

# The Free Fracking Agreement

## Proposed TiSA Annex on Energy Related Services

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As Heads of State prepare to sign an historic United Nations accord in Paris to avoid today's accelerating climate catastrophe, their trade negotiators are meeting in Geneva to secretly forge a new Trade in Services Agreement (TiSA) covering Energy Related Services (ERS) that could expand fossil fuels exploitation causing climate change, according to analysis of new [documents](#). Call it the Free Fracking Agreement.

Reviving a proposed framework first floated a decade ago during the Bush-Cheney administration known as "[Halliburton's WTO Agenda](#)," TiSA's proposed new deal would recklessly undermine urgent work worldwide to reduce dangerous carbon emissions, create clean energy jobs, and increase energy security for economies 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 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 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 and to urge government to abandon the fossilized paradigm of free trade in place of a clean, fair energy future for all.

As UNFCCC's COP 21 in Paris opens, TiSA talks resume at WTO in Geneva; the objectives of each could not be more diametrically opposed.

## **BRIEF BACKGROUND ON THE WTO, TiSA AND ENERGY**

Although oil is the world's most traded commodity, energy issues have historically been excluded from world trade rules due to their strategic nature and sensitive character. WTO core principles that generally prohibit export restraints and require nations to reduce domestic consumption in proportion to any decreases in exports have helped to keep energy off the table in Geneva.

WTO's existing General Agreement on Trade in Services (GATS) does not include natural resource constraints or environmental considerations in its General Exceptions, making the trade-in-services paradigm inherently insensitive to sustainability issues.

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 imperatives. TiSA's ultimate destination is even more apparent given 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 Energy Committee proposed in its seminal May 2001 policy paper to establish an energy services chapter in GATS, then spent much of the decade trying to push it through while it waged war and attempted regime change in the world's most oil-rich regions, particularly the Persian Gulf and Venezuela.

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 the trade-in-services talks.

The Obama White House then blindly imported the Bush-Cheney proposals into its own trade policy "reform" platform as seen in the TransPacific Partnership (TPP), and now today's TiSA, even though these trade policies are at odds with Obama's climate policies.

While today's TiSA proposal 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 its top proponents, affording some semblance of social and environmental cover for the same agenda of exploiting dirty energy.

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).

Their plan with TiSA is to establish a “high standard” agreement within WTO that other energy exporting nations can later adopt.

## **Proposed TiSA TEXT ON ENERGY RELATED SERVICES**

The proposed TiSA proposal by Norway and Iceland would be the basis for negotiations on an Annex on Energy Related Services, much like the Annexes on other strategic sectors such as Financial Services, Electronic Commerce, Telecommunications, Maritime Transport, or Domestic Regulation, that have been previously leaked by Wikileaks. Energy Related Services would also be disciplined in the Schedules of the members, in which they list the energy related services to which they commit to the TiSA’s market access disciplines on a positive basis. In addition, the Schedule would include ERS for which the country takes exceptions to TiSA’s National Treatment provisions, as they are scheduled on a negative basis – meaning all future energy related services that have not yet been developed, would be subject to the 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 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.”*

TiSA’s proposed text 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.

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.

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 of 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.

TISA's approach could make Mexico extend the same policies to both and prevent it from encouraging one while discouraging the other, or even treating them differently in light of its turbulent history and public opinion.

Mexico may want more foreign investment or expertise in its offshore wind sector yet TISA would make it grant equal access to foreign oil services companies even though they may have made commitments to scale back this sector due to its high carbon emissions or to set aside a certain number of jobs for its own engineers to encourage and ensure domestic employment opportunities.

## **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.”*

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 to distribution, across CPC categories.

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

Despite TISA's definition recognizing ownership over energy resources, the ERS text effectively requires countries to establish markets for foreign services suppliers, thereby ensuring access to anyone when exploiting the energy resource regardless of nationality or record in respecting rights.

## FREE FRACKING FOR EVERYONE, EVERYWHERE

### Article III – Cross-border Trade

*“1. Each Party shall undertake commitments without limitations to permit cross-boarder 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]*
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- *2. Subject to any terms, limitations, conditions, and qualifications set out in its Schedule, each Party shall permit cross-boarder 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. Service suppliers could challenge conditions set on energy companies that they hire local labor or install the latest flaring /methane-capturing technology, from entirely ban fracking, could be put on the chopping block.

