

Trade and sustainable development in the Transatlantic Trade Investment Partnership

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A concept note by



Introduction

This note has been developed by Transport & Environment and the European Environmental Bureau in response to the Commission request for input into developing a trade and sustainable development chapter in the ongoing European Union (EU) and United States (US) free trade agreement, otherwise known as the Transatlantic Trade Investment Partnership (TTIP). The note first provides a brief overview of sustainable development before outlining a proposal for how to promote sustainable development within TTIP.

Brief overview of trade and sustainable development

In 1987, the United Nations World Commission on Environment and Development published a report titled “Our Common Future” in which it coined the term “sustainable development.”¹ To be sustainable, development must be undertaken in such a manner as to “meet the needs of the present without compromising the ability of future generations to meet their own.”² For the last 28 years, sustainable development has become a bedrock principle for policy objectives across the world with three pillars — economic development, social development and environmental protection — that are considered interdependent and mutually reinforcing.

Since 2009, following review of the EU Sustainable Development Strategy, the EU has redoubled its efforts towards a cohesive policy framework based on sustainable practices.³ The work of DG Environment, through monitoring the application of EU environmental law in member states and greening the European semester, reflects this desire for cohesive policy application.⁴ Furthermore, recourse to infringement procedures has allowed the European Commission in several instances to fulfil its responsibilities as “guardian of the treaties” when member states fail to fulfil their obligations under the EU treaties. This framework for upholding EU environmental *acquis* should serve as a source of inspiration for negotiating similar provisions on sustainable development in TTIP.

Many free trade agreements (FTAs) include provisions on sustainable development. To date, however, these provisions have done little to nothing to advance sustainable-development objectives, in particular because inadequate state-to-state dispute-settlement mechanisms are provided. In this regard, the FTAs with South Korea, Colombia and Peru serve as clear examples. There, state-to-state dispute settlement on sustainable development is simply restricted to non-binding recommendations whereas other topical

¹ See World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (1987), available at <http://www.un-documents.net/our-common-future.pdf>.

² World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (1987), p. 41, available at <http://www.un-documents.net/our-common-future.pdf>.

³ European Commission, *Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions: Mainstreaming Sustainable Development into EU Policies: 2009 Review of the European Union Strategy for Sustainable Development*, COM(2009) 400 final (24 July 2009), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0400&from=EN>.

⁴ See European Commission, DG Environment, *Greening the European Semester* (website), available at http://ec.europa.eu/environment/integration/green_semester/index_en.htm (last visited 1 June 2015).

areas, such as those relating to commerce, have provisions providing remedies and sanctions for infringements. This differential and unequal treatment means that the sustainable-development chapters are subservient to the commercial ones. Even though the South Korean FTA clearly states that an objective of the agreement is to promote sustainable development — unlike the Colombia and Peru FTAs — those provisions are not given the same legal representation as other chapters, underscoring the lack of cohesive policy treatment in comparison to the intra EU-Commission approach. Indeed, chapters on sustainable development found in FTAs are often no more than voluntary agreements, as opposed to traditional legislative instruments. Voluntary agreements may provide more flexible and rapid solutions in comparison to traditional lawmaking, but these soft measures often lack transparency, ambition, legitimacy, and efficacy.

The approach to sustainable development in TTIP is flawed. Based on the information available, it seems clear that the approach will mirror that in the draft EU-Canada Free Trade Agreement (CETA). While CETA marks a slight improvement on previous FTAs by defining specific topical areas, it remains constrained by its lack of effective state-to-state dispute settlement, in particular with respect to remedies and sanctions for infringements.

