

**350.org * Center for Biological Diversity * Center for International Environmental Law *
Earthjustice * Food & Water Watch * Friends of the Earth * Green America * Greenpeace
USA * Institute for Agriculture and Trade Policy * Natural Resources Defense Council *
Oil Change International * Sierra Club * SustainUS**

October 29, 2015

Re: Environmental Provisions in the Trans-Pacific Partnership

Dear Member of Congress,

Our organizations have been following the TPP negotiations for years and have expressed our serious concerns about its impact on the environment. Now that the environment chapter has been finalized and the negotiations for the entire agreement have concluded, we write to underscore key elements that should be included and excluded from the pact.

The environment chapter should be judged by whether its provisions are strong enough to have a meaningful impact on the ground in TPP countries and whether the obligations will be enforced. We are also concerned that any potential benefits of the environment chapter will be overwhelmed by the negative impacts of other provisions in the pact including the TPP's investment, sanitary and phytosanitary, technical barriers to trade, regulatory coherence chapters and other provisions that have an impact on key environment and public health protections.

To that end, this letter is divided into three sections. The first is dedicated to rules that should be included in the environment chapter; the second is dedicated to enforcement; and the third to rules outside of the environment chapter that would have a particularly negative impact on the environment.

We strongly urge you to vote no to a TPP that does not address all of these concerns.

I. Rules that must be included in the environment chapter with binding obligations (i.e., “shall” obligations) include:

- **All of the ‘May 10th’ standards, which are also all included in the Trade Priorities and Accountability Act of 2015 (i.e. “fast track”).** As 19 Members of Congress wrote in a July 29, 2015 letter to Ambassador Froman, “The TPP would fail... scrutiny if it does not incorporate the standards set in the May 10, 2007 Agreement, reached by House Democrats and the Bush White House, with respect to the environmental chapter.”¹ These standards, reiterated in the fast-track bill, not only stipulate that environmental obligations be enforced on the same basis as the commercial provisions and that countries

¹ Letter to Ambassador Froman from 19 members of Congress. July 29, 2015. Available at: http://blumenauer.house.gov/images/pdf/072915_letter_TPP.pdf

not waive or derogate from environmental laws, but also that Parties must incorporate a specific list of seven multilateral environmental agreements (MEAs) into free trade agreements and subject those commitments to the FTA dispute settlement process.²

The binding obligation to uphold commitments made under all seven MEAs and subjecting those commitments to the same dispute settlement procedures as commercial obligations is critical. It helps give parity to environmental and commercial obligations in trade agreements. More fundamentally, it helps ensure that countries do not waive or weaken their obligations under MEAs in order to attract trade or investment and that a country faces consequences if it does weaken its safeguards. To that end, since the May 10th agreement all U.S. free trade pacts have required countries to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfill its obligations under a set of seven multilateral environmental agreements (MEAs) and subject those commitments to the FTA dispute settlement process.

The TPP must include all of the May 10th obligations, including that countries shall adopt, maintain, and implement its obligations under the following specified agreements:

- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- The Montreal Protocol on Substances that Deplete the Ozone Layer;
- The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships;
- The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (The Ramsar Convention);
- The International Convention for the Regulation of Whaling;
- The Convention on the Conservation of Antarctic Marine Living Resources; and
- The Convention for the Establishment of an Inter-American Tropical Tuna Commission.

We further note the 2013 finalization of the Minamata Convention on Mercury, which the United States became a Party to in November 2013. Since some of the TPP countries are significant contributors to the global supply and trade of mercury, it is imperative that compliance with obligations under the Minamata Convention be included in TPP as well.

