

Sustainable development and environment in TTIP

Moving from empty language to equal consideration

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A joint study by



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Executive Summary

1. Existing trade policy counteracts sustainable development

1.1 Failed promise in EU sustainable policymaking

While the principles of sustainable development are clearly set forth in the EU's foundational treaties, the record of real policy application in EU trade policy is less encouraging. Constitutional ambitions and requirements notwithstanding, environmental protection and sustainability measures are relegated to secondary consideration whenever commercial interests are at stake.

The Commission currently treats sustainable development as perfunctory – an unwanted stepchild to the overall agreement. As long as this hierarchy of priorities continues, sustainable growth and development will be limited. EU trade policy must equally incorporate the pillars of social cohesion, environmental protection and economic expansion; these same principles must be interwoven into every aspect of the EU's trade policies going forward.ⁱ

1.2 TTIP should set a new standard for sustainable trade

The nature of existing trade policy is inherently imbalanced – not in terms of imports and exports, but in the forked approach to commerce and sustainability. At the same time, the scope of trade agreements is shifting; long-gone are the days when liberalisation simply meant lowering tariffs. In this regard, T&E and ClientEarth embrace TTIP's potential to catalyse bilateral agreement on and enforcement of sustainability targets.

However, this optimism depends on the inclusion of enforceable and strong environmental and labour protection provisions in the final TTIP agreement, in particular in the Sustainable Development chapter. However, the current position of the Commission on sustainable development in TTIP is similar to the previous weak approach. The United States approach demonstrates more commitment to sustainability by making the few labour and environmental aspects of its trade agreements enforceable.

1.2.1 Nine recommendations for a new sustainable trade framework

Neither the European or American approach has proven adequate. The EU's proposed Sustainable Development chapter, and the US' anticipated Environment and Labour chapters, contain only a few weak commitments to the values they profess to uphold. We maintain that the final TTIP text *must* include a stronger commitment to sustainable development, negotiated in full transparency, and incorporating the following 9 points:

1. Application of state-to-state dispute settlement to the provisions of the Sustainable Development chapter;
2. Adoption and effective implementation of core environmental agreements as a condition for final conclusion;

3. Absolute protection of states' rights to regulate *via* a Clean Hands clause and an extension to the scope of the exceptions clause, while also removing provisions that allow challenges to current and future standards;
4. Incorporation of a stronger role for civil society in the monitoring and enforcement of the agreement's environmental aspects;
5. Introduction of bilateral environmental safeguard clauses;
6. Integration of environmental protection requirements into every chapter of the agreement text;
7. Cooperation on the removal of unsustainable subsidies while simultaneously promoting those that are sustainable;
8. Prohibition of environmental dumping;
9. Centralisation of sustainable development as an essential element of all current and future trade agreements.

These proposals chart a clear path away from the European Commission's current 'green-washing' of trade agreements and closely match the European Parliament's request for a new approach to sustainable development and trade.

Conclusions

Trade volumes are expanding at the same time as the scope of agreements widens. As part of this evolution, negotiations must now progress beyond lip-service treatment of sustainability objectives and create real, enforceable commitments to environmental and social protections.

Trade and sustainability are not incompatible; rather, they can complement one another if properly guided. T&E and ClientEarth's joint-report outlines the parameters under which trade liberalisation can be achieved sustainably. The direct applicability of this joint report is to TTIP, but it also provides a flexible blueprint for the revision of existing free trade agreements and those negotiated in the future.

There is clear support for an overhaul of EU trade policy to incorporate sustainability objectives. The European Parliament recently stipulated to the Commission that the final TTIP agreement must 'lead to an ambitious, comprehensive and balanced trade and investment agreement of a high standard that would promote sustainable growth with shared benefits.'ⁱⁱⁱ As is, failure to fundamentally revise the sustainable development chapter not only damages the EU's external credibility, but could lead to the rejection of the overall agreement.

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1. Legal revision of trade and sustainable development

Sustainable development has become one of the essential goals and ambitions of the EU, and is now a guiding principle for both its internal and external policies.¹ Domestically, this is manifest in Article 3 (3) of the Treaty on European Union (TEU), which states that the EU shall ‘work for the sustainable development of Europe’, Likewise, ‘[i]n its relations with the wider world, the Union shall [contribute to] the sustainable development of the Earth’ (article 3 (5) TEU).

