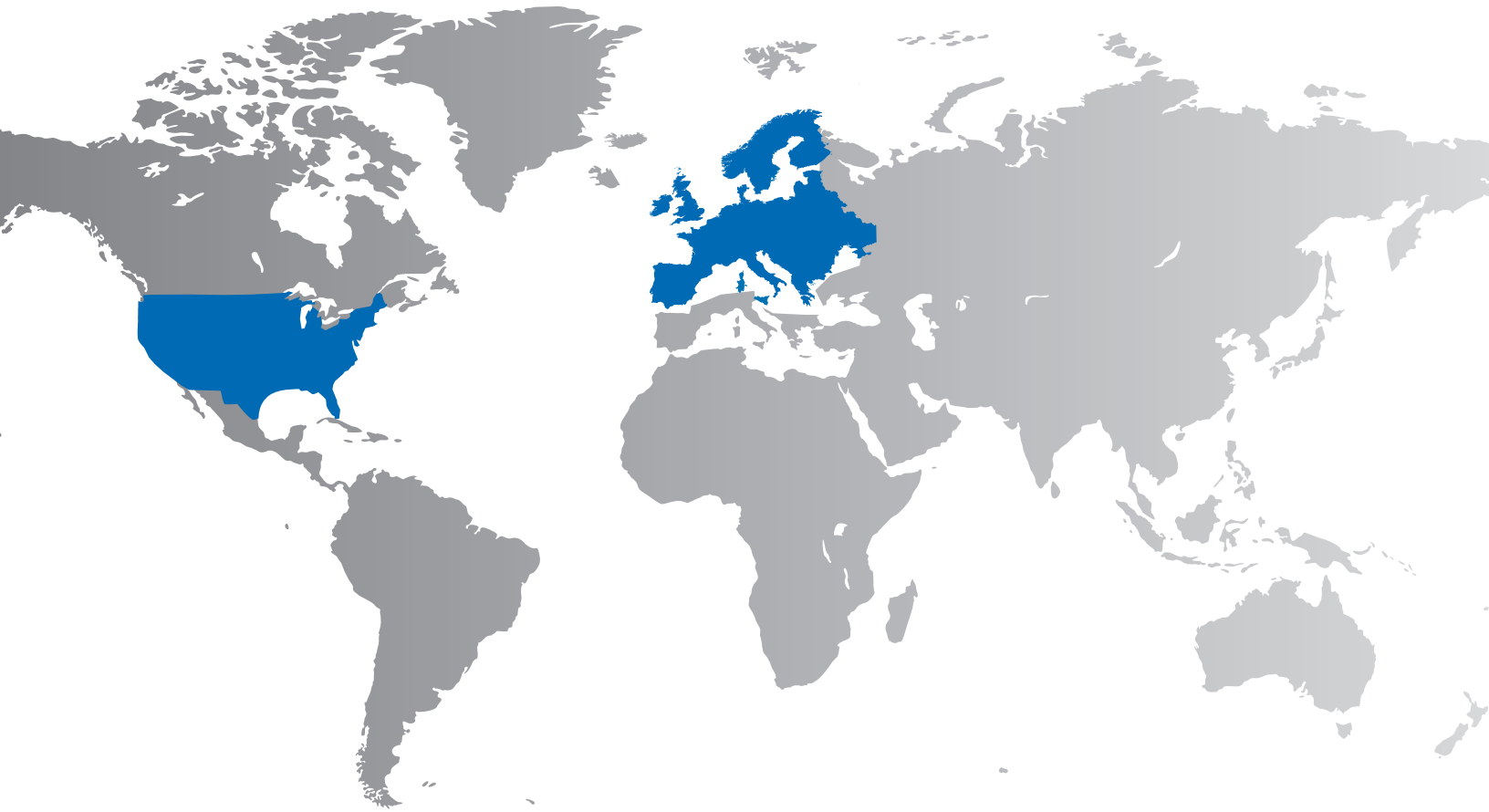


# THE TRANSATLANTIC FREE TRADE AGREEMENT:

What's at Stake for Communities and the Environment





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# THE TRANSATLANTIC FREE TRADE AGREEMENT: What's at Stake for Communities and the Environment

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## ACRONYMS

DOE	Department of Energy
ETS	Emissions Trading Scheme
FTA	Free Trade Agreement
G20	Group of Twenty
GM	Genetically Modified
GMO	Genetically Modified Organisms
HLWG	High Level Working Group
ICAO	International Civil Aviation Organization
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
LNG	Liquefied Natural Gas
MEPs	Minimum Energy Performance Standards
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
PSR	Physicians for Social Responsibility
REACH	Regulation, Authorization and Restriction of Chemicals Program
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TPP	Trans-Pacific Partnership
TSCA	Toxic Substances Control Act
TTIP	Transatlantic Trade and Investment Partnership
USTR	US Trade Representative
WTO	World Trade Organization

## EXECUTIVE SUMMARY

In his 2013 State of the Union address, President Obama announced the launch of negotiations for the Transatlantic Trade and Investment Partnership (TTIP) – an expansive new trade pact between the United States and the European Union. However, since tariffs in the U.S. and the EU are already low, the TTIP will have little to do with traditional trade issues such as tariffs.<sup>1</sup> Instead, the bulk of the negotiations will focus on removing so-called “non-tariff barriers”—or regulatory differences—such as discrepancies in U.S. and EU environmental, food safety, and chemical standards. Negotiators will also focus on increasing investment across the Atlantic Ocean.