- **A legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources.** TPP negotiating partners include key timber producer, processing, and consumer countries, and all are negatively impacted by illegal logging and associated trade. Similarly, the growing problem of trade in illegal wildlife products in the Asia-

² Bipartisan Trade Deal. May 2007.

https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf

Pacific region has led to dramatic declines in biodiversity and in populations of many threatened and endangered species such as elephants and rhinoceros. As members of Congress argue in their July 29th letter to Ambassador Froman, it is critical that the TPP include a legally enforceable prohibition on trade in illegally harvested timber and illegally taken fish and wildlife.³ Within the context of a prohibition, countries must be required to adopt, maintain, and implement policies to identify contraband and to penalize violators of the prohibition in a manner that will serve as a strong disincentive to engage in illegal trade. Time-bound obligations and specific provisions for key countries should be included to help ensure that there is follow through and milestones to determine whether countries are living up to these obligations. Language that requires countries to “combat,” “deter,” or otherwise address illegal trade in flora and fauna without an obligation to establish and implement a clear prohibition will be insufficient to address the problems of illegal timber and wildlife trade.

- **Legally binding commitments to address illegal, unreported and unregulated (IUU) fishing.** IUU fishing is widespread, accounting for up to 30 percent of global catch each year. As the July 29 Congressional letter referenced above notes, some of the “worst actors” of IUU fishing are in the Pacific region. It is therefore critical that the TPP text goes beyond just recognizing the importance of addressing IUU fishing, encouraging cooperation, and calling on countries to “strive to” or “seek to” address IUU fishing. The TPP must, instead, require countries to address IUU fishing, including through: (1) legally binding requirements to implement port state measures, including specifically referencing the commitments of the 2009 Agreement on Port State Measures, which are necessary to exclude illegally caught fish from entering international supply chains; (2) prohibiting the trade, transshipment or sale of products harvested or traded in violation of laws that protect living marine resources; and (3) obligating countries to abide by the trade related provisions of regional fisheries management organizations (RFMOs), including the Inter-American Tropical Tuna Convention (IATTC) and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), which are critical to prevent illegally caught fish from entering international trade. Given the pervasive extent of IUU fishing and the history of some TPP countries as transshipment ports, failure to *require* adherence to anti-IUU measures would allow the TPP to facilitate trade in illegally caught fish products.
- **Legally binding rules to prohibit subsidies that contribute to overcapacity and overfishing.** Fisheries subsidies that promote overcapacity and overfishing drive fisheries depletion while also creating unfair competition in seafood trade. The TPP should

³ Letter to Ambassador Froman from 19 members of Congress. July 29, 2015. Available at: http://blumenauer.house.gov/images/pdf/072915_letter_TPP.pdf

prohibit subsidies for all fishing activities that contribute to overcapacity and overfishing and that negatively affect fish stocks in an overfished condition.

- **Legally binding prohibitions on shark finning and associated trade and commercial whaling.** International trade of shark fins and commercial whaling, including among TPP countries, is a major driver of the worldwide depletion of shark and whale populations. The July 29 Congressional letter notes that “there are significant trade related environmental concerns that effective provisions in the TPP can help remedy,” noting that “the practice of whaling and shark finning continues in the region.” The TPP should address these problems with legally binding bans, or prohibitions, on shark finning, shark fin trade, and commercial whaling. With respect to whaling, it is critical that TPP countries are required to adopt, maintain, and implement its obligations under the International Convention for the Regulation of Whaling. Language that recognizes the problems of shark finning and commercial whaling without specific and enforceable obligations to address these problems would put sharks and whale populations at increased risk by making potential markets for these illegal products larger.
- **Protections for countries to implement rules and safeguards that address climate change, including commitments under the United Nations Framework Convention on Climate Change (UNFCCC).** There is a direct connection between increased trade and increased climate-disrupting emissions and an increasing number of trade and investment cases that directly challenge climate and clean energy policies. Therefore, the TPP should require countries to live up to their commitments in the UNFCCC and explicitly protect the ability of countries to adopt, maintain, and implement rules and policies to address climate change including greenhouse gas emission standards, feed-in tariffs, a carbon cap and/or tax and any related border tax adjustments, renewable energy programs, government programs that cultivate local production of clean energy and green goods, and energy efficiency standards or labels.

