

**Defenders of Wildlife * Earthjustice * Environmental Investigation Agency *
Friends of the Earth US * Sierra Club**

Via Electronic Filing

June 1, 2010

Ms. Carmen Suro-Bredie, Chairman
Trade Policy Staff Committee
Office of the United States Trade Representative
Washington, D.C.

Re: Request for Comments Concerning an Environmental Review of the Proposed Trans-Pacific Partnership Trade Agreement *75 Fed. Reg.* 4480 (March 25, 2010)

Dear Ms. Suro-Bredie:

On behalf of the undersigned organizations, we are pleased to provide comments and recommendations on the proposed environmental review of the Trans-Pacific Partnership Agreement (TPP), a regional initiative that currently includes Peru, Chile, Australia, New Zealand, Singapore, Vietnam and Brunei. The environmental reviews mandated by Executive Order 13141 and its implementing guidelines are intended to assist the United States in crafting trade policies that reflect environmental priorities in a meaningful way. The reviews must identify salient trade and environment linkages in the proposed agreement, including direct and indirect impacts on the environment, and then be employed to shape and define the United States' negotiating priorities. The environmental reviews should not be seen as stand-alone analyses, but rather as an integral part of the negotiations. As part of this process, full participation by both by the public and agencies with environmental responsibilities and expertise is necessary. To be meaningful, the reviews should comprehensively assess the myriad ways in which trade directly and indirectly affects the environment, and describe how these findings can contribute to shaping the contours of the agreement itself. The reviews should also be available before negotiations begin. If done well, we believe that the environmental review process can strengthen our entire trade agenda by creating a more balanced policy that supports sustainable trade practices and will garner broader public support. Our organizations have reports and further information that detail the complexities of many of the issues highlighted below. We look forward to assisting the United States Trade Representative (USTR) and the Council on Environmental Quality (CEQ) in fully achieving the benefits of this potentially powerful tool.

General Comments on Scope, Objectives and Outcomes

The scope of the review should include environmental impacts due to investment, services, intellectual property, and other disciplines under negotiation, as well the direct impacts of tariff and non-tariff measures. The review should also thoroughly and meaningfully examine legal and regulatory impacts and explore alternative policy approaches to those used in recent FTAs.

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. The scoping review should identify current obstacles to improving environmental performance, with specific attention to market failures and policy failures underlying currently inadequate practices and the environmental impacts of existing FTAs. The potential relevance of trade-related policies and/or complementary policies should be examined. This will require a close give and take between assessment and the development of negotiating positions. For example, it is possible that the U.S. Government may approach a negotiation with tariff reduction as its initial concern but that the assessment process will demonstrate that the Government should place substantial negotiating attention on subsidy reduction, or corporate accountability, or cooperative capacity building ventures.

The environmental review should also provide for a more robust consideration of a variety of policy options and alternatives. We believe that alternatives should also play a role in the core analysis. The environmental review should examine the impacts of the different options or alternatives, allowing a comparison of the likely environmental implications of the options. The environmental review process can and should be used to establish coherent policies that achieve the desired outcomes of sustainable development and environmental protection. While assessing the impacts of the expected outcome of negotiations is critical, we note that the USTR has not yet engaged in a formal process with broad stakeholder consultation to identify trade negotiating priorities and objectives under the Obama administration. We also believe that it is important to take a step back and consider how, given the economic and environmental implications of our commercial relations with another country or countries, or in a certain sector, the U.S. can adjust international trade rules in that sector or with that country to better meet our environmental goals and make the commercial relations more sustainable.

Lastly, given that USTR has indicated that the TPP will include provisions for accession, the environmental review should consider how it will ensure comparably robust and effective reviews are performed as new countries consider joining the TPP at a later date.

Global and Transboundary Effects

The scope of the environmental review must address the full range of relevant questions, including impacts of a global nature. While we have long stressed that the implementing guidelines of Executive Order 13141 do not sufficiently encourage, and often seem to discourage, careful attention to global and transboundary impacts, the guidelines do include consideration of “implications for US interest, including international commitments and programs for international cooperation” as one of the five factors for use in determining whether it is appropriate and prudent to examine global or transboundary impacts. At a time when anthropogenic climate change threatens the lives and livelihoods of the world’s population, it is increasingly clear that environmental challenges in one part of the world invariably affect the rest of the world. Global and transboundary impacts of our trade policy must be considered because they are critical to our country’s environmental future and our international responsibilities.

Further, as part of the May 10th congressional agreement on trade policy, significant improvements were achieved in the environment chapter including requirements for countries to

fulfill their obligations under a specific set of Multilateral Environmental Agreements (MEAs)¹ and, in the case of the Peru Trade Promotion Agreement, an Annex on Forest Sector Governance to improve weak environmental governance and natural resource management in the forest sector in Peru. These improvements reflect a commitment on the part of the United States government to ensure that US trade policy contributes to improved environmental outcomes both in the United States as well as in trading partner countries. We believe that the environmental reviews must build upon this important advance in US trade policy by ensuring comprehensive assessments of environmental governance, including institutions and policies.

GENERAL ENVIRONMENTAL CONSIDERATIONS

Avoid Environmentally-Harmful Trade Liberalization Measures

It is vital that the United States ensure that trade liberalization through the TPP does not directly lead to increased harm to the environment. In particular, tariff reductions and the elimination of environmentally-beneficial protections in certain sectors can promote environmental damage and over-exploitation of natural resources, if done without these potential adverse impacts in mind. We therefore urge that tariffs not be reduced and that these protections and safeguards not be eliminated when those actions are likely to encourage environmental harm. There needs to be thorough study, planning and implementation of protective measures to ensure environmental protection provided by any barrier remains or is strengthened by the post-treaty process before the tariff, barrier or other protection is altered or removed. We are especially concerned about the impact in all TPP countries of liberalization of tariff and non-tariff measures in the following sectors: forestry, mining, fisheries, shipping transport, air transport, oil/gas extraction and transport and agriculture.

Nearly all the countries in the proposed Trans-Pacific Partnership Agreement have significant forest resources that will be affected by trade liberalization policies in the lumber and forest products sectors. We believe it is particularly important that laws and measures designed to protect the environment in the forestry sector not be eliminated. