Procurement of energy related services]

Procurement is already covered by TiSA's core article on procurement, which imports GATS article XIII. Specifically, it excludes procurement for government consumption but covers procurement for services that are resold to the public—e.g., energy services.

Since TiSA talks define any and all activity related to energy— from exploration to distribution—as “energy related services,” including government procurement, ERS would effectively extend over energy and climate policy the global trade rules that prioritize private investment and export expansion above all other public interests.

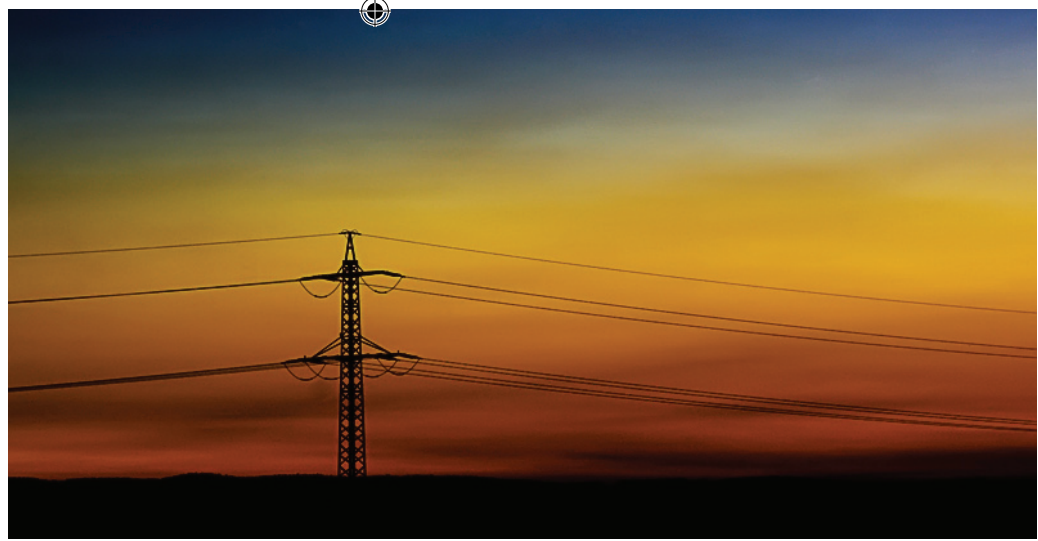
The vast market power of government purchasing is frequently used by federal, state, and local officials to achieve local environmental goals, to stimulate local employment, and to reverse discrimination against marginalized communities.

Public budgets are often used to procure specific types or services and products from people or populations that have been historically excluded due to diverse reasons of racial or ethnic discrimination. Such procurement policies are very important in countries with long histories of colonial powers expropriating resources and their current neo-colonial legacy as practiced by foreign companies.

The proposal includes placeholder text that is bracketed, denoting that the text is tentative and/or not agreed for inclusion. This indicates an intention by the proponents to include government purchasing (procurement) of energy related services into the Annex.

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Walter Keller/CC

South Africa's experiment in renewable energy policy, the Renewable Energy Independent Power Producers' Programme, is an excellent example of TiSA's threat—if exported to WTO—to sovereign domestic decisions to encourage new energy mixes and to ensure that the ownership and benefits are equitably distributed among local actors, especially prioritizing traditionally marginalized populations.²⁹

TISA'S PROPOSED TEXT ON "DOMESTIC REGULATION" AND "TRANSPARENCY"

Annexes for the TiSA are reinforced by other chapters with overlapping commitments, such as the chapters on Transparency requirements, Domestic Regulation disciplines, and other cross-cutting themes that would place further limits on public policy space of governments regarding climate, conservation, domestic job creation, and other public goals.

For example, the [Transparency text](#) would provide energy corporations with a right to provide inputs to proposed measures including laws, regulations, procedures, and administrative rulings, and potentially would mandate a governmental obligation to respond to foreign corporations which had provided input, in advance of a final decision on any of the proposed measures.

Likewise the Domestic Regulation Annex proposes to constrain governments' ability to regulate licensing standards and procedures, technical standards, and professional qualifications. For examples on Domestic Regulation, see separate section on that subject.

According to analysis previously published by Wikileaks, the TiSA Annex on Domestic Regulation currently contains over twenty grounds for challenging non-discriminatory, transparent regulations.

