



Leaked EU "Sustainable Development" Proposal Fails to Protect Environment from Threats of TTIP

Academics, policy makers, environmental organizations, and voters have voiced increasing concern that the [Transatlantic Trade and Investment Partnership](#) (TTIP) pact under negotiation between the United States and European Union (EU) would undermine environmental protection. [Leaked documents](#) and [official position papers](#) reveal that TTIP would give some of the world's largest fossil fuel corporations the power to challenge environmental policies in private tribunals while imposing [restrictions on green jobs policies and expanding trade in climate-disrupting fossil fuels](#). U.S. and EU officials have sought to defend the deal as environmentally beneficial. In particular, the European Commission has [asserted](#) that a TTIP chapter on "Trade and Sustainable Development" would "safeguard basic rules that protect...the environment" and even "reinforc[e]...environmental governance."

[A leaked September 2015 version of the EU proposal for the Sustainable Development chapter](#) reveals that it falls far short of these goals. The chapter's weak and unenforceable environmental provisions stand in sharp contrast to the [strong and highly-enforceable privileges for foreign investors that are](#) proposed for TTIP. Nothing in the leaked chapter would prevent foreign companies from using those special privileges to attack environmental policies in unaccountable trade tribunals.

And while the chapter expresses concern about climate change, TTIP would actually facilitate increased trade in fossil fuels – an [explicit goal](#) set by the Council of the EU. Moreover, the chapter is too weak to "reinforce" environmental policy making, as the EU claims.

The text's failure to adequately safeguard or meaningfully advance environmental protection stems from three core flaws:

1. The text does not provide adequate protection for an array of environmental policies that TTIP would undermine.
2. The text's environmental provisions are vaguely-worded, creating obvious loopholes.
3. The text fails to include any meaningful enforcement mechanism.

It is important to note that even if a dispute settlement mechanism were included (and even if the environmental commitments were strengthened), environmental obligations have historically not been enforced under U.S. trade agreements. In addition, even if the standard enforcement mechanism in U.S. trade pacts were included, it would still be weaker than the one foreign corporations could use to challenge environmental policies under TTIP.

Environmental policies are not adequately protected from TTIP threats

The proposed text would not stop companies or governments from using TTIP rules to undermine environmental policies in either the EU or the U.S. While the EU “intends to present further proposals” concerning climate change and “the importance of promoting green growth,” there is nothing in the current text to protect climate and environmental policies from the myriad threats of other parts of the deal.

For example, nothing in the text would prevent foreign corporations, on either side of the Atlantic, from challenging climate or other environmental policies via an “investor-state dispute settlement” (ISDS) mechanism or via the European Commission’s proposed “Investment Court System.” Both enable foreign investors to challenge environmental policies before a tribunal that would sit outside any domestic legal system and be able to order governments to compensate companies for the alleged costs of an environmental policy. While the Commission claims that its new investment “[reforms](#)” would protect the right to regulate, States could still be “sued” if foreign investors considered that a policy change violated the broad, special rights that the Commission’s “reformed” investment proposal would give them.

If an EU member state or U.S. state introduced a moratorium on fracking, for example, fossil fuel corporations would be able to challenge the moratorium as “arbitrary” on the basis that it frustrated the companies’ “legitimate expectation” to be able to continue fracking. A U.S. company is already using the North American Free Trade Agreement (NAFTA) to [demand compensation for a moratorium on fracking in Quebec, Canada](#) on that very basis. The European Commission’s proposed “sustainable development” chapter includes no safeguards that would alleviate such threats. In fact, TTIP would newly empower firms such as ExxonMobil, Chevron, Royal Dutch Shell, and BP to challenge common sense policies to protect the environment.

The leaked text also would do nothing to prevent increased trade in fossil fuels under TTIP. While the chapter suggests that the Parties should cooperate to “facilitate trade” in environmentally friendly goods, the Council of the EU has also proposed an energy chapter in TTIP that would facilitate trade in environmentally *destructive* goods, including oil and gas.

According to a previously-leaked EU proposal for a TTIP energy chapter, “The EU proposes to include a legally binding commitment in TTIP guaranteeing the free export of crude oil and gas resources...” This would require the United States to undermine its current policy for liquefied natural gas (LNG) export licensing and its ban on the export of crude oil by requiring the U.S. to automatically approve licenses to export crude oil and LNG to the EU, increasing global greenhouse gas emissions and encouraging further extraction of fossil fuels. If the U.S. government chose to reinstate restrictions on crude oil or LNG exports to the EU in order to combat climate change, it would risk TTIP-authorized trade sanctions or orders for government compensation.

[The EU also has proposed](#) TTIP procurement provisions that would prohibit policies intended to incentivize domestic production of green goods such as wind turbines or solar panels, despite the leaked text’s stated support for “green growth.” The leaked “sustainable development” text does not exempt widely-used “domestic content” policies in renewable energy programs from such

TTIP rules, offering little consolation to policymakers wondering if they could defend popular green jobs policies from costly TTIP challenges.

To adequately protect environmental policies, the proposed chapter would need to include a “carve-out” stating that none of TTIP’s rules apply to measures related to environmental protection.¹ Instead, the European Commission has included provisions that may be intended as “safeguards,” but that would not provide effective protection against challenges to climate and environmental policies.

For example, the leaked text states: “The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to set and regulate its levels of domestic...environmental protection, and to adopt or modify relevant policies and laws accordingly...” This provision would not offer an adequate defense for TTIP-enabled challenges to environmental policies. First, the operative language is weak – rather than state that “*Nothing in this Agreement shall prevent a Party from*” determining, setting, regulating adopting, or modifying its environmental protections, the provision includes the far less enforceable provision that the Parties merely “*recognise* the right” to do such policymaking. Second, an ISDS tribunal could easily interpret this provision as having no effect on ISDS rulings against environmental policies. Technically, such rulings require governments to compensate a foreign investor for the challenged policy, not to alter the policy. Of course, such costly rulings can have (and have had) the effect of chilling public interest policymaking, but an ISDS tribunal could ignore this effect and decide that ruling against an environmental policy does not in any legal sense block the government’s “right to regulate.”

And, while the leaked text states: “A Party shall not waive or derogate from” or “fail to effectively enforce” its environmental laws “in a manner affecting, trade or investment,” similar provisions in recent U.S. Free Trade Agreements (FTAs) have failed to prevent governments from weakening environmental protection to attract foreign investment. Similar provisions in the U.S. – Peru FTA did not stop Peru from [rolling back an array of environmental protections](#) last year, including stripping enforcement powers from the environmental ministry, in the name of boosting investment. To date, Peru has faced no consequences for contradicting the terms largely replicated in the leaked TTIP text.

¹ Such a “carve-out” should make clear that it is the government, not a trade tribunal, that determines whether a measure relates to environmental protection. A “carve-out” would provide greater protection than an “exception.” An “exception” would mean that TTIP’s polluter-friendly rules still apply to environmental measures, while a “carve-out” would remove such measures from the entire scope of TTIP’s rules. In the event of a challenge over environmental measures, a tribunal would first decide whether the measures fell within the scope of the agreement. An “exception” would not stop the challenge at this point, while a “carve-out” could. For an “exception,” the tribunal would go on to consider whether the measures violated the rules, and only after deciding that they did indeed constitute a violation would the tribunal assess whether the government could avoid being penalized as a result of the “exception.”

Vague wording creates loopholes in environmental provisions

Despite the European Commission's claim that TTIP's "sustainable development" chapter would "reinforc[e]...environmental governance," the leaked text's provisions are too ambiguous to actually require robust environmental protection.

The chapter states that each Party "shall ensure that its domestic policies and laws provide for and encourage high levels of protection" for the environment, but leaves open to each Party to interpret what "high levels of protection" actually means. Similarly, the leaked text repeatedly states that the Parties "shall implement effective domestic policies" to achieve environmental goals, while failing to spell out what constitutes an "effective domestic policy."

For example, the chapter states that "the Parties shall implement effective domestic policies and measures to combat illegal logging and related trade..." and includes similar calls for "effective" policies regarding biological diversity, illegal wildlife trade, and chemicals and waste. But the text offers no definition of "effective" – a word on which the utility of these provisions hinges. Nor are there any details as to what a Party must do to achieve such nebulous goals as "the conservation and sustainable use of biological diversity." With the exception of the text's section on management of fisheries, which spells out some specific measures that Parties should undertake to comply, the draft chapter is rife with vague aspirations instead of concrete and clear measures that, if enforced, would help promote environmental protection.

In addition, the text fails to require both Parties to ratify additional international agreements that would bolster environmental protection. For example, the text does not require the United States or EU member states to ratify multilateral environmental agreements (MEAs) to which they are not already a Party. The United States has ratified just [a fraction](#) of the [dozens of MEAs](#) ratified by EU member states. Despite this disparity and the additional environmental protection that further ratifications would provide, the text only offers the non-binding suggestion that the Parties "should continue to strive towards further ratification" of MEAs.

Similarly, while the text includes *some* stronger provisions regarding the "sustainable management of fisheries," Parties are only asked to "adhere to the principles" of international agreements to deter illegal, unreported, and unregulated fishing, but not to ratify those agreements.

Investors' rights trump enforcement of environmental provisions

The European Commission's draft text lacks any enforcement mechanism to hold countries accountable to the chapter's environmental provisions – a step backwards from recent U.S. trade agreements that have subjected environmental and commercial terms to the same enforcement mechanism. The Commission does note in the text that "dispute settlement aspects shall be developed at a later stage." An earlier EU [position paper](#), released in January 2015, proposed a state-state dispute settlement process (where one government can bring a case against another for alleged non-compliance) for this chapter, but it did not include trade sanctions or other penalties if a government failed to enforce the environmental provisions. This non-binding framework would offer little incentive for States to comply.

Even if the leaked text were subject to state-state dispute settlement with penalties for non-enforcement, and even if the environmental provisions were precise and comprehensive commitments rather than the current ill-defined objectives, there is still no indication that those environmental provisions would be enforced, and therefore no indication that they would have any meaningful impact on the ground. For example, the U.S. – Peru FTA included a Forest Sector Annex with detailed obligations, subject to binding state-state dispute settlement, aimed at stopping the illegal timber trade between Peru and the United States. Yet, more than six years after the FTA took effect, illegal logging in Peru’s Amazon rainforest remains [rampant](#). If the stronger terms in the Peru FTA have failed to deter environmental degradation, why should the weaker terms proposed for TTIP do any better?

In addition, even if the proposed chapter included a state-state dispute settlement mechanism, its environmental terms would not be nearly as enforceable as the sweeping rights that foreign investors could use under TTIP to challenge environmental policies.

Both the EU and the United States have proposed for TTIP to not only establish broad rights for foreign investors, but to empower those investors to privately enforce those rights via ISDS – a far stronger enforcement mechanism than state-state dispute settlement. For state-state dispute settlement to be used for an environmental violation, a private actor (such as an environmental organization) would have to first convince its government to initiate a case against the other government, despite the diplomatic and financial costs that the government would incur. But a foreign firm wanting to challenge an environmental policy would not need to convince anyone before bringing an ISDS case against a government. The lower barriers to ISDS enforcement help explain why foreign investors have used ISDS to launch [more than 600](#) investment-related cases against governments under international trade and investment agreements, while governments have initiated [a mere four such cases](#) via state-state dispute settlement.

Conclusion

Despite its name, the proposed “sustainable development” chapter would not promote environmental protection. To do so would require replacing the text’s litany of non-binding vagaries with strong, specific, comprehensive, and enforceable obligations to safeguard the environment.

Even more importantly, the leaked text fails to even mention, much less protect against, TTIP’s many threats to our environment.

If the EU and U.S. negotiators want to ensure that environmental protection is not undermined by TTIP, they need to start by amending the agreement’s polluter-friendly terms. They should, for example, remove foreign investor rights (including ISDS or the Investment Court System) that threaten environmental policies, eliminate rules designed to facilitate increased trade in fossil fuels, and delete procurement terms that restrict green job creation. To guarantee environmental protection, they also should carve out environmental policies from *all* of TTIP’s rules. Barring such changes, TTIP would remain a toxic trade deal.