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## TTIP vs. Climate Policy: What is at Risk?

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Once upon a time, trade negotiations were about tariffs. Back around 1990, tariffs were high enough to affect the volume of global exports and imports. In that context, advocates of trade treaties could credibly claim that their goal was to lower tariffs and thereby expand international trade.

What a difference a quarter-century makes. The tariff-cutters have triumphed; today most tariffs are so low that they no longer matter. Average tariffs on trade between the United States and the European Union are less than 3 percent in both directions.<sup>i</sup> Any economic growth that could result from removing tariffs must have already happened by now. Yet the latest arguments for further trade liberalization still echo the rhetoric of the past, with only a minor update: “non-tariff barriers” are now said to be blocking the additional economic growth that could come from even freer trade.

### Non-tariff barriers or democratic decisions?

The Transatlantic Trade and Investment Partnership (TTIP), a proposed treaty between the United States and the European Union, is intended to reduce non-tariff barriers to trade. In particular, removing the “technical barriers to trade” (TBT) caused by EU standards is a goal of U.S. participation in TTIP, according to the U.S. Trade Representative: “The launch of negotiations for a T-TIP Agreement – a comprehensive trade and investment agreement – is providing new opportunities to address TBT-related issues with the EU.”<sup>ii</sup>

Although the terms of the treaty are still being debated, many proposals for TTIP would create new institutions or mechanisms with the power to change or eliminate regulations that affect trade. In the process, TTIP could block important efforts in both the EU and the U.S. to reduce carbon emissions and combat climate change.

Regulations are not, in general, arbitrary bureaucratic obstacles. Many regulations are adopted by democratically elected governments in order to achieve socially desirable outcomes, preventing or correcting damages that would result from unregulated private markets. Rolling back well-designed regulations in order to promote trade would privilege corporations over democracy; it would give greater priority to expanding exports and profits than to protecting human health and the natural environment.

In particular, the TTIP agenda of removing “non-tariff barriers” could reverse recent progress on climate policy in both Europe and America, and could create new obstacles to the creation of a sustainably low-carbon society. This policy brief explores several areas where climate protection is threatened by TTIP, and by the mistaken view of regulations as merely “barriers” to be overcome.

The rollback of climate regulations under TTIP could take many forms. There could be explicit agreement on the lower of the two sides' standards, or "downward harmonization." A gentler-sounding alternative, mutual recognition of differing regulations, could still create irresistible pressure from businesses to lower costs by adopting the cheaper standard. Investor-state dispute settlement (ISDS) mechanisms, included in many recent trade agreements and many proposals for TTIP, empower individual corporations and investors to bring legal challenges against other countries' climate and environmental standards. Under any of these mechanisms, much could be lost.

### **Defining renewable energy**

The EU's Renewable Energy Directive calls for 20 percent of EU energy consumption to come from renewable sources by 2020, with higher targets under discussion for 2030 and beyond. The U.S. Trade Representative objects to the EU Renewable Energy Directive as a "technical barrier to trade," due to a definition of renewable fuels that restricts U.S. exports of soybeans for use as a biofuel feedstock.<sup>iii</sup> The EU, meanwhile, has levied anti-dumping penalties on biodiesel and bioethanol exports from the U.S. and other countries, claiming that they represent unfair competition with European biofuel producers.<sup>iv</sup> Such conflicts could escalate if TTIP provides new opportunities for American and European firms to challenge the other side's regulations, allowing the pursuit of global commercial advantage to outweigh the values of environmental protection and democracy.

### **Feed-in tariffs vs. fossil fuels**

The principal policies used to promote carbon-free electricity in Europe are feed-in tariffs, setting specific, above-market rates that are paid to renewable generators. Feed-in tariffs have succeeded in expanding the use of renewable energy – and have thereby reduced the revenues of fossil fuel generators.<sup>v</sup> A foreign owner of a fossil fuel plant could use ISDS, which allows companies to sue governments over regulations they dislike, to claim that feed-in tariffs were unfairly reducing the expected profits of conventional power generators. There is a clear precedent for this: Vattenfall, a Swedish power company, has successfully sued for a weakening of German water regulations that affected a coal-burning power plant, and is also suing Germany – reportedly for over €4 billion – over its plans for an early phase-out of nuclear power.<sup>vi</sup> It would be shortsighted to ignore the dangers of further anti-environmental litigation using ISDS under TTIP.

Although less widespread in America, feed-in tariffs have been introduced in some U.S. states. The U.S. regulatory system leaves many questions of climate and energy policy to state governments, and some states, such as California, have roughly European levels of climate initiatives. They are potentially vulnerable to the same kinds of challenges as EU policies.

### **Energy efficiency and appliance standards**

The EU's Energy Efficiency Directive sets European standards for reducing the demand for energy; as with renewable energy, the energy efficiency targets will rise over time. These targets could be seen as a non-tariff barrier to trade by foreign producers of less efficient appliances. Another regulatory conflict shows that this is not an imaginary threat.