PSI has previously published detailed analyses on the potential problems of governments adopting these proposed disciplines on domestic regulation, including:

Scott Sinclair's "TiSA Versus Public Services" ³⁰

Ellen Gould's "The Really Good Friends of Transnational Corporations Agreement" ³¹

Other analysts who have explained TiSA's threats to domestic regulation can be found at Our World Is Not For Sale's website. ³²

CONCLUSIONS AND RECOMMENDATIONS

Other than undermining the existing system of utility regulation in the United States, TiSA's proposed rules for Energy Related Services threaten a number of measures aimed at cutting carbon emissions and ensuring that the exploitation of energy resources actually accrues to countries and communities who own the resources as well as the workers who are necessary elements of organizing production.

Governments participating in TiSA talks in Geneva should step back and assess the implications of what they are negotiating and how it relates to other top policy objectives they are pursuing, especially as concerns the urgent need to address climate change. The imperative of creating low-carbon economies must trump the short-term profit pressures of the powerful fossil fuel corporations.

ENDNOTES

- 1 <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>
- 2 <http://www.ourworldisnotforsale.org/it/node/1559>
- 3 <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/SP12-TheWorldTradeOrganizationandOil-AJimenezGuerra-2001.pdf>
- 4 However, GATS Article XVI (Market Access) provides that the prohibition on limiting service operations or volume of services does not cover measures that "limit inputs for the supply of services." While widely viewed as granting an environmental exception for market access rules, this flexibility does not extend to GATS National Treatment rules (requiring foreign service suppliers to be treated no less favorably than nationals), which act as a barrier to climate policy.
- 5 <http://www.ourworldisnotforsale.org/en/article/TiSA-framework-reregulating-global-trade-services>
- 6 <https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2014/July/Testimony-Deputy-USTR-Punke-Before-House-Ways-Means-Committee-Trade>
- 7 <http://www.wtrg.com/EnergyReport/National-Energy-Policy.pdf>
- 8 <http://fpc.state.gov/documents/organization/38004.pdf>
- 9 <http://cepr.net/publications/op-eds-columns/bush-administration-pushes-for-regime-change-in-venezuela>
- 10 Personal communication with USTR services staff after author's presentation at civil society side events in San Francisco.
- 11 <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>
- 12 <https://ustr.gov/sites/default/files/ITAC-6-Energy-and-Energy-Services.pdf>
- 13 <http://ec.europa.eu/trade/policy/in-focus/TiSA/>
- 14 <https://wikileaks.org/TiSA/>
- 15 <https://wikileaks.org/TiSA/TiSA-Energy-Related-Services-Proposal-IS-NO/TiSA-Energy-Related-Services-Proposal-IS-NO.pdf>
- 16 *FN. Article 3 of GATT already prohibits a preference for local over imported energy goods. The TiSA Annex makes clear that the neutrality principle applies to energy services.*
- 17 https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_01_e.htm
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- 19 <https://stats.oecd.org/glossary/detail.asp?ID=309>
- 20 <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/wto-rules-against-ontario-in-green-energy-dispute/article5461941/>
- 21 <http://www.loc.gov/law/foreign-news/article/nigeria-local-content-bill-signed-into-law/>
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- 23 <http://www.ourworldisnotforsale.org/sites/default/files/Analysis-TiSA-Domestic-Regulation-Annex.pdf>
- 24 http://www.world-psi.org/sites/default/files/documents/research/report_TiSA_eng_lr2.pdf
- 25 Stumberg, Robert, *Negotiations on Domestic Regulation: A Plain Language Guide*, Harrison Institute for Public Law, Georgetown University 19 May 2010.
- 26 <http://www.ourworldisnotforsale.org/sites/default/files/Analysis-TiSA-Domestic-Regulation-Annex.pdf>
- 27 <http://www.ourworldisnotforsale.org/sites/default/files/Analysis-TiSA-Domestic-Regulation-Annex.pdf>
- 28 http://www.350bayarea.org/rally_for_solar_10_14
- 29 Baker, L and Wlokas, H L. 2015. South Africa's renewable energy procurement: A new frontier? Energy Research Centre, University of Cape Town, Cape Town, South Africa.
- 30 http://www.world-psi.org/sites/default/files/documents/research/en_TiSAresearchpaper_hqp_internal.pdf
- 31 http://www.world-psi.org/sites/default/files/documents/research/report_TiSA_eng_lr2.pdf
- 32 <http://www.ourworldisnotforsale.org/sites/default/files/Analysis-TiSA-Domestic-Regulation-Annex.pdf>





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