While corporations may see regulatory differences between countries as costly hurdles to international business, governments use regulatory oversight and product standards to pursue important public interest goals such as protecting clean air and water, mitigating climate disruption, ensuring consumer safety, and guaranteeing the rights of workers. Therefore, the Sierra Club argues, any convergence of regulations between the U.S. and the EU must not only harmonize regulations up to the highest possible standard, but also provide governments the flexibility to further strengthen public interest safeguards as necessary.

While regulatory harmonization would likely impact a wide array of laws, safeguards, and standards, this discussion paper focuses on three important regulatory arenas that may be impacted by TTIP negotiations:

**1. Environmental protection:** Many of the policies used by governments to respond to environmental challenges like the climate crisis, such as energy efficiency

standards or labeling, could be considered non-tariff barriers to trade and therefore could fall within the purview of the TTIP. It is critical, therefore, that the TTIP provides governments with the flexibility to maintain and strengthen environmental and climate policies without constraints and without fear of trade litigation. If the TTIP is to address discrepancies in environmental standards, governments must be allowed to maintain both the highest level of standard and the flexibility to exceed the highest standard when necessary.

**2. Food Safety:** One of the most contentious sets of issues within TTIP pertains to the regulation of food safety and agricultural and animal products. Food and agricultural issues that may be discussed in upcoming TTIP negotiations include the EU’s bans on genetically modified (GM) goods, hormone-treated beef, and chlorine-washed poultry products. These regulations have been in place in the EU for years in order to protect EU consumers. The TTIP must not seek to deregulate or undermine the food safety standards.

**3. Industrial Chemical Regulations:** TTIP negotiations offer the United States an opportunity to upgrade its antiquated chemical safety laws, which date back to the 1976 Toxic Substances Control Act (TSCA). Aligning U.S. chemical safety regulations with the EU’s Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) program of 2006 would be a significant step toward modernizing the U.S. chemical regulatory apparatus and improving the safety of chemicals for the health and well-being of the public.

Regulatory harmonization is not, however, the

only important consideration for communities and the environment that the TTIP will address. The TTIP also has the potential to significantly expand hydraulic fracturing, or “fracking,” across the United States by increasing U.S. exports of liquefied natural gas (LNG) to Europe. In fact, if the TTIP includes so-called “national treatment for trade in gas,” the U.S. Department of Energy (DOE) would be legally bound to automatically approve all exports of U.S. LNG to the EU without any review, conditions, modifications, or delay. In light of the health and environmental risks associated with fracking, as well as the effects that increased LNG exports would have on U.S. electricity prices, it is essential that the TTIP allows the U.S. DOE to assess whether exporting natural gas is in the interest of the American public.

Finally, this discussion paper analyzes the impacts of investor protections and investor-state dispute settlement in the TTIP. Over the past two decades, free trade and investment rules have given vast privileges to foreign corporations at the expense of communities, workers, and the environment. The investor-state dispute settlement mechanism, for example, allows corporations to sue governments in private tribunals over laws and policies that the corporation alleges diminishes their expected future profits. Investment rules in agreements such as the North American Free Trade Agreement (NAFTA) have allowed corporations to attack a host of critical environmental and human health policies related to mining regulations, bans on toxic chemicals, fracking restrictions, and more. The Sierra Club strongly opposes the inclusion of investor-state dispute settlement in the TTIP and is also very concerned that the inclusion of broad investor protections, such as a guarantee to “fair and equitable treatment,” could open the door to investment cases simply when governments

amend or establish laws and policies designed to protect the public interest.

Ultimately, this discussion paper argues that the protection of communities, working families, and the environment must be at the core of any trade agreement. The TTIP negotiations must therefore (1) preserve and provide opportunities to strengthen environmental, labor, climate, health, safety, and other regulations and standards in the United States and EU; (2) preserve the ability of the U.S. Department of Energy to review and oversee U.S. liquefied natural gas exports to the EU and ensure that any exports are in the interest of the public; and (3) ensure that investment rules do not undermine the ability of governments to protect communities and the environment.

The first step in ensuring that trade policy protects communities and the environment is involving the public in all stages of decision-making. However, the ability of the public and even policy makers to contribute to and ultimately impact the TTIP will depend on the level of transparency in the negotiations. The Sierra Club believes it is critical that governments make draft negotiating texts and country submissions publically available. Opportunities for regular public and Congressional engagement and consultation are also critical. A new model of trade that benefits communities and the environment is possible, and it begins with public input and scrutiny.

## I. INTRODUCTION

In his State of the Union address on February 13, 2013, President Obama announced that the United States will launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP) with the European Union.<sup>2</sup> Formal nego-



tiations are expected to begin in the summer of 2013, and governments wish to conclude TTIP by the end of 2014.<sup>3</sup>

The TTIP seeks to expand U.S.-EU trade flows by eliminating tariffs, reducing U.S.-EU differences in product standards and regulations, and increasing investment across the Atlantic.<sup>4</sup> With the European Union and the United States representing 47 percent of global GDP and 33 percent of world trade flows, the potential benefits and risks of this trade agreement are significant.

While one goal of the negotiations is “to get as close as possible to the removal of all duties on transatlantic trade in industrial and agricultural products,”<sup>5</sup> TTIP actually has very little to do with traditional trade issues such as tariffs and quotas. That is because tariffs in the U.S. and the EU are already very low, averaging approximately 5.2 percent for the U.S. and 3.5 percent for the EU.<sup>6</sup> Much of the negotiations, therefore, will focus on removing so-called “non-tariff barriers”— such as regulatory differences in environmental, food safety, and chemical standards.