The EU’s common commercial policy is not exempted from achieving these goals. The Treaty on the Functioning of the European Union (TFEU) requires the common commercial policy to be conducted in the context of the principles and objectives of the EU’s external action.² These principles and objectives require the EU to ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’.³ Moreover, Article 11 of TFEU even explicitly requires environmental protection requirements to be integrated in EU policy, including EU trade policy. Article 11 TFEU states:

‘Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.’

Despite these constitutional ambitions and requirements, EU trade policy has not given sufficient consideration to environmental protection and sustainable development. While many contemporary free trade agreements (FTAs) nod to the principle of sustainable development, the chapters on trade and sustainable development merely focus on fostering future collaboration on environmental and labour matters without imposing any significant and enforceable obligations on the Parties, in contrast to the legally enforceable provisions on commercial liberalisation.

This two-tiered structure within FTAs reduces sustainable development provisions as subservient to commercial chapters; it imposes a separation that contravenes the three foundational pillars (from the 1987 Brundtland Report, three pillars of sustainable development: (1) environmental responsibility; (2) social cohesion; and (3) economic development) which have been reaffirmed by the EU and counterpart governments around the world. Moreover, it exposes a lack of cohesion between the Commission’s approach to sustainable development and its cooperation with external trading partners – specifically in contradiction with articles 7 and 11 of the TFEU.⁴

¹ In the preamble of the Treaty on European Union (TEU), the Member States recognise their determination to take ‘into account the principle of sustainable development’. Thus, internally the EU shall, according to Article 3 (3) TEU, ‘work for the sustainable development of Europe’ Moreover, ‘[i]n its relations with the wider world, the Union shall [contribute to] the sustainable development of the Earth’ (article 3 (5) TEU). More specifically, Article 21 (2) (d) TEU requires the EU in its foreign policy (including its trade policy) to ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’.

² Article 207 (1) TFEU.

³ Article 21 (2) (d) TEU.

⁴ Article 7 TFEU reads ‘[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’

2. Promoting a new approach to trade and sustainable development

These troubling patterns extend to the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the United States. Based on available information, the TTIP agreement will recapitulate the same flawed approach to sustainable development contained within the Comprehensive Economic and Trade Agreement (CETA) and EU-Singapore FTA, both currently awaiting legislative approval.

The EU and US profess a relationship of exceptional closeness and adherence to common values. The weakness of TTIP's provisions on sustainable development betrays this spirit, and squanders an opportunity to advance the underlying policy objectives. Measures to remediate inadequate and inherently unequal treatment of sustainable development objectives – both within TTIP and as a model for future agreements – can be achieved through the following nine prescriptions:

2.1. Dispute settlement: Subject environmental aspects of TTIP to dispute settlement mechanisms

The new generation of EU trade agreements excludes the use of (state-to-state) dispute settlement for the sustainable development chapters. As a result, a Party cannot effectively address and sanction the other Party for violations of environmental commitments in these agreements. The EU's recent FTAs with South Korea, Colombia, and Peru serve as clear examples of where these environmental chapters are relegated to a lower tier than other areas and where commitments are virtually toothless. Even in the case of the EU-RoK FTA, where the promotion of sustainable development is an explicit objective, the chapter is still not afforded the same legal representation as others.⁵ The same approach has been taken towards the sustainable development and environment chapters in the EU-Singapore FTA and CETA. The only exception to this policy is the EU-Caribbean Economic Partnership Agreement.⁶

TTIP provides a unique opportunity to subject environmental protections to binding dispute settlements. This would satisfy the explicit requirement within the United States Trade Promotion Authority (TPA) that requires its negotiators 'to ensure that enforceable labo[u]r and environment obligations are subject to the same dispute settlement and remedies as other enforceable obligations under the agreement'.⁷ The United States already allows recourse to dispute settlement over environmental and labour provisions in most of its FTAs. Four US FTAs contain no restrictions on the use of dispute settlement for the environmental provisions of the

⁵ Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6.

⁶ The use of dispute settlement is, however, made conditional upon resorting to a specific consultation mechanism in article 189 of the agreement. See article 204 (6) of the agreement.

