



Energy Trade in the Trans-Atlantic Trade and Investment Partnership: Endangering Action on Climate Change

"Climate change is a defining challenge of our time."

– EU Commission President Manuel Barroso, January 22, 2014¹

"Someday, our children, and our children's children, will look at us in the eye and they'll ask us, did we do all that we could when we had the chance to deal with this problem and leave them a cleaner, safer, more stable world? And I want to be able to say, yes, we did."

– President Barack Obama, June 25, 2013²

Introduction

On May 19, 2014 the Huffington Post published a draft of the European Union “non paper”³ on raw materials and energy in the Trans-Atlantic Trade and Investment Partnership (TTIP), an expansive free trade and investment agreement that is currently being negotiated between the United States and the European Union (EU).⁴ Because tariffs between the U.S. and the EU are already low, this pact will have little to do with traditional trade issues such as tariffs. Instead, the bulk of the agreement will focus on removing what many governments and multinational corporations refer to as “non-tariff barriers” or “trade irritants”—which are more commonly known as environmental, public health, and other public interest safeguards. The draft, dated September 20, 2013, serves as an important—and worrying—indicator of how the EU sees the development of trade rules governing energy and raw materials in the pact.

The TTIP negotiations are taking place against the backdrop of a changing energy outlook and deteriorating climate. Over the past decade the U.S. has become a net exporter of coal and petroleum products,⁵ and is poised to increase natural gas exports significantly in coming years.⁶ The EU is concerned with energy security and diversification, but also justifiably worried about the risks of exploiting its own natural gas reserves. It is, therefore, looking to import energy, including natural gas and crude oil, from countries including the U.S.⁷ These dynamics are making energy a focus of the TTIP negotiations.

Understanding this proposal and its implications for the ability of governments and communities to tackle the climate crisis is important not only because of the volume of trade in energy goods between the United States and Europe—in 2012 EU-U.S. trade in gasoline and diesel products was worth US\$32 billion⁸—but also because this chapter will serve as a blueprint for future trade agreements with other countries.

Unfortunately, as described below, the EU proposal reinforces a dangerous model of trade that would limit the ability of the U.S. and the EU to put in place and implement policies to combat the climate crisis and protect human health. Despite the fact that climate scientists and experts warn that the vast majority fossil fuel reserves must stay in the ground and that countries must urgently scale up renewable energy development and deployment to avoid climate catastrophe,⁹ this proposal would likely:

- *Expand* fossil fuel exports from the U.S. to the EU, and therefore fossil fuel exploration in the U.S.;
- *Increase* the EU’s reliance on fossil fuel imports;
- *Limit* the ability of governments to set the terms of energy policy; and
- *Restrict* the development of localized renewable energy programs.

The proposal, in other words, would endanger efforts to tackle the global climate crisis at a time when decisive action is more necessary than ever.

Increasing Trade in Oil and Liquefied Natural Gas

The aim of the proposed Chapter, as laid in in *Article A: Principles*, is to “reinforce” free trade in energy by “abolishing trade and investment restrictions on goods and services” and “creating a more transparent market framework.” By abolishing trade restrictions on energy—which in the United States only exist for natural gas and crude oil exports—this proposal would actually encourage increased exports of fossil fuels from the U.S. to the EU. Increased trade in fossil fuels from the U.S. to the EU (primarily in liquefied natural gas, or LNG, and oil products) would incentivize more natural gas and oil development in the United States utilizing “fracking,” which poses significant environmental and public health hazards, while deepening Europe’s dependence on dangerous fossil fuels.

The real thrust of the EU proposal is in *Article C: Export Restrictions*. Article C(2) deals with export restrictions on “energy goods,” which are defined in *Article B: Definitions* as “coal, crude oil, oil products, natural gas, whether liquefied or not, and electrical energy.” (Although “electrical energy” potentially includes electricity produced from renewable sources, in the transatlantic context transport will involve exportable commodities such as liquefied natural gas, oil, and coal products—not electrical energy such as solar or wind.) The Article states that:

“exports of energy goods to the other Party shall be deemed automatically to comply with any conditions and tests foreseen in the Parties respective legislation for the granting of export licenses.”

This provision has implications for both natural gas and crude oil exports from the U.S. to the EU. With respect to natural gas, Article C reflects the U.S. Natural Gas Act’s requirement that

exports of natural gas to countries with which the U.S. has a free trade agreement requiring national treatment for trade in gas automatically be “deemed consistent with the public interest and approved without modification or delay.”¹⁰ Importantly, if no free trade agreement is in place, the Department of Energy must conduct a public analysis to determine whether exports are inconsistent with the public interest before granting a license.¹¹

The EU is not currently an entity with which the United States has a free trade agreement, but if the TTIP were agreed to, it would be. Article C(2) reinforces the policy that natural gas exports from the U.S. to the EU must be automatically deemed in the public interest and automatically granted, thus further curtailing the ability of the U.S. to control fossil fuel exports for health, security or environmental purposes.

The fact that natural gas exports from the U.S. to the EU would be automatically deemed in the public interest and export licenses automatically granted—with no review or analysis—is preposterous. This is because natural gas exports mean:

- **More Fracking in the U.S.:** In order to feed foreign markets through exports, the U.S. will need to produce more gas—most of which will come from fracking. Fracking emits large amounts of hazardous, smog-forming, and climate-altering pollutants into our air, is a serious threat to our water supply, and presents serious risks to the public health, our land, and communities.
- **Increased Reliance on Fossil Fuels in the EU:** According to the European Wind Energy Association (EWEA), in 2011 Europe spent €406 billion (approximately U.S. \$563 billion) on imports of fossil fuels. In 2012 that number rose to €545 billion.¹² According to EWEA, this cost around three times more than the cost of the Greek bailout (up to 2013).¹³ Europe’s dependence on fossil fuel imports is high, and particularly with TTIP, is likely going to continue to rise. This not only undermines Europe’s economic future, but also undermines Europe’s clean-energy transition. Global dependence on fossil fuels must end in order to avoid catastrophic climate impacts; TTIP takes Europe in the wrong direction.
- **More Climate Emissions:** Natural gas, in order to be exported from the U.S. to the EU, must first be liquefied. Liquefied natural gas itself is a carbon-intensive fuel,¹⁴ with life-cycle emissions significantly greater than those of natural gas. The energy needed to cool, liquefy, and store natural gas for overseas shipment makes LNG more energy- and greenhouse-gas-intensive than ordinary pipeline gas and even some fuel oils.¹⁵ Moreover, natural gas production and infrastructure, including wells and pipelines, have been found to leak methane, a potent greenhouse gas that traps nearly 86 times as much heat as carbon dioxide over the crucial 20-year period, and 34 times as much heat over a 100-year period.¹⁶

In addition, U.S. exports of natural gas would raise demand for U.S. natural gas, causing an increase in domestic gas prices.¹⁷ Analysis shows that the price increase in U.S. natural gas will shift the domestic gas market back towards coal.¹⁸ As the U.S. Energy Information Administration (EIA) notes, “the decrease in natural gas consumption is

replaced with increased coal consumption.”¹⁹ Specifically, EIA predicts that 72 percent of the decrease in gas-fired electricity production will be replaced by coal-fired production in the U.S.²⁰ As a result, LNG exports will likely increase CO₂ emissions from U.S. power generation, thereby further exacerbating global climate change.

With respect to crude oil exports, the U.S. Energy Policy and Conservation Act of 1975 (EPCA) directs the president to issue regulations prohibiting the export of crude oil and natural gas, but allows the president to exempt from this prohibition “such crude oil ... exports which he determines to be consistent with the national interest and the purposes of this chapter.”²¹ The regulations require a license for all crude oil exports, which may be issued for seven categories of exemption to the general export prohibition²² and on a case-by-case basis if the export is consistent with the national interest and the purposes of the EPCA.