While the Sierra Club believes that the TTIP could offer an opportunity to raise public interest regulations in the U.S. and the EU, the downward harmonization of regulations would pose a serious threat to the environment, working families, and communities. It is therefore imperative not only that regulations are harmonized upward, but also that any convergence of regulations serves as a regulatory floor that allows governments the flexibility to develop more ambitious environmental and public interest policies in the future.

Because of the many regulatory divergences between the U.S. and the EU with respect to

environmental protection, public health and safety, and consumer rights, it is perhaps not surprising that attempts at a U.S.-EU free trade pact has repeatedly failed in the past.<sup>7</sup> The 1990s, for example, witnessed a number of transatlantic initiatives aimed at liberalizing trade between the U.S. and the EU, including the Transatlantic Declaration (1990), the New Transatlantic Agenda (1995), the Transatlantic Economic Partnership (1999), and the EU-US Economic Initiative (2005).<sup>8</sup> Each time, however, negotiators failed to bridge differences on key regulatory issues such as agricultural subsidies and intellectual property rights.<sup>9</sup>

Many of the issues that undercut previous efforts at a U.S.-EU free trade agreement remain unresolved today. Agriculture regulations, for example, have been cited as a particularly thorny issue for negotiators. The U.S. has, for instance, criticized the EU’s requirements for labeling genetically modified organisms (GMOs), its ban on hormone-treated beef, and its generally more restrictive food-safety rules.<sup>10</sup> U.S. and EU agricultural subsidies, along with high EU tariffs on U.S. agricultural products, are also likely to be fiercely contested in the TTIP negotiations.<sup>11</sup> In light of these major obstacles, some have expressed doubts about the future success of the TTIP.<sup>12</sup>

Regulatory harmonization is not, however, the only important consideration for communities and the environment that TTIP will address. Also of concern is that the TTIP may remove the ability of the U.S. Department of Energy to review, condition, or deny exports of U.S. liquefied natural gas (LNG) to EU countries.<sup>13</sup> Automatic exports of U.S. LNG to the EU, a significant importer of natural gas, would likely expand fracking across the United States and lead to higher domestic electricity prices, impacting U.S. consumers, manufacturing, and

jobs.

With respect to investment, the Sierra Club is deeply concerned that the inclusion of the controversial “investor-state dispute settlement” would allow foreign corporations to bypass domestic courts and sue governments in international tribunals over laws and policies that corporations allege reduce their expected future profits. Investment provisions in existing free trade agreements, including the North American Free Trade Agreement (NAFTA), have already facilitated a proliferation of cases challenging environmental and climate policy related to mining regulations, bans on toxic chemicals, and energy regulations.<sup>14</sup> The Sierra Club is also concerned that the inclusion of very broad investor protections, such as the “fair and equitable treatment,” could open the door to investment cases simply when governments adopt new laws or policies or amend existing laws and policies designed to protect the public interest.

Finally, it is important to note that the ability of civil society and even policy makers to contribute to and ultimately impact the TTIP will depend on the level of openness in the negotiations. Recent trade and investment negotiations, such as negotiations for the Trans-Pacific Partnership (TPP) agreement, have lacked transparency and have, therefore, prevented meaningful public engagement and input. After years of TPP negotiations, not a single word of draft text or countries’ proposals has been formally made public. In order to help ensure a positive outcome in the TTIP for the communities, working families, and the environment, increased transparency and opportunities for public engagement will be absolutely critical.

This discussion paper addresses the potential

implications of the TTIP between the United States and the European Union. It will (1) discuss key U.S.-EU regulatory differences in the areas of the environment and climate change, agriculture and food safety, and industrial chemicals; (2) examine the potential for TTIP to dramatically expand U.S. exports of liquid natural gas and fracking; and (3) warn against the dangers of including broad rights for foreign corporations in the investment chapter of the agreement.

## II. U.S.-EU REGULATORY DIFFERENCES

U.S. and EU trade representatives are committed to removing non-tariff barriers and harmonizing regulatory standards. In the TTIP, the harmonization of standards will likely be addressed throughout the agreement, including in: (1) a chapter on “Technical Barriers to Trade,” which would build upon the World Trade Organization (WTO) Agreement on Technical Barriers to Trade and address standard-setting, testing and certification requirements, and labeling; (2) a chapter on sanitary and phytosanitary measures, which would build upon the WTO Sanitary and Phytosanitary Agreement and would address the application of food safety and animal and plant health regulations; (3) a chapter on “regulatory coherence,” which would address the development and implementation of “efficient” and “cost-effective” regulations for goods and services; and (4) provisions or annexes that contain additional commitments in specific, mutually-agreed goods and services sectors.<sup>15</sup>

It is critical that any harmonization of regulations must not only harmonize up to the highest standard, but that the established standard must be set as a regulatory floor instead of a regulatory ceiling. Governments must have the flexibility to maintain and raise labor, health, safety, environmental, and other standards in order to protect their constituents and the environment.

With these goals in mind, the following subsections identify U.S.-EU regulatory differences related to the environment, food and agriculture, and chemicals that may be scrutinized in TTIP negotiations. While other regulations, such as those related to financial services, will likely also be impacted, this discussion paper focus-

es on the aforementioned subset of issues.