⁷ Trade Promotion Authority came into force through US Public Law 114 – 26. See page 129 STAT. 328, under (H) for the citation.

agreement, while another seven restrict the use of dispute settlement to failure to enforce environmental laws.⁸

The Commission should capitalise on the opportunity to negotiate an ambitious agreement on state-to-state dispute settlement with a like-minded partner. Dispute settlement should be possible for the entirety of the trade and sustainable development chapter commitments; it should ensure that either Party can suspend concessions and/or obligations in case of non-compliance with a ruling of the dispute settlement panel. The use of dispute settlement should, furthermore, incorporate and not inhibit the monitoring mechanisms established in various international environmental agreements; these can even be used to strengthen claims brought under dispute settlement in the EU's trade agreements. In addition, the Commission should ensure the effectiveness of the dispute settlement procedure by ensuring thorough public stakeholder consultation prior to launching a dispute settlement procedure.

Such an approach is in full alignment with the European Parliament's resolution calling upon the Commission to ensure that dispute settlement in TTIP 'applies to the whole agreement'.⁹ This will not only demonstrate the EU's willingness to put its commitments on sustainable development on an equal footing to its commercial interests, but will also reinforce and complement the EU's external environmental policies. Only if empowered with real and effective enforcement mechanisms can the EU's collaborative and multilateral efforts on sustainable development make meaningful progress.

2.2. Conditionality: The conclusion of TTIP must be made conditional on the adoption and effective implementation of a core list of environmental agreements.

The EU is party to over 40 international environmental agreements and actively seeks to promote solutions to environmental issues at both the regional and international levels. Enforcement provisions in those agreements are generally weak, relying heavily on non-governmental organisations for monitoring and 'naming and shaming' in cases of non-compliance.¹⁰ However, global environmental problems are becoming more pressing than ever.¹¹ At the same time, contemporary trade agreements are increasing in their scale, complexity, and coverage. Therefore, they provide an excellent vehicle through which to bolster the effectiveness of multilateral environmental agreements by providing economic incentives to EU trade partners for the adoption, maintenance, and implementation of these agreements.

Introducing conditionality based on environmental criteria in TTIP is in-line with both the EU and US's past trade policies. While the EU has mostly maintained a light-touch approach,

⁸ Sinkna Jinnah and Elisa Morgera, 'Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda'(2013) 22 RECIEL 324.

⁹ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) at 2. (d) (iv).

¹⁰ Sinkna Jinnah and Elisa Morgera, 'Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda'(2013) 22 RECIEL 324.

¹¹ Ibid citing The Worldwatch Institute, *The State of the World 2013: Is Sustainability Still Possible?* (Island Press, 2013), at 4-5.

conditionality has been applied by the EU on a number of occasions in the past. The Energy Community Treaty requires the Parties to implement EU environmental legislation.¹² The EU has furthermore made application of its Generalised Scheme of Preferences with developing partners conditional upon their acceptance of and adherence to a number of core environmental and labour agreements.¹³ In the US, TPA reaffirms that it must take an ‘adopt, maintain, and implement’ approach requiring trade partners to match accession to multilateral environmental agreements.¹⁴

As per the European Parliament’s resolution of 8 July 2015, the Commission should:

*‘ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO’s Decent Work Agenda and the core international environmental agreements’.*¹⁵

TTIP should therefore include a provision that requires adoption of the aforementioned list, as well as effective enforcement obligations. It is essential that the Commission negotiates an ambitious list (see [Annex I](#)), since the US list only contains seven environmental agreements. Such an approach will protect the competitiveness of EU firms and improve their ability to avoid being pulled into a race-to-the-bottom by counterparts in trade partner countries.

2.3. Right to regulate: TTIP must guarantee the right to regulate

The European Commission has pledged on a number of occasions that it will protect the EU’s right to regulate, for instance by stating that ‘EU standards are not up for negotiation. TTIP would uphold them all.’¹⁶ Nonetheless, the language used in TTIP and in other *so-called* ‘new generation’ FTAs insufficiently guarantees the EU’s regulatory sovereignty because it is modelled on World Trade Organisation (WTO) Agreements. These agreements are problematic because they treat the protection of public interests as an exception, rather than the norm. Moreover, WTO agreements have repeatedly allowed successful challenges to domestic legislation aimed at protecting public interests, including the environment. The Commission should take the following steps to fully enshrine the EU’s right to regulate: (1) introducing clauses that strengthen the right of the Parties’ to regulate and (2) remove provisions that can be used to challenge EU and US standards.