II. Enforcement:

Strong obligations with weak or no enforcement would render the chapter meaningless. Our organizations are also extremely concerned that the provisions agreed to in the environment chapter will not be enforced. The United States has never once brought a trade dispute against another country for failing to live up to its environmental obligations in trade deals even when there has been documented evidence of non-compliance with environmental obligations. As members of Congress wrote in a July 18th letter to Ambassador Froman, for example, “...we are deeply troubled by the level of illegal logging that continues in Peru, despite the many tools available in the U.S.-Peru Trade Promotion Agreement to combat the problem. There is

evidence that illegally harvested timber continues to leave the country, even finding its way into the U.S.”⁴

Given the mounting evidence that Peru has consistently failed to live up to its past environment chapter obligations,⁵ we urge Congress to withhold its vote on the TPP until Peru has addressed past violations and until it has come into compliance with its new TPP environmental obligations.

Moreover, given the failure of the current dispute settlement system to monitor and address issues of non-compliance, we urge a new approach to dispute settlement resolution for environmental complaints. One approach could be to establish and empower an independent body to continuously monitor countries’ compliance with environment chapter obligations, report on best-practices and compliance, and bring cases directly to a dispute settlement body if and when it finds non-compliance with environmental obligations.

III. Outside of the environment chapter, the TPP must:

- **Exclude Investor State Dispute Settlement; reduce the scope of investor rights.** Investment rules in free trade agreements and bilateral investment treaties are increasingly being used to challenge climate, environmental, and public health policies. For example, more than 600 corporations have used investor-state dispute settlement (ISDS) to challenge government policies including a moratorium on fracking in Quebec, a nuclear energy phase-out and new coal-fired power plant standards in Germany, a requirement for an environmental remediation in Peru, and an environmental impact assessment in Canada. The TPP should exclude investor-state dispute settlement.

In addition, it is critical to reduce the scope of investor rights. In order to help reduce the chances of investment rules being used to challenge environmental and other public interest policies, the TPP must, for example: (1) narrow the definition of investment so that it only covers the commitment of capital or acquisition of real property. Government procurement and natural resource concession contracts, authorizations, and agreements; regulatory permits; the assumption of risk; and the expectation of gain or profit must be excluded from the definition of covered investments; (2) eliminate the possibility that corporations can claim indirect expropriation over generally applicable regulatory

⁴ Letter to Ambassador Froman from 18 members of Congress. July 28, 2015. Available at: http://blumenauer.house.gov/images/pdf/072815_letter_ustr.compressed1.pdf

⁵ See, for example: Environmental Investigation Agency. *Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue*. June 2015. [http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_\(FTA\)_Allows_Illegal_Logging_Crisis_to_Continue.pdf](http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf). And Aljazeera. *Peru’s Rotten Wood*. August 12, 2015. <http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html>

measures that do not transfer ownership of the investment in any circumstance; (3) narrow the definition of minimum standard of treatment (MST) so that it can only be used in instances of gross denial of justice by a host country's domestic courts and so that the burden of proof for establishing an MST violation must be on the claimant; and (4) include a 'carve out' so that generally applicable measures related to the protection of health, safety and the environment; natural resource conservation; and international human and labor rights and other public interest policies cannot be challenged using investment rules.

- **Retain the ability of U.S. government agencies to make decisions about energy exports, including liquefied natural gas (LNG), based on the public interest.** As amended in 1992, the Natural Gas Act stipulates that the U.S. Department of Energy must approve permit applications to export natural gas to countries with which the United States has a free trade agreement "requiring national treatment for trade in natural gas."⁶ Importantly, without a free trade pact that includes national treatment for trade in gas, the DOE must conduct a careful and public analysis to determine whether exports are consistent with the public interest before granting a license.⁷ Automatic exports of U.S. LNG without any assessment of the public interest are particularly dangerous in the TPP as it includes large LNG importers. Japan, one of the TPP countries, is the largest LNG importer in the world, importing 4112.608 billion cubic feet of natural gas in 2011.⁸ And the fact that the TPP is a docking station for additional countries to join in the future means that the TPP creates an expanding web of countries with automatic access to gas from the United States.