Promoting sustainable development in TTIP

Sustainable development in TTIP is currently subject to differential and unequal treatment. In particular, based on the information available, state-to-state dispute settlement on sustainable development is limited to aspirational objectives and government consultations – with the only remedies and procedural guarantees being those provided for in domestic legal frameworks, which effectively forecloses any meaningful state-to-state dispute settlement. In comparison, based on the information available, most other topical areas in TTIP fall under the chapter on state-to-state dispute settlement while still others reference the dispute-settlement provisions in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) Agreement, which provide a comparable level of protection. This differential and unequal treatment of state-to-state dispute settlement for sustainable development cannot be reconciled with the EU policy objectives in this area.

The EU must provide equivalent state-to-state dispute settlement for sustainable development, one that ensures that commitments are upheld by governments and, by extension, private actors and industry operating within their borders. This equivalence can be accomplished in one of three ways.

First, the EU has previously included an ‘essential elements’ clause in certain international agreements such as the EU-Central America Association Agreement⁵ in which Article 1 calls for the respect of “democratic principles and fundamental human rights”. The scope of the ‘essential elements’ clause found in Article 1 should be broadened to include the Trade and Sustainable Development or environmental protection. The ‘essential elements’ clause has not been included in all EU trade agreements to date – for example, the Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada. The Mercosur Democratic Clause (part of the Ushuaia Protocol) takes this concept one step further in Article 3, stating that “Any breach of the democratic order in one of the Parties of the present protocol will give rise to... (Article 5) the suspension of the right to participate in the different organizations of the respective integration processes up to the suspension of the rights and obligations emerging from these processes”. The suspension of an agreement, in the case of TTIP, could be applied to a breach of the conditions laid out in the Trade and Sustainable Development⁶.

⁵ PART I GENERAL AND INSTITUTIONAL PROVISIONS TITLE I NATURE AND SCOPE OF THIS AGREEMENT ARTICLE 1. CENTR-AM/EU/en 10, available at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147661.pdf

⁶ Protocolo de Ushuaia Sobre compromiso democrático en el mercosur, La república de Bolivia y la república de Chile. http://www.mercosur.int/msweb/portal%20intermediario/es/archivos/destacado4_es.doc

Second, by interweaving sustainable development into every aspect of the agreement – not treating it as an appendage or unwanted stepchild to the overall agreement – which would require incorporating it into the other topical areas, i.e. a specific section in each chapter setting out the relevant obligations. In doing so, Parties would be able to call upon the state-to-state dispute-settlement provisions applicable to those topical areas and, where provided, benefit from corresponding remedies and sanctions when infringements occur, such as the reinstatement of tariffs and quotas. Such an approach would not have to displace the chapter on sustainable development already in TTIP, in particular the aspirational goals and institutional arrangements that seek to promote cooperation (although some modifications to that text may be necessary). Instead, it would serve as a complement and safeguard in the event such aspirational goals and cooperation fail to resolve the issue.

For example, the chapter on vehicles in TTIP aims to reduce tariffs (5.2% for the US and 3.5% for the EU), harmonise certain safety standards, align the joint EU-US work in the United Nations Economic Commission for Europe (UNECE) and cooperate on future issues and research and development, such as electric vehicle technology.⁷ An additional section could be included setting out a transatlantic commitment to promote and uphold domestic policies and legislation – both existing and prospective – that promote sustainable development. To this end, in the EU, the following domestic transport policies and legislation should be promoted and upheld within TTIP, among others:

- White Paper Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System;⁸
- Emission GHG Performance Standards for Vehicles;⁹
- Fuel Quality Directive;¹⁰ and
- Noise Emissions of Motor Vehicles.¹¹

Third, by creating a stand-alone chapter on sustainable development that contains an equivalent state-to-state dispute settlement mechanism. In this instance, although not interwoven into the other aspects of the agreement, linkages to the other topical areas could be provided thus ensuring an interdependent and mutually reinforcing framework. State-to-state dispute settlement, however, would have to be equivalent, which should be achieved by linking the sustainable-development chapter to the state-to-state dispute settlement already provided for in TTIP in order to ensure equivalence and avoid watering down the mechanism as in previous agreements.

⁷ European Commission, *European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership* (Memorandum) (13 February 2013), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=869> (last visited 26 March 2013).

⁸ European Commission, *White Paper Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System* (28 March 2011), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0144> (last visited 21 June 2015).

⁹ See e.g. Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 Setting Emission Performance Standards for New Passenger Cars as part of the Community's Integrated Approach to Reduce CO₂ Emissions from Light-Duty Vehicles 2009 O.J. L 140/1; European Commission, *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 510/2011 to Define the Modalities for Reaching the 2020 Target to Reduce CO₂ Emissions from New Light Commercial Vehicles* (11 July 2012) [COM(2012) 394 final – 2012/0191 (COD)]; see generally [TransportPolicy.net](http://www.transportpolicy.net), *EU: Light-Duty: Emissions*, available at <http://www.transportpolicy.net/index.php?title=EU: Light-duty: Emissions; TransportPolicy.net>, *EU: Light-Duty: GHG*, available at <http://www.transportpolicy.net/index.php?title=EU: Light-duty: GHG>.

¹⁰ Directive 2009/30/EC of the European Parliament and of the Council amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC (23 April 2009); see also Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC.

¹¹ Regulation (EU) No 540/2014 of the European Parliament and of the Council of 16 April 2014 on the sound level of motor vehicles and of replacement silencing systems, and amending Directive 2007/46/EC and repealing Directive 70/157/EEC.

In either instance, in support of the inclusion of sustainable development in TTIP, the EU should also consider adopting EU legislation with bilateral safeguard clauses. The EU-South Korea FTA, which entered into force in July 2011, could serve as a model. There, during negotiations, the EU-South Korea FTA caused massive outcry from the European Automotive industry who felt that the agreement was skewed in favour of South Korean vehicle manufacturer.¹² As a concession prior to the ratification, the EU adopted a regulation implementing a bilateral safeguard clause.¹³ The bilateral safeguard clause enabled the EU to suspend further reductions in customs duties or increase them to previous levels if lower rates were to lead to an excessive increase in imports from South Korea, causing or threatening to cause "serious injury" to EU producers.¹⁴ The bilateral safeguard clause introduced a number of important monitoring conditions, such as the right of the Commission, Parliament or industry to demand the launch of an investigation that could lead to activation of the bilateral safeguard clause as well as specific surveillance measures linked to rise in imports.

Here, the bilateral safeguard clause developed for the EU-South Korea FTA could be adapted for sustainable development. For example, with respect to climate change, the impact assessment for TTIP is not yet complete thus it is impossible at this stage to discuss the overall climate impact of the agreement. But based on the simple principle that a trade agreement will increase trade and more trade in goods requires more transport, one can conclude that aviation, maritime and road transport will increase, which could lead to an increase in CO₂ emissions. In this regard, the integration of sustainable development into TTIP implies an internalisation of external costs and goods and services with significant externalities – to promote efficient and beneficial outcomes. The targets would need to be agreed within the negotiations but each region would be free to define its own conditions and assessment in line with its own regulatory framework. Both trade partners would continually update the conditions in line with legislative developments.

Further information

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¹² See e.g. European Automobile Manufacturers Association, *EU-South Korea FTA* (Web Article), available at <http://www.acea.be/news/article/eu-south-korea-fta> (last visited 1 June 2015).

¹³ European Commission, Proposal for a Regulation of the European Parliament and of the Council Implementing the Bilateral Safeguard Clause of the EU-Korea Free Trade Agreement, 2011 O.J. C 308 E/98, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XP0301&from=EN>.

¹⁴ European Parliament, Press Release: EU-South Korea Free Trade Accord: MEPs Agree on the Safeguard Clause (26 January 2011), available at <http://www.europarl.europa.eu/news/en/news-room/content/20110124IPR12357/html/EU-South-Korea-free-trade-accord-MEPs-agree-on-the-safeguard-clause>.