## 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” confers new rights on foreign investors to establish themselves directly in country, and leaves even less eligible activities listed as “set out” in participants’ Schedules as exceptions to be regulated.

## **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 optimisation 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.”*

The principle TiSA aims to establish here is subjugating nations’ ultra-sensitive “sovereignty over energy resources” to international trade rules that are the very antithesis of self-governance principles. 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 they shall be “subject to rules of international law” that reduce state control, then goes on to establish individual service markets for every single activity (CPC categories) involved in exploiting energy resources, mandating that must be made accessible to foreign energy service providers, forcing states to forfeit many of the main economic benefits of exploiting resources to entities outside of their own territory.

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. [These terms](#) above are all elaborated as specific themes in another proposed TiSA annex on Domestic Regulation, as explained in [PSI’s previous reports on TiSA](#), and would reinforce [proposed GATS rules](#).

## **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 sounds like it safeguards 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.”

As a result of TiSA’s proposed text, if approved, 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 permits, many of which 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.

TiSA’s related text on Transparency requirements, Domestic Regulation disciplines, and other cross-cutting themes, link to reinforce ERS commitments with the other annex’s overlapping rules.

It will be interesting to see how the US Trade Representative now applies the president’s new “climate test” for approving energy infrastructure for fossil fuels pipelines like the defeated Keystone XL pipeline.

## **MISGUIDED MANDATE ON MONOPOLIES**

### **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.”*

While Article VII could work well for clean energy in the [case of California's corrupt](#) electricity company blocking measures that would significantly scaling up of renewables' by "net metering" the presence of the "[national]" in brackets reveals that this demand is driven by the increasing desire of many oil services countries to penetrate the seventy percent of the planet's fossil fuel resources currently under state ownership.

Since TiSA members aspire to first have it adopted as a "plurilateral" agreement then intend 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 who 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 oligarchs that benefit most from TiSA's misguided mandate.

## **GOVERNMENT SPENDING AS MAJOR MARKETS**

### **[Article VIII - Procurement of energy related services]**

The proposal includes placeholder text that is bracketed, denoting that the text is tentative and/or unagreed for inclusion. This indicates an intention by the proponents to include government purchasing (procurement) of energy related services into the Annex. Since TiSA talks define any and all activity related to energy— from exploration to distribution—as "energy related services," including government procurement of ERS would effectively extend over energy and climate policy the very world trade rules that prioritize private investment and export expansion above all other public interests with regards to the vast market of government purchasing, which is frequently used by federal, state, and local officials to achieve local environmental or other goals, to foment local employment, and to reverse discrimination against marginalized communities.

## **TISA's PROPOSED TEXT ON "DOMESTIC REGULATION" "TRANSPARENCY"**

Annexes for the TiSA on Transparency requirements, Domestic Regulation disciplines, and other cross-cutting themes would place further limits on public policy space of governments regarding climate, conservation, domestic job creation, and other public goals with regards to Energy Related Services. 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 who 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. According to analysis previously [published by Wikileaks](#), the TISA Annex on Domestic Regulation currently contains over twenty grounds for challenging completely non-discriminatory, transparent regulations.

## **CONCLUSIONS AND RECOMMENDATIONS**

ERS proposed rules undermine 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 this week in Paris, and on the ground in their own countries.

## **ABOUT THE AUTHOR**

Victor Menotti works with the International Forum on Globalization. He has written and spoken extensively about the impact of globalization on ecosystems, and he has helped build international networks among the energy producers and energy workers, as well as traditional farming, forest, fishing, and indigenous communities whose survival depends on their sustainable use. He is the author of the IFG report, "Free Trade, Free Logging: How the World Trade Organization Undermines Global Forest Conservation," "The Other Oil War: The Halliburton Agenda on WTO Energy Services," the chapter "WTO and Native Sovereignty" in *Paradigm Wars: Indigenous Peoples' Resistance to Economic Globalization*, and, "The WTO and Sustainable Fisheries" for the Institute for Fisheries Resources. Victor learned to speak Spanish, Portuguese, French, Italian, and some Slovak, after earning his degree in International Relations from UCLA.