2.3.1. Introducing a ‘clean hands clause’ and extending the scope of the exceptions clause

First, the EU should reaffirm its regulatory sovereignty by including a ‘clean hands clause’ (CHC) in the TTIP agreement. Such a clause would strengthen the parties’ rights to regulate through

¹² Article 12 of the Energy Community Treaty (1 July 2006).

¹³ Regulation 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303/1.

¹⁴ US Public Law 114 – 26. See page 129 STAT. 327, under (10) (A) (i).

¹⁵ European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) at 2. (d) (ii).

¹⁶ European Commission, *The Top 10 Myths about TTIP* (Luxembourg 2014) at 4.

consumption and export rules where such interventions protect environmental and social conditions.

Both TTIP parties are adamant that the agreement will not lower regulatory standards on either end, but these assurances are dubious in the absence of a CHC. Inclusion of this clause will ensure that a number of current EU rules are less likely to be challenged through the agreement's dispute settlement mechanisms and that no ceiling is imposed on similar and advanced rules in the future. The text of a CHC might resemble the following:

Nothing in this agreement shall be construed as preventing a Party from taking any measure to ensure that the Party is not economically implicated in environmentally or socially harmful behaviour or morally unacceptable behaviour, including when that behaviour takes place outside the territory of that Party.

A non-exhaustive list of environmental issues that would benefit from the addition of a CHC to the TTIP text includes:

- The Biofuels sustainability criteria based on the Renewable Energy Directive (2009/28/EC);
- Directive 2008/101/EC on the inclusion of aviation activities in the EU ETS scheme;
- Potential measures undertaken against carbon leakage adopted pursuant article 10 b (1) (b) of the EU ETS Directive 2003/87/EC;
- EU organic products regulation (Council Regulation (EC) No. 834/2007);
- Regulation (EC) No. 66/2010 on the EU Ecolabel.

Furthermore, a CHC in the TTIP agreement would set an important precedent and conceivably shield EU rules against further challenges from other FTAs to which it is party.

Secondly, the general exceptions clauses in new generation of trade agreements should not be modelled after the General Agreement on Tariffs and Trade (GATT), which dates back to 1948 and General Agreement on Trade in Services (GATS). Instead the general exceptions clause in TTIP should be modernised and give both the EU and US broad discretion in taking public policy decisions.

The nature of general exceptions in TTIP should depart from CETA, which embodies the old approach. For instance, CETA only allows for a closed list of public interest exemptions – excluding, for example, the possibility of taking measures to protect consumers. The exceptions clause should instead include an open-ended list of public interests that can be invoked in case liberalisation violates any of the TTIP sustainable development provisions. Moreover, the exceptions clause should include language that recognises the right of the parties to not only set their own levels of protection, but that also give them a wide margin of discretion to implement.

2.3.2. Remove provisions that can be used to challenge EU and US standards

A central component of strengthening the Parties' right to regulate will be the removal of all provisions that resemble the '*chapeau*' of article XX of the GATT, which states that:

'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

This provision has been used in the past to strike down measures protecting the environment and other public interests.¹⁷ For instance, the WTO Appellate Body recently held that the EU ban on seal products violated the *chapeau* and wrote a detailed criticism of how the EU operated the exceptions. Consequently, these *chapeau* provisions unnecessarily criminalise environmental and other public interest measures.

Furthermore, the Commission should refrain from drafting similar provisions in future agreements. For instance, article 13.1 (3) of the EU-Singapore FTA states that 'environmental and labour standards should not be used for protectionist purposes'. Such language is unnecessarily vague and gives arbitrators a means of ruling against environmental legislation.

2.4. Access to justice: TTIP must give civil society an effective role in the enforcement of environmental aspects of TTIP

EU trade policy champions the right to seek redress at domestic and international institutions when partners fail to fully uphold their commitments. EU programmes can file complaints under the Trade Barriers Regulation, which requires the Commission to take a decision on whether or not to pursue commercial policy measures.¹⁸ This decision can be appealed by the complainants. Similarly, the EU may initiate anti-dumping and anti-subsidy investigations after industry stakeholders have submitted a complaint to the Commission and those complainants may seek judicial relief against that decision.¹⁹

More controversially, the Commission is seeking to introduce special rights for foreign investors enabling them to sue Parties to the EU's trade agreements for damages resulting out of a breach of investment provisions.

Natural persons and Civil Society Organisations (CSO) that are negatively affected by breaches of the environmental provisions in the EU's FTAs have not been given similar access to these extrajudicial remedies. The EU-Colombia/Peru FTAs merely contain a right to petition which is not subject to judicial review and that does not enable Parties to the agreement to pursue any meaningful action. The EU-RoK FTA merely enables a closed list of civil society groups – the 'domestic advisory group' – to enter into a dialogue on matters falling within the sustainable

¹⁷ *US – Gasoline* (1996) WT/DS2/AB/R; *US – Shrimp* (1999) WT/DS58/AB/R; *EC – seal products* (2014) WT/DS400/AB/R and WT/DS401/AB/R; *EC – Tariff Preferences* (2004) WT/DS246/AB/R, *Brazil – Retreated Tyres* (2007) WT/DS332/AB/R

¹⁸ Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation [1994] OJ L 349/71.

¹⁹ Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51; Council Regulation 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [2009] OJ L 188/93.

development chapter. The draft texts of CETA and the EU-Singapore FTA do not go beyond providing domestic consultation rights for civil society regarding the implementation of the sustainable development or environment chapters.

Civil society and individuals negatively affected by the violation of environmental provisions must be given *equal rights* compared to foreign investors and other parties seeking access to justice under trade law. The provisions should entitle those persons to submit to the competent authority of each Party any observations relating to violations of environmental provisions in TTIP or an imminent threat of such violation by the other Party of which they are aware. Those persons shall be entitled to request the competent authority to take action under the dispute settlement provisions. A substantiated request must be considered by the competent authorities and a negative decision shall state the reasons for it. Moreover, such a decision shall be subject to domestic judicial review.

[Annex II](#) sets out an example of how an access to justice provision could be included in the TTIP text

2.5. Safeguards: TTIP must introduce bilateral environmental safeguard clauses

The proposed agreement's commitment to sustainable development would be bolstered by the inclusion of bilateral safeguard clauses. The EU-RoK FTA, which entered into force in July 2011, would serve as an apt model in this regard.²⁰ The aforementioned safeguard clause allows for tariff levels to be adjusted if ever the volume of imported Korean cars was so great that it caused or threatened to cause "serious injury" to EU vehicle manufacturers. It introduced a number of important monitoring conditions, such as the right of the Commission, Parliament, or industry groups to request the launch of an investigation that could lead to activation of the clause, as well as specific surveillance measures linked to import flows.

Here, the bilateral safeguard clause could be adapted to suit the objectives of sustainable trade. For example, based on the likelihood that any agreement increasing trade flows will inevitably increase aviation, maritime, road, and rail transportation activity – and, consequently, GHG emissions – the Parties may suspend the reduced tariff rates for products shipped by the most polluting ships or planes. TTIP would in effect permit the EU to take 'autonomous measures' and not apply the reduced rate resulting out of TTIP to goods transported in an environmentally unfriendly way.²¹ In this regard, the sustainable development chapter in TTIP would help rebalance the costs of FTAs in favour of consumers, who historically bear the burden of negative externalities from liberalised trade.

²⁰ Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6

²¹ Akin to the model of for example Council Regulation 1344/2011 of 19 December 2011 suspending the autonomous Common Customs Tariff duties on certain agricultural, fishery and industrial products and repealing Regulation 1255/96 [2011] OJ L 349/1

2.6. Integrate and strengthen: Environmental protection requirements must be integrated throughout the TTIP text

Current diplomatic norms treat language on sustainable development as perfunctory – an unwanted stepchild to the overall agreement. This profoundly undermines the realisation of any professed sustainable development objectives. Sustainable development must be interwoven into every aspect of the agreement in order to fulfil its three constituent pillars; it must be omnipresent in every topical area with specific sections detailing the relevant obligations. This would enable parties to call upon the state-to-state dispute settlement provisions applicable to each topical area and, ultimately, avail themselves of remedies and sanctions when infringements occur.