### ENVIRONMENT AND CLIMATE CHANGE

It is critical that TTIP provide flexibility for governments to respond to environmental challenges, including the climate crisis. Governments must maintain the ability to put in place new climate policies and strengthen existing policies, such as feed-in tariffs, a carbon cap and/or tax, and renewable energy and energy efficiency standards without constraints and without fear of trade litigation. A ‘carve-out’ stating that TTIP chapters do not apply to measures that address climate change or environmental protection would ensure that the TTIP does not add to the risk of trade or investment litigation.

Below are some examples of environmental and climate policy that may be addressed within the context of TTIP. If TTIP is to address any of these standards, governments must be allowed to maintain both the highest level of standard and the flexibility to exceed the highest standard.

#### *Environmental Labeling*

Both the U.S. and the EU have employed a variety of environmental labeling programs to promote the production of energy-efficient goods and reduce greenhouse gas emissions.<sup>16</sup> For instance, both the U.S. Energy Star and the EU Ecolabel are voluntary labeling schemes that cover a variety of household appliances and electronics. More recently, a number of European countries have begun experimenting with voluntary and mandatory carbon footprint labeling programs, and the European Commission itself is currently in the process of developing and proposing an EU carbon labeling system.<sup>17</sup>



Environmental labeling, like other labeling and certification standards, falls within the scope of technical barriers to trade (TBT). And, in its 2013 Report on Technical Barriers to Trade, the USTR flagged voluntary labeling schemes, including for energy efficiency, as potentially problematic. The report specifically stated that:

“In various product sectors, certain governments are developing and implementing so-called ‘voluntary’ standards in a manner that effectively makes compliance with them mandatory. In addition, many truly voluntary standards that governments have developed (such as voluntary labeling programs related to energy efficiency or agricultural products) have nonetheless created substantial trade barriers. Further, oftentimes voluntary standards may solely reflect domestic stakeholder interests rather than also those of the larger global trading community.<sup>18</sup>”

While there already exists a WTO Agreement on TBT, the U.S.-EU High Level Working Group on Jobs and Growth (HLWG) has proposed that TTIP include a “TBT plus” chapter that would likely go beyond the TBT commitments in the WTO and leave very little flexibility for programs such as environmental or carbon labeling. If a chapter on TBT is included in the TTIP, it must include a strong exception for environmental measures to ensure that green labeling and other green certification programs are not subject to trade litigation under TTIP. Furthermore, TTIP must not reduce the product coverage of current environmental labels nor derail new environmental labeling efforts such as the EU’s carbon labeling initiatives.

### **Energy Efficiency Standards**

Improving energy efficiency through energy efficiency standards is an important strategy

for reducing greenhouse gas emissions.<sup>19</sup> While European countries and the United States have developed minimum energy performance standards (MEPs) for a variety of products, the EU has moved more aggressively toward improving European energy efficiency through its Ecodesign Directive. This Directive establishes a framework under which environmental requirements can be imposed on how manufacturers design energy-using or energy-related products that are sold in EU markets.<sup>20</sup>

Since energy efficiency standards like the Ecodesign Directive affect both domestic and imported goods, they have implications for international trade. A 2006 report by the Organization for Economic Cooperation and Development (OECD), for example, called for the harmonization of energy performance test procedures in order to lower non-tariff barriers to trade.<sup>21</sup>

As in the case of eco-labeling, energy efficiency standards could fall under the scope of technical barriers to trade. While the USTR did not raise concerns about the EU’s energy efficiency standards in its 2013 Report on Technical Barriers to Trade, a strong environmental exception in TTIP’s TBT chapter would help ensure that energy efficiency standards are not subject to trade litigation in the future. Moreover, as with eco-labeling, energy performance standards must not be weakened for the sake of harmonization.

### **EU Emissions Trading Scheme and Aviation Directive**

In 2005, the EU adopted the Emissions Trading Scheme (ETS), the world’s first carbon emissions cap-and-trade system. Covering over 11,000 power stations and industrial plants, the ETS sets a cap (i.e., limit) on the total amount of greenhouse gases that can be produced by

regulated industries. The EU plans to lower the cap over time so that, by 2020, emissions produced in sectors that are regulated by the ETS are 21 percent lower than their 2005 levels.

Until recently, the ETS has only targeted domestic energy-intensive producers, leaving imported goods untouched.<sup>22</sup> In January of 2012, however, the EU adopted the Aviation Directive, which extended the ETS system to include greenhouse gases emitted by all airline flights originating from or landing in the European Union.<sup>23</sup> A number of countries, including the U.S., China, and India, have fiercely contested the inclusion of airline emissions into the EU ETS.<sup>24</sup>

In November 2012, the EU temporarily suspended the Directive in the hopes that an international agreement on aviation emissions would be produced in the International Civil Aviation Organization's (ICAO) fall of 2013 meeting.<sup>25</sup> The EU has, however, made it clear that the ICAO's failure to deliver a strong international agreement on aviation emissions will result in the automatic reinstatement of the Aviation Directive.<sup>26</sup>

Because airlines are required to purchase carbon emission allowances for each ton of CO<sub>2</sub> emitted during a flight into or out of the EU, the Aviation Directive may effectively raise the cost of air-transporting foreign goods into Europe, meaning that the Directive could be

viewed as a non-tariff barrier to trade. Consequently, if the Aviation Directive is not resolved in the upcoming ICAO meeting, it may be addressed in the U.S.-EU trade negotiations.

It is critical that the TTIP provides policy space for all countries involved to respond to the climate crisis. Efforts to address climate change, including the Aviation Directive, must not be compromised through the TTIP.