Climate-related standards for appliances include restrictions on the use of fluorinated greenhouse gases such as hydrofluorocarbons (HFCs) in refrigeration, air conditioning and other applications.<sup>vii</sup> The U.S. Trade Representative has identified EU regulation of fluorinated greenhouse gases as a "technical barrier to trade", since some U.S. appliance manufacturers will be unable to comply with these rules, noting that

“the U.S. appliance industry was extremely concerned with the lack of its ability to participate in the development of [the EU] proposal beyond a single public meeting.”<sup>viii</sup>

### **Fracking**

The controversial technology of hydraulic fracturing, or fracking, has led to the recent surge in U.S. natural gas production. Fracking has released a flood of gas that has lowered the price, but has also caused environmental damage to drilling sites and nearby water supplies. Many U.S. states allow fracking with only limited health and environmental regulation; many European countries do not allow fracking, or would be likely to impose very strict regulations. Hopes that fracking could lead to an American-style boom in European gas production have subsided, as early estimates of European gas reserves have been revised downward. Nonetheless, some industries still want access to the gas that could be produced by fracking in parts of Europe.

ISDS challenges could still overturn regulations on fracking in European countries and U.S. states that restrict or ban the practice, as suggested by a pending case under the North American Free Trade Agreement (NAFTA). The Canadian province of Quebec has adopted a ban on shale gas exploration and development, in order to study the environmental impacts of fracking. Lone Pine Resources, a Canadian oil company that has incorporated in the U.S., filed an ISDS case against Canada demanding massive compensation for the “arbitrary, capricious, and illegal” action of the provincial government, which allegedly serves “no cognizable public purpose.”<sup>ix</sup> An expansion of opportunities for ISDS cases under TTIP could lead to similar challenges to France, New York State, and other anti-fracking jurisdictions.

### **Tar sands oil**

The EU Fuel Quality Directive (FQD), adopted in 2009, called for reducing the greenhouse gas intensity of transport fuels. One proposal for FQD implementation would have counted oil produced from Canadian and Venezuelan tar sands as having greater greenhouse gas intensity than conventional oil. Extracting oil from tar sands is a very energy-intensive process, so the lifecycle emissions for extraction and use of oil are greater for tar sands than for conventional oil wells. A complete accounting of the lifecycle emissions from tar sands oil would make it difficult to use such oil and still comply with the FQD. The resulting shift away from tar sands oil would have led to a reduction in greenhouse gas emissions of up to 19 million tons of CO<sub>2</sub> per year.<sup>x</sup>

The proposal was immediately met with strong opposition from Canada, the U.S., and major oil company lobbyists. Debate over the proposal spilled over into the negotiations for the EU-Canada free trade agreement, threatening to derail the entire agreement. It has also appeared throughout the TTIP negotiations, with US representatives repeatedly pushing for formulas that, in effect, treat all crude oil as having the same emissions intensity, regardless of how it is produced.<sup>xi</sup> Ultimately the EU proposal was withdrawn, due to the lobbying effort, combined with concerns about dependence on Russia, and a geopolitical preference for Canadian oil.

In this area, TTIP has already contributed to a retreat from earlier EU climate proposals. The EU had decided, acting democratically and within the law, to discourage the use of some of the world’s dirtiest oil supplies. The oil industry and its North American allies used the TTIP negotiations to reverse the EU decision. The damage is not only to the environment, but to democracy as well.

## **Non-carbon air pollutants**

The U.S. has more stringent standards than the EU for several common air pollutants other than greenhouse gases, including particulates, sulfur dioxide, lead, and short-term nitrogen oxide levels.<sup>xii</sup> These pollutants are often emitted jointly with carbon dioxide in the combustion of fossil fuels, particularly coal. Limits on these pollutants constrain the operation of coal plants, requiring expensive pollution controls that make coal less competitive with other sources of power. The recent decline in U.S. dependence on coal, reducing greenhouse gas emissions from the electric power sector, is due in part to strict limits on non-carbon air pollutants.

In the area of motor vehicle fuel efficiency and emissions, European and American standards are roughly comparable on paper. But the recent scandal over Volkswagen's emissions cheating has revealed that the U.S. has better testing and enforcement procedures, amounting to stricter regulations in practice.

The EU has stricter standards, and more to lose from downward harmonization, in most areas of climate and energy policy. But the reverse may be true in the important cases of air pollution standards for power plants and motor vehicles. It is all too possible to imagine European firms bringing ISDS challenges to American standards for particulates, sulfur, and lead emissions as unfair barriers to trade.

## **Conclusion**

Describing climate, energy, and environmental regulations as barriers to trade forces the discussion into a misleading and ill-fitting framework. Regulations are adopted to pursue social goals that the unregulated market cannot achieve on its own, such as stabilizing the earth's climate and preventing dangerous levels of global warming. As Nicholas Stern put it, "Climate change is a result of the greatest market failure the world has seen."<sup>xiii</sup> For climate polluters, regulations may be barriers to trade; for the rest of society they are an urgent imperative to redress this massive failure.