Article C(2) could be interpreted to require any application for a license to export crude oil to the EU to be granted on the grounds that under Article C(2) the “national interest” test in the EPCA is automatically satisfied.²³ This could open the door to crude oil exports from the U.S. to the EU, which would have significant consequences for our global climate. For example, lifting the U.S. crude oil export ban, which TTIP could be a precursor to, would ultimately mean:

- **Windfall Profits for the Oil Industry:** Oil Change International estimates that lifting the crude oil export restrictions would bring the price of U.S. oil in line with international prices, which would raise U.S. oil prices by \$10 per barrel or more.
- **More Fracking for Oil in the U.S.:** With even deeper profits, the oil industry would be better able to drill in more marginal oil fields and produce even more oil, which means more dangerous fracking.
- **More Global Climate Emissions:** On average, a \$10 increase in crude oil prices would lead to 9.9 billion barrels of additional U.S. oil production between 2015 and 2050. Oil Change International puts that figure in a climate context: 9.9 billion barrels of oil would release more than 4.4 billion tons of CO₂ into the atmosphere when burned—the equivalent of annual emissions from 1,252 average U.S. coal power plants, or lifetime emissions from 42 coal plants.²⁴

Given the very serious climate implications associated with expanding trade in natural gas and crude oil, this or any TTIP proposal that would limit the ability of governments to fully examine and manage fossil fuel exports is alarming.

Limiting the Ability of Governments to Set the Terms of Energy Policy

In addition to incentivizing trade in fossil fuels, the EU proposal would also limit the ability of governments to set the terms of energy policy. *Article D: Domestic Price Regulation*, for example, has to do with the “right” of states to maintain a public service obligation (PSO), which is a regulatory mechanism used in the EU to ensure that entities supplying public goods, such as transport networks, mail service, or gas and electricity utilities, continue to operate even when market conditions might be unfavorable. In the energy sector, a PSO guarantees, through regulatory measures or requirements addressed to suppliers or transmission and distribution

system operators, minimum standards in terms of consumer and environmental protection which could not be reached through the simple operation of the market.

Article D.1 states that Parties “may impose a public service obligation on enterprises” and Article D.2 states that “Parties have the right to define the kind of public service obligation they wish to maintain”—just as long as the policy is “not more burdensome than necessary.” In other words, Parties don’t actually have the right to maintain whatever kind of public service obligation they wish. In fact, such a “necessity test” has been used numerous times by countries to challenge laws at the WTO designed to protect public health and the environment.²⁵ And it creates yet another basis on which legitimate and beneficial sustainable-energy policies may be judged by the WTO and similar institutions based on trade law rather than by sovereign governments based on climate science and the real-world necessities of building a green economy.

In another example, **Article K: Transit** proposes to make Article V of the General Agreement on Trade in Tariffs (GATT), which requires “freedom of transit through the territory of each member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other members,”²⁶ explicitly applicable to energy transport via pipeline and transmission grid. This is problematic because there may be circumstances under which the transit of certain types of fuel, whether by pipeline or other means, presents increased environmental risks (e.g., transport of tar sands crude by pipeline because of risks in the event of pipeline leaks and spills). It is therefore critical for states to retain the right to prevent, restrict, or alter the route of pipeline transit for environmental purposes.²⁷

Finally, it is important to point out that **Article I: General Principles of Risk Management in Offshore Oil and Gas Operations** gestures toward establishing risk management and safety standards for offshore oil and gas operations. The Article, however, does not go far enough to meaningfully address the risks. Article I(3), for example, proposes standards for accident prevention and risk management. Among other requirements, the text states that Parties must:

- Require operators to ensure “that all *suitable measures* are taken to prevent major accidents in offshore oil and gas operation” (emphasis added);
- Ensure that operators “take all *suitable measures* to limit the consequences for human health and for the environment in the case of a major accident” (emphasis added); and
- Require operators to ensure “that offshore oil and gas operations are carried out on the basis of systematic risk management so that residual risks of major accidents to persons, the environment and offshore installations are *acceptable*” (emphasis added).