## **BOX 1: ADDRESSING STRESS ON THE ENVIRONMENT AND NATURAL RESOURCES IN TTIP**

As trade increases, so does stress on natural resources. It is therefore critical that the TTIP contain an environment chapter that is legally enforceable through dispute settlement and that includes obligations for countries to enforce and strengthen their domestic environmental laws and policies and their commitments under multilateral environmental agreements.

The environment chapter must also address biodiversity and conservation challenges, including commitments to strengthen implementation and enforcement of measures to eliminate trade in illegally harvested wood and wood products and illegally taken wildlife, and to ensure sustainable fisheries management.

Illegal logging and trade in illegally harvested timber and timber products harm the environment and exacerbate climate change. In addition, the illegal timber trade has serious economic impacts. According to World Bank estimates, the market value of global annual losses from illegal logging in public lands is over \$10 billion, with an approximate loss of \$1 billion annually to U.S. industry.<sup>27</sup>

Given that the U.S. and the EU are major markets for wood products, trading over \$1.5 billion in forest products in 2012, the TTIP presents an opportunity to deepen commitments to prohibit the trade of illegally harvested wood and wood products.

Similarly, because the European Union and the United States are importing, exporting and transit countries for legal and illegal wildlife and major fishing exporters and markets, TTIP can play a role in halting illegal wildlife trade and ensuring responsible and sustainable fisheries management.

## FOOD SAFETY AND AGRICULTURE

Perhaps the most contentious trade issue on the table is the regulation of agricultural and animal products that fall under the scope of sanitary and phytosanitary (SPS) measures. Like technical barriers to trade, the HLWG has suggested that TTIP include an “SPS plus” chapter, suggesting even less flexibility for food safety policies than currently exist under the WTO.

As described below, some of the most sensitive food safety issues revolve around genetically modified products, hormone-treated beef and beef products, and pathogen reduction treatments for poultry. The USTR will likely seek to address these issues in an SPS chapter of TTIP, as the USTR’s 2013 Report on Sanitary and Phytosanitary Measures suggests.<sup>28</sup>

### **Genetically Modified Products**

The European Union’s restrictions on genetically-modified (GM) products have been, and will likely continue to be, a sticking point for U.S. and EU trade negotiations. While U.S. policies do not distinguish between GM and non-GM products or require the labeling of GM products, the EU has for years tightly regulated the cultivation, importation, and sales of GM goods.<sup>29</sup> In fact, due to Europe’s high safety standards for genetically-modified products, most GMOs are banned in the EU.<sup>30</sup> European law also requires that GM products be labeled for the benefit of consumers.

In Europe, GMO regulations are largely viewed as sound public health policymaking.<sup>31</sup> For instance, when asked whether GMO regulations would be reassessed during TTIP negotiations, European Commission President Jose Barroso replied: “These negotiations are not about compromising the health of our consumers

for commercial gains.”<sup>32</sup> Current EU laws that require the labeling of genetically-modified foods are similarly justified as consumer protection measures.<sup>33</sup> In contrast, many U.S. businesses and public officials see EU GMO restrictions as trade protectionist measures aimed at insulating EU farmers from foreign competition.<sup>34</sup>

Strikingly, this animosity among U.S. corporate and public officials toward GMO regulations is not shared by the American public. According to a 2013 HuffPost/YouGov survey, 82 percent of Americans believe that GM products should be labeled.<sup>35</sup> And a 2009 CBS News/New York Times poll found that a majority of Americans did not want to buy genetically modified food.<sup>36</sup>

### **Hormone-Treated Beef**

The EU’s ban on hormone-treated beef imports has been embroiled in trade disputes since its enactment in 1988. Although European officials justify the ban on the grounds of health risks, the United States and Canada, neither of which restricts the use of hormones in meat, have responded by sanctioning a variety of European food products.<sup>37</sup> In 2009, however, the EU and U.S. negotiated a truce wherein the EU maintained its ban on imports of hormone-treated beef, but raised its import quotas for hormone-free beef.<sup>38</sup> In exchange, the United States lifted its sanctions against EU products.<sup>39</sup>

The EU’s policies on hormone-treated meats may be revisited during TTIP negotiations. European officials, at least, seem to be anticipating a fight, as evidenced by European Commission President Barroso’s statement: “We will not negotiate changes that we do not want of the basic rules on either side, be it on hormones or GMOs.”<sup>40</sup>

### **Chlorinated Poultry**

The EU's ban on imports of chlorine-washed poultry products represents another potential sticking-point in the TTIP negotiations. The EU believes that maintaining strict sanitary rules during the production and processing of poultry is more effective at reducing food pathogens than simply washing poultry in chemicals.<sup>41</sup> However, since most American poultry producers treat their products with chemical washes, the EU's food safety measures have effectively excluded U.S. poultry goods from European markets.<sup>42</sup>

It is likely that these and other food-safety issues will be placed on the TTIP negotiating table. It is paramount, however, that the pursuit of regulatory harmonization does not downgrade the food-safety measures implemented in either the U.S. or the EU, and that the TTIP not seek to deregulate or undermine the food safety standards on either sides of the Atlantic.

### **CHEMICAL SAFETY**

Another key regulatory difference in the U.S. and the EU has to do with chemical safety. While Europe modernized its chemical laws in 2006 with the adoption of the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) policy, the United States continues to rely on the Toxic Substances Control Act (TSCA) of 1976 to ensure the safety of chemical products in the U.S.<sup>43</sup> Given the outdated nature of TSCA, a wide array of groups – including Physicians for Social Responsibility (PSR),<sup>44</sup> the American Chemistry Council,<sup>45</sup> the Breast Cancer Fund,<sup>46</sup> and the chemical industry itself<sup>47</sup> – have called for the law's reform.