More specific to the context of TTIP, this approach would not need to displace the existing chapter on sustainable development. Instead, it would serve as a complement to the aspirational goals and institutional arrangements that seek to promote cooperation (although this text can still benefit from further modifications) and, failing these, as a safeguard through which issues might be resolved.

Consider TTIP's vehicles chapter as an example. Included among its objectives are bilateral tariff reduction (currently at 5.2% for the US and 3.5% for the EU), harmonisation of specific safety standards, further alignment of efforts by the EU and US in the United Nations Economic Commission for Europe (UNECE), and cooperation on future issues and research, such as electric vehicle technology. An additional section could be included specifying transatlantic commitments to sustainable development through both existing and prospective domestic policies and legislation. This should be reflected in the EU through the following (non-exhaustive) domestic transport policies:

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

2.7. Subsidies: TTIP should address unsustainable subsidies and promote sustainable subsidies

The use of subsidies for environmentally degrading activities not only creates enormous trade distortions, it also imposes severe costs on society and the environment. For instance, fossil fuel subsidies in the EU account for €87 billion a year and €318 billion a year in the United States.²² Such subsidies hamper the economic development of green energy solutions and result in

²² Constanze Adolf, Jacqueline Cottrell, Amani Joas, Claudia Schulz, *TTIP and Fossil Fuel Subsidies: Using international policy processes as entry points for reform in the EU and the USA* (March 2013) available at <https://us.boell.org/2014/04/03/ttip-and-fossil-fuel-subsidies-using-international-policy-processes-entry-points-reform> visited on 14 September 2015 at page 7 basing findings on OECD, IMF and IEA data.

significant additional GHG emissions: experts have estimated that if fossil fuel subsidies were eliminated by 2020, this would result in a reduction of 10% of global GHG emissions.²³

The Commission needs to negotiate an ambitious text that would create a framework for phasing out unsustainable subsidies. As a corollary to this framework, the EU should also take the lead in reforming the WTO SCM agreement to better reflect the distortionary effects of fossil fuel subsidies on trade. Both parties should work towards a *per se* prohibition of unsustainable subsidies on the basis of their negative environmental impacts. Provisions could not only include a commitment to international cooperation along the lines of the WTO ‘friends of fish’ initiative, but also an obligation to report and dismantle such subsidies.

At the same time, both Parties should ensure protection of subsidies that promote sustainable activities, such as those for green energy solutions or sustainable fishing. These should be exempted from disciplinary measures introduced in TTIP, and the EU and US might coordinate further efforts to work towards similar multilateral protections for green subsidies.

2.8. Environmental dumping: TTIP should prohibit environmental dumping

FTAs like TTIP enable producers to relocate their production facilities between signatories without any significant costs. This creates a phenomenon wherein producers lower costs seeking out weaker regulations, without sacrificing market access to their former home country. At the same time, the introduction of strict and costly environmental and social regulations incentivise flight to jurisdictions where such rules are less strict; *so-called* pollution havens. As a result, countries experience competition for investment from other countries with low levels of environmental and social protection. This not only creates economic pressure on the introduction or maintenance of robust environmental and social standards, but can also jeopardise the effectiveness of EU regulations. For instance, the threat of carbon leakage has already resulted in the free allocation of emission allowances to industries exposed by international competition.²⁴

The Commission should ensure that TTIP addresses the negative effects of globalisation and social and environmental dumping in particular. To this end, TTIP must enable the Parties to engage in effective counter-measures to off-set social and environmental dumping. At the same time, the Commission should ensure that such measures do not weaken existing environmental and labour laws. Thus, counter-measures can only be used to uphold existing levels of protection, and not to create special exemptions for EU industry in order to mitigate the effects of social and environmental dumping.

²³ G-20 Leaders’ Statement, ‘Energy Security and Climate Change’, The Pittsburgh Summit, 24-25 September 2009, para. 29.

²⁴ See most recently, Commission Decision determining, pursuant to Directive 2003/87/EC, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 [2014] OJ L 308/114.

2.9. Sustainable development as an essential element: Sustainable development should be an essential element of TTIP

Finally, the TTIP text would benefit from the inclusion of an ‘essential elements’ clause ensuring that either Party can suspend the application of the agreement when the other Party fundamentally undermines the objectives of the sustainable development chapter. ‘Essential elements’ clauses are already standard practice for the protection of human rights in existing EU agreements and they enable the Parties to (partially) suspend application in case of violations. This means that the sustainable development chapter is not only an essential element of TTIP, but also that it must be coupled with an effective ‘non-execution’ clause. Such a ‘non-execution’ clause permits either party to take ‘appropriate measures’, including suspension in whole or in part of any obligations resulting out of TTIP, if the other party violates the essential elements clause.

3. Conclusions and Policy recommendations

It is clear that European trade policy falls very short of ensuring environmental protection and sustainable development. The current sustainable development chapter template used in European FTAs is barely adequate and struggles to advance the objectives it professes. Many previous FTAs have done nothing more than give a cursory nod to the principle of sustainable development. This is due to their focus on voluntary cooperation and implementation, which creates a lack of significant and enforceable obligations in sharp contrast to the legally enforceable provisions on commercial liberalisation.

This report proposes nine mutually-reinforcing solutions that should be adopted in future FTAs so as to ensure that environmental issues are no longer green-washed, but instead placed squarely at the heart of any deal, thereby supporting the EU’s wider goals and ambitions. It recommends:

1. Applying the state-to-state dispute settlement mechanism to the provisions of the Sustainable Development chapter;
2. Conclusion made conditional upon the adoption and effective implementation of core environmental agreements;
3. Enshrining the right to regulation via a ‘clean hands clause’ and extending the scope of the exceptions clause, while also removing provisions that allow challenges to current and future standards;
4. Providing a role for civil society in the monitoring and enforcement of environmental aspects of TTIP;
5. Introducing bilateral environmental safeguard clauses;
6. Integrating environmental protection requirements into every chapter of the text;
7. Cooperate on removing unsustainable subsidies while promoting those that are sustainable;
8. Prohibition of environmental dumping;
9. Centralisation of sustainable development as an essential element of all current and future trade agreements.

If adopted, these nine remedies to current trade malpractices can greatly improve the credibility of the Commission as it professes to be an active and committed agent of the EU's wider environmental and sustainable development ambitions. Additionally, these recommendations chart a viable new path in line with the recent request of the European Parliament, which must also ratify the final agreement. Failure to fundamentally revise the sustainable development chapter not only damages the EU's external action, but could lead to the rejection of the overall agreement.

4. Annex I: list of international environmental agreements

4.1. Priority list

1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989)
2. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
3. Convention on Biological Diversity (1992)
4. Cartagena Protocol on Biosafety (2000)
5. Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (2010)
6. Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (2010)
7. Stockholm Convention on persistent Organic Pollutants (2001)
8. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)
9. Convention on Transboundary Effects of Industrial Accidents (1992)
10. Convention on Environmental Impact Assessment in a Transboundary Context (1991)

4.2. Additional list

11. Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
12. Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
13. The United Nations Framework Convention on Climate Change (1992)
14. Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)
15. Convention on the Law of the Non-navigational Uses of International Watercourses (1997)
16. Convention on the Conservation of Antarctic Marine Living Resources (1980)
17. Convention on Long-Range Transboundary Air Pollution (1979)
18. Minamata Convention on Mercury (2013)
19. International Tropical Timber Agreement (1994)
20. Convention on the Conservation of Migratory Species of Wild Animals (1979)

5. Annex II: Access to justice provision

1. Natural or legal persons:

(a) affected or likely to be affected by a violation of a provision in the sustainable development chapter or

(b) having a sufficient interest in environmental decision making or labour protection,

shall be entitled to submit to the competent authority of each Party any observations relating to violations of the sustainable development chapter or a potential violation by the other Party of which they are aware and shall be entitled to request the competent authority to take action under [the dispute settlement provisions].

To this end, the interest of any non-governmental organisation promoting environmental or labour protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the violation in question.

3. Where the request for action and the accompanying observations show in a plausible manner that a violation has occurred or is likely to occur, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the other Party an opportunity to make his views known with respect to the request for action and the accompanying observations.

4. The competent authority shall, as soon as possible inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

5. The persons referred to in paragraph (1) shall have access to a domestic court competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Agreement.

ⁱ Brundtland, G., Khalid M., *et al.*, “Our Common Future,” (United Nations World Commission on Environment and Development, 21 May 1987), <http://www.un-documents.net/our-common-future.pdf>.

ⁱⁱ European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) at 2. (d) (ii).