There are a number of problems with this unenforceable, non-binding language. First, it is important to note that while the proposed definition of “major accident” (as defined in **Article A: Definitions**) refers to environmental harm, the definition would only be met where the incident also involves or has a “significant potential to cause” “fatalities or serious personal injury.”²⁸ Environmental damage without actual or potential fatalities or serious personal injury—such as the Exxon Valdez oil spill that spilled hundreds of thousands of barrels of Crude Oil in Alaska in 1989—would not appear to qualify as a major accident. In addition, because the terms “all

suitable measures” and “acceptable risk” are vague and undefined, they do little to ensure real protection against accidents or other risks to the environment and human health.

Restricting the Development of Clean Energy

The only section of the draft text to deal specifically with renewable energy—*Article O: Localization in the renewable energy sector*—actually serves to *restrict* the ability of governments to create localized clean energy economies and build domestic manufacturing of renewable energy technologies. The most recent report of the Intergovernmental Panel on Climate Change (IPCC) stated that global greenhouse gas emissions need to fall by 40-70 percent below 2010 levels in order to avoid catastrophic climate impacts.²⁹ In order to avert climate disaster, countries must significantly scale up renewable energy development and deployment. Within this context, rules in TTIP that limit the tools that governments have to foster renewable energy industries are particularly dangerous.

Article O(a) prohibits governments from using local content requirements in renewable energy programs. Local content requirements, also known as buy-local rules or domestic content rules, are requirements that an enterprise purchase or use goods of local origin. Article O(b) also prohibits governments from “requiring forming partnerships with local enterprises, unless such partnerships are deemed necessary for technical reasons and the Party can demonstrate these upon request by the other Party.”

Local content requirements have been a standard policy tool used by governments to foster, nurture, and grow new industries. The ability of governments to adopt local content requirements favoring local producers and suppliers is critical to the goals of localizing energy production, incentivizing clean energy, and creating green jobs—all of which contribute to the broader goal of tackling climate change. The transition to a clean energy economy depends on a robust local supply of green goods, services, and jobs to cultivate a domestic renewable energy industry that can challenge the power of the fossil fuel industry in the setting of national climate policies.

This provision has even broader implications for developing countries, which could be implicated if this chapter serves as a blueprint for future agreements. Particularly during the early stages of countries’ development, it is critical that governments have the ability to nurture and grow domestic industries—including renewable energy industries—in order to cultivate a manufacturing base. History shows that governments need a range of policy tools, including local content requirements, to support such industries until they are internationally competitive.

It is critical that governments have every tool at their disposal to be able to develop, grow, and support renewable energy. Governments and communities must have the right to determine whether or not a local content requirement will increase the viability, success, and effectiveness of a renewable energy program. The TTIP must not close the door on such programs.

Conclusion

EU Commission President is right: ‘Climate change is a defining challenge of our time.’ It may, in fact, be *the* defining challenge of our time. And while TTIP negotiators meet behind closed

doors to work out the intricacies of the global trade rules that will affect all aspects of our lives, the climate crisis rages on.

The EU's proposal for a raw materials and energy chapter in the TTIP reinforces a dangerous model of trade that would limit the ability of the U.S. and the EU to put in place and implement policies to combat the climate crisis and protect human health and the environment. The proposal, however, is not just dangerous because of its impacts on the U.S. and the EU. Because the agreement will serve as blueprint for future trade agreements, it could also restrict the ability of governments and communities outside of the U.S. and the EU to adopt urgently needed climate measures.

Climate scientists and experts warn that the vast majority fossil fuel reserves must stay in the ground and that countries must urgently scale up renewable energy development and deployment to avoid climate catastrophe.³⁰ This EU non-paper, however, does nothing to reconcile the incompatibility of existing trade rules with the need to use all available tools and measures to meet the challenge of climate change, and, in a number of areas, actually goes beyond existing trade rules to further restrict the ability of governments and communities to combat the climate crisis. Decisive action on climate change is necessary, and must be supported by a new model of trade that departs significantly from that which is espoused in this proposal.

ENDNOTES

¹ Statement by European Commission President Manuel Barroso on the 2030 Energy and Climate Framework. January 22, 2014. http://europa.eu/rapid/press-release_SPEECH-14-50_en.htm

² Remarks by the President on Climate Change. Georgetown University. June 2013. <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>

³ A non paper is essentially draft negotiating text.