One chief failing of TSCA is its limited regulation of pre-1976 chemicals. Although the law grants the Environmental Protection Agency

(EPA) the authority to ban dangerous chemicals from U.S. markets, the TSCA also grandfathered in the 60,000 chemicals that were already in use during 1976. Since 1976, less than 200 of these “pre-existing” chemicals have been tested for human safety and only 2 percent of the original 60,000 have been reviewed by the EPA for human health risks.<sup>48</sup> Unfortunately, the EPA's ability to evaluate untested chemicals is hampered by the TSCA itself. Specifically, the law requires that the EPA “justify in court its orders to keep a chemical off the market or to impose additional testing requirements,” thereby adding a layer of difficulty to the process of reviewing and banning dangerous chemicals.<sup>49</sup>

In contrast, Europe's REACH program provides extensive regulatory oversight of the production, importation, sale, and use of industrial chemicals in the EU. The most innovative piece of this legislation is its mandate that manufacturers and importers of chemicals supply EU regulators with safety-related data (e.g., data on chemical uses, toxicity, and exposure risks to human health and the environment) on all new chemicals and many existing chemicals.<sup>50</sup> Moreover, any company that produces or imports one ton or more of a chemical per year must register the substance with EU regulators. For certain chemicals, REACH also requires the submission of “exposure scenarios” that describe how the manufacturer will control chemical exposures to humans and the environment.<sup>51</sup> By requiring companies to register new and existing chemicals, produce health and safety-related data on these substances, and develop strategies for managing potential risks, REACH works to help safeguard the public and the environment from the dangers of untested chemicals.<sup>52</sup>

The USTR has expressed a number of concerns

over the EU's REACH program, signaling that chemical regulatory differences will be on the TTIP negotiating table.<sup>53</sup> The United States should, however, view TTIP negotiations as an opportunity to update its chemical regulations.

Harmonizing EU chemical regulations downward would be a particularly dangerous proposition for the health and safety of communities and the environment.

## **BOX 2: LABOR RIGHTS AND WORKER PROTECTIONS IN THE TTIP**

Although both American and European workers generally enjoy high levels of protection, European laws typically afford employees greater benefits and protection. For instance, while U.S. laws do not guarantee workers paid vacation time or paid sick leave,<sup>54</sup> European workers are entitled to a minimum of four weeks of paid vacation and at least some paid sick leave each year.<sup>55</sup> Moreover, EU law mandates that employees cannot work more than 48 hours a week;<sup>56</sup> in contrast, the United States imposes no such legal cap on weekly number of hours labored.<sup>57</sup> It is important to note that the higher European standards are correlated with a higher level of unionization in Europe; collective bargaining agreements, for example, cover approximately 66 percent of employees across the EU, but only 12.5 percent of workers in the U.S.<sup>58</sup>

The TTIP offers an opportunity to strengthen the rights of workers and the economies of both the U.S. and the EU. The TTIP should include the basic commitment to adopt, enforce and maintain core labor rights as laid out in the ILO Declaration on Fundamental Principles and Rights at Work. In addition, the U.S. and EU should explore the adoption of specific mechanisms to provide for consultation and information disclosure between workers and transnational corporations, as well as stronger protections for workplace safety and health.<sup>59</sup>

Moreover, expanded and more effective collective bargaining rights would lead to higher wages, more demand, more investment, more jobs and healthier workplaces.<sup>60</sup> Thus, expanded and strengthened labor rights would form the basis for a broadly shared prosperity. Labor rights, jobs, and wages must be a core priority of the TTIP. Any downward harmonization of labor standards would be unacceptable.



### III. TTIP: INCREASING NATURAL GAS EXPORTS AND FRACKING

Because of the new quantities of natural gas unleashed by hydraulic fracturing, or “fracking,” the United States has the ability to become a major natural gas exporter for the first time ever. Exporting U.S. liquefied natural gas (LNG) comes with significant environmental and economic risks. For example, LNG exports would expand unconventional natural gas production in the United States, a practice with substantial negative environmental impacts, and would raise domestic energy prices.

While it is critical to examine these and other policy implications of new natural gas exports, the TTIP would likely require the United States government to automatically approve all exports of U.S. liquefied natural gas to the EU without any review, conditions, modifications or delay as an unintended consequence of a provision in U.S. law. Europe is a major importer of natural gas,<sup>61</sup> and would likely be quite eager to gain automatic access to U.S. natural gas. But because exports will have significant domestic impacts, it is critical for domestic policymakers to retain their discretion appropriately to condition or deny volumes of gas for export, as warranted.

This problem dates back to a provision of the U.S. Natural Gas Act, as amended in 1992.<sup>62</sup> More than twenty years ago, in an effort to speed up Canadian gas imports, U.S. Congress mandated that the Department of Energy automatically approve all LNG shipments to or from countries with which the U.S. has a free trade agreement that calls for so-called “national treatment for trade in gas.” Although Congress was motivated by import-related concerns and never anticipated significant LNG

exports, the Department of Energy now reads that same provision to remove its ability to even evaluate whether exports of natural gas to free trade agreement countries are in the interest of the American public.<sup>63</sup>

The environment and the U.S. economy would suffer from unfettered exports of U.S. natural gas. The LNG export process begins with extracting the gas—the vast majority of which would come from unconventional gas production (including the fracking process). An intrusive procedure, fracking involves pumping millions of gallons of water, sand, and chemicals underground to create pressure which forces out natural gas. Unconventional gas production can emit large amounts of hazardous, smog-forming, and climate-altering air pollutants into our air, and is a serious threat to our water supply. Unconventional gas production operations also disrupt forests, parks, and communities across the country.