Increasing exports of U.S. natural gas would stimulate increased natural gas production—most of which will come from unconventional gas sources, including fracking. Furthermore, the DOE recently concluded that the greenhouse life cycle of LNG is significant.⁹ In light of these risks, the TPP must protect the ability of the Department of Energy to examine whether LNG exports are in the public interest and to make decisions about exports based on that analysis either by excluding national treatment for trade in gas or by new language explicitly protecting the DOE authority.

- **Protect the U.S. government's prerogative to ensure that imported food fully meets U.S. food safety standards and to restrict chemicals, pesticides and genetically**

⁶ 15 U.S.C. § 717b(c).

⁷ 15 U.S.C. § 717b(a).

⁸ Energy Information Administration. <http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=3&pid=26&aid=3> Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States. p.14-15. May 2014. <http://energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf>

modified organisms (GMOs) that may pose threats to the environment and consumers. The Sanitary and Phytosanitary (SPS) obligations under the World Trade Organization (WTO) and existing U.S. FTAs require governments to prove that restrictions on potentially unsafe chemicals, pesticides and GMOs are “necessary.” These rules require governments to justify such restrictions by providing scientific evidence that the products pose specific threats to human, plant or animal health – a significant burden in the face of uncertainty about new products’ long-term environmental and health risks. Governments that cannot provide such scientific evidence are required to conform their domestic safeguards to international standards that may offer a lower degree of protection. For example, for more than five decades, U.S. law has put the burden of proof on food and chemical companies to show a “reasonable certainty of no harm” from their products in the food supply; putting the government in a position of having to prove that safeguards for food are “necessary” could turn this longstanding law on its head. In addition, SPS rules require governments to accept food imports if the exporting country’s food safety system is deemed “equivalent,” even if the foreign food safety regime has fewer safeguards than that of the importing country. To preserve policy space for the U.S. government to adequately protect plant, animal and human health, the TPP must not replicate or expand on existing SPS rules.

- **Omit any rules that threaten product labels designed to protect the environment.** The broad Technical Barriers to Trade (TBT) rules of the WTO and existing U.S. FTAs have been used to undermine non-discriminatory labels that allow consumers to choose environmentally-friendly products. For example, the WTO has ruled against the U.S. “dolphin-safe” tuna label – a voluntary label that applies to U.S. and foreign tuna producers alike and that has contributed to a dramatic reduction in dolphin deaths – on the basis that the label constitutes a “technical barrier to trade.” Were the TPP to replicate or expand on the WTO’s TBT rules, it would expose an array of U.S. environmental labels and labeling initiatives to challenge, including those designed to protect animal safety, encourage energy efficiency and inform consumers about products with genetically modified ingredients.
- **Exclude any rules that could delay or halt the adoption or implementation of climate and environmental policies, that could limit the ability of countries to strengthen environmental, public health, and other public interest safeguards, or that help set a new precedent for trade rules to interfere with domestic rule-making processes.** Regulatory cooperation rules in the TPP must not put in place any new requirements or guidelines for the rule-making or legislative processes of governments. Any new requirements or guidelines for countries and/or states, such as new cost benefit analysis, new trade impact analysis, or invitations for other governments or foreign businesses to comment on proposed changes to domestic laws and regulations,

would unnecessarily serve to slow or possibly halt the creation and adoption of new climate and environmental policies and would serve as a dangerous precedent for future trade agreements. In addition, the TPP should not require or instruct governments to “harmonize” public interest policies, as this could lead to a lowering of environmental standards in countries with the most robust protections. Nor should the deal require or instruct governments to accept products or services that pass for safe in other TPP countries, whether via “mutual recognition” or “equivalence” processes, as doing so could allow the entry of environmentally harmful products and services restricted under domestic law.

We strongly urge you to vote *no* to a TPP that does not address these concerns. Thank you for your attention to these issues.

Sincerely,

350.org
Center for Biological Diversity
Center for International Environmental Law
Food & Water Watch
Friends of the Earth
Earthjustice
Green America
Greenpeace USA
Institute for Agriculture and Trade Policy
Oil Change International
Natural Resources Defense Council
Sierra Club
SustainUS