⁴ Huffington Post, *Read The Secret Trade Memo Calling For More Fracking and Offshore Drilling*. May 19, 2014. http://www.huffingtonpost.com/2014/05/19/trade-fracking_n_5340420.html

⁵ See U.S. Energy Information Administration, *Quarterly Coal Report July – September 2013*, (January 2014), available at <http://www.eia.gov/coal/production/quarterly/pdf/qcr.pdf>; U.S. Energy Information Administration, *U.S. Petroleum Products Exports Exceeded Imports in 2011*, (March 7, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=5290>.

⁶ U.S. Energy Information Administration, *Annual Energy Outlook 2013*, at 3 (April 2013), [http://www.eia.gov/forecasts/aeo/pdf/0383\(2013\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2013).pdf)

⁷ Reuters, *European countries anxious to buy U.S. natural gas*. January 17, 2014, <http://www.reuters.com/article/2014/01/17/usa-lng-europe-idUSL2N0KR0Y220140117>

⁸ Energy Post, *Why an EU-U.S. Trade Deal Matters for the Energy Sector*, (Nov. 12, 2013), <http://www.energypost.eu/eu-us-trade-deal-matters-energy-sector/>

⁹ See, for example, International Energy Agency (IEA). *World Energy Outlook 2012*. <http://www.iea.org/publications/freepublications/publication/English.pdf>. And: Intergovernmental Panel on Climate Change Press release, April 2014. http://www.ipcc.ch/pdf/ar5/pr_wg3/20140413_pr_pc_wg3_en.pdf

¹⁰ 15 U.S.C. § 717b(c).

¹¹ 15 U.S.C. § 717b(a).

¹² The European Wind and Energy Association. *Avoiding Fossil Fuel Costs with Wind Energy*. March 2014. http://www.ewea.org/fileadmin/files/library/publications/reports/Avoiding_fossil_fuel_costs.pdf