The environmental impacts associated with natural gas exports extend beyond the production process, however. Once the gas is extracted, it needs to travel from production sites to coastal export terminals through hundreds of miles of pipelines. Whether exporters are expanding old pipelines or building new ones, these major construction projects can cut across private property and public land, further fragmenting landscapes and increasing pollution. There are also environmental impacts associated with the building of natural gas export terminals. New terminals will require the dredging of sensitive estuaries to make room for massive LNG tankers. Expanding facilities and ship traffic will also take their toll on coastal communities and the environment.

And, while some tout natural gas as a clean, safe way to provide energy, the energy needed

to cool, liquefy, and store natural gas for overseas shipment makes LNG more energy and greenhouse gas intensive than ordinary gas pipelines and even than some fuel oils pipelines.<sup>64</sup> Opening our natural gas reserves to EU exports will, therefore, increase the world's dependency on a fossil fuel with significant climate impacts.

The U.S. economic costs associated with expanding natural gas exports are also significant. U.S. exports of natural gas would raise demand, causing an increase in domestic gas prices. According to Synapse Energy Economics and the Department of Energy's own economic contractor, higher domestic energy prices from LNG exports would disproportionately harm the middle class and U.S. manufacturing.<sup>65</sup> Similarly, while the exact price

increase of U.S. natural gas will depend on the amount of gas exported and the elasticity of supply, a recent report commissioned by Dow Chemical says that natural gas prices in the U.S. could triple by 2030 under a high-export scenario.<sup>66</sup> Moreover, these immediate price impacts constitute only a small fraction of the economic harm done by further focusing the U.S. economy on raw material export and minerals extraction rather than on value-added manufactured exports.

With such significant implications for our environment, economy, and climate, it is critical that the TTIP be drafted in such a way that it retains the ability of the U.S. Department of Energy to assess whether exports of natural gas from the U.S. to the EU are in the interest of the public.



### **BOX 3: ELIMINATING FOSSIL-FUEL SUBSIDIES, ENSURING POLICY SPACE FOR CLEAN ENERGY SUBSIDIES**

The U.S. and the EU should eliminate subsidies for the oil, coal, and gas industries. The exact level of fossil fuel subsidies in the U.S. and EU is difficult to quantify because of lack of transparency in reporting. However, official estimates show that up to \$75 billion per year in Organization for Economic Cooperation and Development (OECD) countries goes to support oil, gas, and coal.<sup>67</sup> Even this figure may well be an underestimate.

Particularly in the context of the climate crisis, taxpayer-funded financial support for profitable, mature industries, and environmentally harmful industries must end. The U.S. and a number of EU countries have already committed to eliminating fossil fuel subsidies. In 2009, for example, G20 leaders vowed to “phase out and rationalize over the medium term inefficient fossil fuel subsidies while providing targeted support for the poorest.”<sup>68</sup>

The TTIP presents an opportunity to make this commitment a reality, including by increasing the transparency of fossil fuel subsidies, developing final plans to phase out fossil fuel subsidies, and listing subsidies to the fossil fuel industry as prohibited subsidies. At the same time, it is critical that governments have the policy space to put in place subsidies for environmentally beneficial clean energy programs without fear of trade litigation.

## IV. PROTECTING CORPORATE INTERESTS THROUGH INVESTMENT RULES

One stated goal of the TTIP is “to achieve the highest levels of liberalisation and investment protection that both sides have negotiated to date in other trade deals.”<sup>69</sup> Within this context, it is important to note that numerous studies have found no significant correlation between a country’s level of foreign direct investment and its decision to adopt treaties with broad investor protections including investor-state dispute resolution.<sup>70</sup> Moreover, there is significant evidence that broad investor protections threaten communities and the environment and, by offering greater privileges for foreign firms than domestic ones, incentivize the offshoring of jobs.<sup>71</sup>

Among the most harmful components of investment rules that must not be replicated in the TTIP are vaguely worded provisions that offer investors, for example, a “minimum standard of treatment” and “fair and equitable treatment.” These provisions have essentially been interpreted as a standstill on regulation, since nearly any new regulation can be deemed as violating an investor’s “predictable regulatory environment,” or depriving them of “fair and equitable treatment.”

Moreover, when a corporation feels that its rights have been violated or the monetary value of their investment has been reduced by the introduction of a new law or policy, the investor-state dispute settlement mechanism allows foreign firms to bypass the domestic court system and sue the government of the host country in private, international tribunals that lack transparency and public accountability.<sup>72</sup> Consequently, foreign firms have used investor-state dispute settlement provisions to

challenge environmental, land-use, energy and other socially-beneficial laws that have been passed by democratically elected governments.<sup>73</sup>

These cases are not hypothetical. By the end of 2012, corporations launched more than 500 cases against 95 governments, many of which directly attacked environmental and other public interest policies.<sup>74</sup> Because investor-state dispute settlement tribunals are given substantial leeway in deciding damage awards, many of the financial compensations paid out to corporations by governments reach massive proportions. Dispute-settlement compensations awarded to corporations in 2012 ranged from \$2 million to \$1.77 billion (U.S.), with many pending claims totaling in the billions.<sup>75</sup>

Investment rules and the investor-state system have been justified on the grounds that they protect foreign investors from the discriminatory or capricious actions of the host government.<sup>76</sup> Others have argued that investor-state dispute settlement tribunals are especially critical in states with poorly performing or inefficient domestic courts.<sup>77</sup> However, given that strong, independent judicial systems are well-established in the both the U.S. and the EU, and that adequate legal pathways already exist for wronged foreign firms, there is no reasonable justification for including investor-state provisions in the TTIP.