Regulations will reduce the profits of some business enterprises; this is an inevitable result when society attempts to redirect the market in healthier, socially sanctioned directions. Limits on smoking reduce the profits of tobacco companies; European limits on gun ownership reduce the profits of gun companies, relative to the norm in many parts of America. These are not "barriers to trade", or reasons to subject more people to lung cancer or weapons injuries. Rather, they are profound statements about the ways in which a democratic society has decided to put people ahead of profits. Constraining such essential decisions, in order to expand trade, would amount to undermining democracy.

The same is true for climate policy and for environmental protection in general. Public deliberation over the collective risks we face and the appropriate measures for risk reduction leads to democratic decisions about protective regulation. If those decisions have been made differently in the U.S. and the EU, or in individual American states or European countries, then some businesses will find themselves able to make more of a profit in one place than another.

Referring to differences in regulations as barriers to trade is deeply undemocratic. It suggests that respecting the political process that led to one standard here and another one there is less important than paving an ever-wider highway for exports and profits. Should America have waited for Europe's much slower progress on tobacco control, before taking action to protect U.S. citizens from health risks? Should European gun legislation have waited until Texas is ready to adopt similar rules for its well-armed

citizens? These decisions would have reduced barriers to trade in certain commodities, but at intolerable human costs.

The path forward in climate and energy policy is not quite as simple as in tobacco and guns. But it is equally important to debate and decide on the appropriate, socially necessary limits on unfettered market activity. The discussion will not proceed in lockstep in different countries and continents. This is a reason to keep talking, and challenging each other to do better – not to undo each other’s progress and undermine democracy in the narrow pursuit of expanded trade.

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<sup>i</sup> See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>.

<sup>ii</sup> U.S. Trade Representative (2014), “2014 Report on Technical Barriers to Trade”, p.66, <https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>.

<sup>iii</sup> *Ibid*, p. 74.

<sup>iv</sup> Jonathan Stearns (2013), “U.S. Bioethanol Makers Face 5-Year EU Anti-Dumping Tariff”, *Bloomberg Business*, <http://www.bloomberg.com/news/articles/2013-02-18/u-s-bioethanol-makers-face-5-year-eu-anti-dumping-tariff>; Cathleen Cimino and Gary Hufbauer (2014), “Trade Remedies Targeting the Renewable Energy Sector”, [http://unctad.org/meetings/en/SessionalDocuments/ditc\\_ted\\_03042014Petersen\\_Institute.pdf](http://unctad.org/meetings/en/SessionalDocuments/ditc_ted_03042014Petersen_Institute.pdf).

<sup>v</sup> Paul Deane et al. (2015), “Quantifying the ‘merit-order’ effect in European electricity markets”, [http://insightenergy.org/system/publications/files/000/000/013/original/RREB\\_III-Merit\\_order\\_Final.pdf?1435070717](http://insightenergy.org/system/publications/files/000/000/013/original/RREB_III-Merit_order_Final.pdf?1435070717).

<sup>vi</sup> Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (2014), “The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark”, <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>

<sup>vii</sup> [http://ec.europa.eu/clima/policies/f-gas/legislation/index\\_en.htm](http://ec.europa.eu/clima/policies/f-gas/legislation/index_en.htm).

<sup>viii</sup> U.S. Trade Representative (2014), p.67.

<sup>ix</sup> Natacha Cingotta et al. (2014), “No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking”, [https://www.foeeurope.org/sites/default/files/publications/foee\\_ttip-isds-fracking-060314.pdf](https://www.foeeurope.org/sites/default/files/publications/foee_ttip-isds-fracking-060314.pdf).

<sup>x</sup> Ab de Buck et al. (2013), “Economic and Environmental Effects of the FQD on Crude Oil Production from Tar Sands”, <http://www.transportenvironment.org/sites/te/files/publications/2013%2005%20FOD%20environmental%20benefits%20CE%20Delft%20report.pdf>.

<sup>xi</sup> Fabian Flues (2014), “Dirty Deals: How Trade Talks Threaten to Undermine EU Climate Policies and Bring Tar Sands to Europe”, [https://www.foeeurope.org/sites/default/files/publications/foee-fqd-trade-ttip-170714\\_0.pdf](https://www.foeeurope.org/sites/default/files/publications/foee-fqd-trade-ttip-170714_0.pdf).

<sup>xii</sup> The EU has stricter standards for ground-level ozone and long-term nitrogen oxide levels, and matches U.S. standards for carbon monoxide. See <http://ec.europa.eu/environment/air/quality/standards.htm> and <http://www.epa.gov/air/criteria.html>. Thanks to Joseph Daniel for research assistance on this issue.

<sup>xiii</sup> Cited in: <http://www.theguardian.com/environment/2007/nov/29/climatechange.carbonemissions>.