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- ¹³ The European Wind and Energy Association. *Avoiding Fossil Fuel Costs with Wind Energy*. March 2014. http://www.ewea.org/fileadmin/files/library/publications/reports/Avoiding_fossil_fuel_costs.pdf
- ¹⁴ See Paulina Jaramillo, W. Michael Griffin, H. Scott Matthews, Comparative Life-Cycle Air Emissions of Coal, Domestic Natural Gas, LNG, and SNG for Electricity Generation, 41 *Environ. Sci. Technol.* 6,290 (2007), http://www.ce.cmu.edu/~gdrg/readings/2007/09/13/Jaramillo_ComparativeLCACoalNG.pdf
- ¹⁵ Kavalov, B., H. Petrio, and A. Georgakaki. “Liquefied Natural Gas for Europe – Some Important Issues for Consideration.” Joint Research Centre of the European Commission Reference Report, 2009. Joint Research Centre. Accessed on May 2, 2013: http://ec.europa.eu/dgs/jrc/downloads/jrc_reference_report_200907_liquefied_natural_gas.pdf
- ¹⁶ IPCC, *Climate Change 2013: The Physical Science Basis*: Chapter 8, page 714, Table 8.7, attached as Exhibit 12.
- ¹⁷ Ditzel, Ken, Jeff Plewes, and Bob Broxson. “US manufacturing and LNG exports: Economic contributions to the US economy and impacts on US natural gas prices.” *Charles River Associates*, February 25, 2013. Accessed on May 3, 2013: http://www.crai.com/uploadedFiles/Publications/CRA_LNG_Study_Feb2013.pdf
- ¹⁸ See, e.g., U.S. Energy Information Administration. *Effects of Increased Natural Gas Exports on Domestic Energy Markets*. January 2012. Pgs. 18-19. http://energy.gov/sites/prod/files/2013/04/f0/fe_eia_ing.pdf
- ¹⁹ U.S. Energy Information Administration. *Effects of Increased Natural Gas Exports on Domestic Energy Markets*.
- ²⁰ U.S. Energy Information Administration. *Effects of Increased Natural Gas Exports on Domestic Energy Markets*.
- ²¹ 42 U.S.C. §6212(b)(1). The Department of Commerce’s Bureau of Industry and Security issued these rules as part of its Short Supply Controls at 15 C.F.R. § 754.2.
- ²² 15 C.F.R. § 754.2(b). The exemptions to the general ban on oil exports include (i) exports from Alaska’s Cook Inlet; (ii) exports to Canada for consumption or use therein; (iii) exports in connection with refining or exchange of strategic petroleum reserve oil; (iv) exports of heavy California crude oil up to an average volume not to exceed 25 million barrels per day; (v) exports that are consistent with certain international agreements; (vi) exports that are consistent with findings made by the President under certain statutes; and (vii) exports of foreign origin crude oil where, based on satisfactory written documentation, the exporter can demonstrate that the oil is not of U.S. origin and has not been commingled with oil of U.S. origin. *Id.*
- ²³ EarthJustice. *Trade in Energy in the Transatlantic Trade and Investment Partnership: An Analysis of the EU “Non-Paper” on Raw Materials and Energy*. May 2014. http://action.sierraclub.org/site/DocServer/Analysis_of_EU_Energy_Proposal_for_TTIP_14-05-19_FINAL_.pdf?docID=15741
- ²⁴ Oil Change International. *Lifting the Ban, Cooking the Climate: The Climate Impact of Ending the U.S. Crude Oil Export Ban*. March 2014. <http://priceofoil.org/content/uploads/2014/03/LiftingTheBanFinal.pdf>
- ²⁵ For example, Mexico challenged a U.S. regulation establishing conditions under which tuna products sold in the United States may be labeled as “dolphin-safe,” on the grounds that it was more trade-restrictive than necessary to accomplish the goals of dolphin conservation. The WTO Panel found that the regulation was more restrictive than necessary to achieve a legitimate objective. See *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 09, 2011). That finding was later reversed by the Appellate Body. See *United States -- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/ (May 5, 2012). Similarly, in 2012 Ukraine filed a complaint with the WTO Dispute Settlement Body against Australia challenging Australia’s plain packaging requirements for tobacco products that were designed to reduce smoking rates and protect public health. Ukraine argued that the regulations are more restrictive than necessary to accomplish the stated health objectives. A panel has been established but no decision has yet been reached in the case. See *Request for Consultations By Ukraine, Australia-Tobacco Plain Packaging*, WT/DS434/1 (March 15, 2012).
- ²⁶ Article V of the GATT provides for freedom of transit: “There shall be freedom of transit through the territory of each member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other members.” GATT Art. V(2). Traffic in transit cannot be subject to any unnecessary delays or restrictions. GATT Art. 5(3). It is to be exempt from customs duties and from all transit duties or other charges, except those for transportation or commensurate with administrative expenses entailed by transit or the cost of services rendered. *Id.* This includes transit of energy or fuels via pipeline or transmission line. See Kurmanov, B., *Transit of Energy Resources Under GATT Article V*, *Transnational Dispute Management* 4 at 23-29 (2013), available at <http://www.group-global.org/en/publication/view/5231>.

²⁷ It is important to note that, given that there is no possible way to transmit energy via pipeline or transmission grid between the U.S. and the EU, this provision seems to be aimed at establishing a precedent for future trade agreements.

²⁸ Article B (4), defining major accident to include “(d) any major environmental incident resulting from incidents referred to in points (a), (b) and (c),” where points (a), (b) and (c) all describe incidents “involving, or with a significant potential to cause, fatalities or serious personal injury.”

²⁹ Intergovernmental Panel on Climate Change Press release, April 2014.

http://www.ipcc.ch/pdf/ar5/pr_wg3/20140413_pr_pc_wg3_en.pdf

³⁰ See, for example, International Energy Agency (IEA). World Energy Outlook 2012.

<http://www.iea.org/publications/freepublications/publication/English.pdf>. And: Intergovernmental Panel on Climate Change Press release, April 2014. http://www.ipcc.ch/pdf/ar5/pr_wg3/20140413_pr_pc_wg3_en.pdf