Previous experience with the investor-state system demonstrates that the monetary, social-welfare, and environmental costs of including investor-state dispute settlement provisions in TTIP would be substantial. In fact, the EU is already facing a number of investor-state suits related to its transition to clean energy sources. For example, after Japan’s Fukushima Daiichi nuclear disaster of 2011, Germany

initiated a phase-out of nuclear power and committed to move toward cleaner renewable energy sources. In response, in May 2012, Vattenfall, a Swedish energy firm with investments in German nuclear energy, filed its request for arbitration against Germany at the World Bank's International Centre for Settlement of Investment Disputes (ICSID).<sup>78</sup> Vattenfall used provisions in the Energy Charter Treaty – an EU trade and investment treaty for the energy sector – to bring its case against Germany, presumably for lost profits and the violation of its fair and equitable treatment.<sup>79</sup> (Because key documents surrounding this case are not publically accessible, the exact claims used by Vattenfall are not available.) Articles indicate that Vattenfall may be seeking U.S. \$4.6 billion in damages from Germany for its commitment to

transition to clean sources of energy.<sup>80</sup> Other examples of investor-state cases that threaten the environment are listed in Box 4.

With significant investments in the fossil fuel industry in both the U.S. and the EU, cases like this one could dramatically increase if the TTIP includes investment provisions similar to ones from recent U.S. and EU trade and investment agreements. It is therefore critical that investor-state dispute settlement be excluded from TTIP; investment rules be drafted in way that retains ability of governments to protect the environment and address climate change; and that the investment chapter of the TTIP include a strong exception for environmental and climate measures.





## **BOX 4: INVESTMENT RULES THREATEN THE ENVIRONMENT**

Investor-state cases challenging public-interest regulations are becoming the norm. Listed below are just two investor-state suits that exemplify how investment rules limit a government's ability to protect the environment and ensure the safety of its people.

### ***Fracking in Quebec***

In November 2012, Lone Pine Resources, a US oil and gas firm, filed its notice of intent to sue Canada for US \$250 million under NAFTA. The crime: A bill passed by Quebec's National Assembly that instituted a moratorium on shale gas exploration and development under the St. Lawrence River.<sup>81</sup> According to Lone Pine, the Quebec government violated the Enterprise's "valuable right to mine for oil and gas under the St. Lawrence River," despite the fact that fracking is known to contaminate drinking water, pollute the air, and cause earthquakes. Lone Pine, however, argued that its loss of a "stable business and legal environment" violated its guarantee to a minimum standard of treatment and should be counted as expropriation.<sup>82</sup>

### ***Mining in Peru***

In 1997, Doe Run Peru – a Peruvian subsidiary of the US-based company, Renco Group Inc – took control of a metallic smelter and refinery complex in La Oroya, Peru – one of the ten most polluted sites in the world. As a part of its contractual and legal obligations, Doe Run was required to implement a series of environmental clean-up projects in La Oroya, including the installation of new sulfuric acid plants to help combat the pollution produced by its complex. However, the company had twice failed to meet its contractual deadlines and had twice been granted extensions by Peruvian authorities to complete the environmental remediation. However, when the Peruvian government failed to give Doe Run a third extension, Renco Group Inc. retaliated on behalf of its subsidiary by initiating investor-state proceeding against Peru under the US-Peru free trade agreement. The corporation claimed that the government's failure to grant Doe Run yet another time-consuming extension violated provisions in the US-Peru FTA, including minimum standard of treatment and indirect expropriation protections. Instead of fulfilling its legal obligations to clean up the pollution caused by its metallic smelter and refinery complex, Renco Group Inc is demanding US \$800 million from Peruvian taxpayers.<sup>83</sup>



## V. CONCLUSIONS

The public, the environment, and the economies of Europe and the United States could potentially benefit from a trade pact that raises public interest regulations in the U.S. and the EU, includes minimum standards for regulations, retains the ability of government agencies to put in place policies which protect communities and the environment, and encourages trade and investment without sacrificing the health and safety of the public.

However, a transatlantic trade and investment agreement could also have devastating consequences for communities and the environment. Pursuing free trade at the expense of environmental protection, consumer safety, and workers' rights may boost the bottom lines of big corporations, but would also cause irreproachable damage to American and European workers and families.

Protection of communities, working families, and the environment must be at the core of any trade agreement. This means that TTIP negotiations must (1) preserve and provide opportunities to strengthen environmental, labor, climate, health, safety, and other regulations and standards in the United States and EU; (2) preserve the ability of the U.S. Department of Energy to review and oversee U.S. liquefied natural gas exports to the EU and ensure that any exports are in the interest of the public; (3) ensure that investment rules do not undermine the ability of governments to protect communities and the environment.

The first step in helping to ensure that trade policy protects communities and the environment is to involve the public in all stages of decision-making. However, the ability of the public and even policy makers to contribute

to and ultimately impact the TTIP will depend on the level of openness in the negotiations. Breaking from the precedent of recent trade negotiations, the Sierra Club believes it is critical that governments make draft negotiating texts and country submissions publically available. Opportunities for regular public and Congressional engagement and consultation are also critical. A new model of trade that benefits communities and the environment is possible, and it begins with public input and scrutiny.

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