

U.S. Environmental Groups Urge Inclusion Of Lacey Act Language In TPP

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Leading U.S. environmental groups this week urged the Office of the U.S. Trade Representative to push for language in the Trans-Pacific Partnership (TPP) agreement that would ban the import of wood, wildlife or products thereof if they are harvested in contravention of the laws of the country of origin.

One environmental source said that existing laws on the books in TPP countries are stringent enough that a commitment to uphold them would have real “teeth” in terms of curbing illegal trade in timber or fish.

“The TPP is an ideal place to build on regional cooperation to curb the illegal trade in timber, timber products, fish and wildlife, and parts thereof,” these groups wrote in June 1 comments to USTR. “We think this could be best accomplished if all importing countries (whether or not they also export these products) adopted legislation akin to the U.S. Lacey Act,” they wrote.

The Lacey Act initially prohibited trade in illegally sourced fish and wildlife, but was expanded in the 2008 farm bill to also cover illegally sourced plants and plant products. It also established new documentation requirements for imported plant and plant products, adding to documentation requirements that were already in place for imported fish and wildlife, sources said.

Environmental sources this week said their main focus in the TPP talks is not as much on replicating the Lacey Act’s documentation requirements, but on getting countries to agree to ban imports of illegally sourced products. At the same time, several sources said the documentation requirements can help to enforce such a ban because they help ensure that importers ensure their suppliers use legally harvested products.

Submitting these comments jointly were the Defenders of Wildlife, Earthjustice, the Environmental Investigation Agency, Friends of the Earth, and the Sierra Club.

One environmental source said that Vietnam and Malaysia, both of which could potentially become full TPP negotiating partners down the road, have severe illegal logging problems. This source said other countries like Chile, Peru and Vietnam also have problems with illegal trade in fish. Chile and Peru are current TPP partners and already have bilateral free trade agreements with the United States.

This source also pointed out that one advantage to pushing for Lacey Act language in the TPP is that it does not dictate specific environmental standards to negotiating partners. Instead, it only requires they ensure that imports do not violate existing laws in the country of origin.

In the U.S.-Peru FTA, the U.S. went beyond the obligation of each side enforcing its environmental laws and mandated that Peru, within 18 months of FTA implementation, put in place specific steps meant to protect its forest sector. But such a prescriptive approach may be difficult to apply to the TPP, where there are eight countries involved in the negotiations, this source said.

The environmental groups' comments acknowledge that these specific provisions in the Peru FTA "are not directly transferable" to the TPP. But they also wrote that the "underlying policy issues" included in an annex to the U.S.-Peru FTA designed to protect the forest sector "should form the basis of a set of environmental provisions for the TPP that address trade in and management of flora, fauna and marine resources."

For example, one environmental source pointed out that the Peru FTA forestry annex included the stipulation that Peru must impose criminal and civil penalties "designed to deter violations of laws, regulations and other measures related to the harvest of, and trade in, timber products."

This source suggested that that basic concept could be applied and expanded among TPP members.

Overall, the groups urged USTR to undergo a thorough review of the environmental consequences of a potential TPP deal before engaging in real negotiations so that those consequences inform U.S. negotiating positions. The second round of TPP talks are scheduled for June 14, but no draft texts have yet been exchanged.

"To be effective and fully accomplish its mandate, the environmental review cannot be used to merely assess and mitigate the impacts of a pre-determined, relatively immutable trade agreement based on the existing model used for FTAs," they wrote.

They also cautioned against moving forward with the TPP talks before knowing what the environmental impacts of bilateral trade deals with Australia, Peru, Chile and Singapore have been. The comments this week came in response from a call by USTR for input on an environmental review of the TPP talks, which it is required to conduct under Executive Order 13141.

According to USTR, the environmental review process will continue throughout the TPP negotiation, and will inform negotiations along the way. It expects to release an interim report on the environmental review sometime in 2011, and a final report at the conclusion of the negotiations, according to a USTR spokeswoman.

The environmental groups also urged USTR to push for "an accelerated phase-out of tariffs and non-tariff barriers" of environmentally beneficial technologies and services. However, they stressed that such phase-outs should only be granted for products that are truly beneficial to the environment.

While not explicitly stated in the comments, environmental sources this week charged that the U.S. has in the context of a World Trade Organization Doha round sectoral initiative to cut tariffs on environmental goods and services included items that do not always meet this standard. For example, one source argued that waste incinerators are included even though they are not environmentally friendly.

Waste incinerators were included in an informal paper tabled by the U.S., Japan, Canada and others in the Doha round last fall as a proposal for the sectoral initiative. Discussions on environmental

goods and services liberalization have lagged in part because countries have been unable to agree to the product coverage.

That paper also included tubes and pipes as environmental goods, because they “facilitate the delivery of safe drinking water and sanitation.” One U.S. environmental source also cast doubt that this item was properly classified as an environmental good, and cautioned that TPP countries should ensure that only items that will clearly be used for environmental purposes should benefit from accelerated tariff reductions.

“We would not want to see a good benefit from reduced tariffs due to environmental justifications but not be used for environmental purposes,” the groups wrote in their comments. “We suggest the establishment of a working group to evaluate these issues and develop recommendations for the purposes of the TPP discussions.”

The groups also reiterated their arguments that the Obama administration should go beyond the provisions in the Peru FTA when it comes to investment and dramatically scale back the ability of private entities to challenge governments through an investor-state arbitration mechanism.

At a minimum, such arbitration should be a last resort, according to the comments. “If the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust all reasonably available domestic legal remedies before having the right to bring claims to international arbitral tribunals,” the groups wrote.

Australia refused to include an investor-state mechanism in its FTA with the U.S., and the environmental groups argue that this should become the model for the TPP. “Future trade agreements should replace investor-state dispute settlement with a state-to-state mechanism, as contained in the U.S.-Australia FTA,” they argued.

Environmental groups worry that investor-state arbitration presents a threat to the ability of governments to regulate in the public interest, because those regulations could become subject to legal challenges brought by private entities under the FTA. While a government could in theory do the same under a state-to-state mechanism, one environmental source said a government would be less likely to do so due to the political ramifications of bringing a case.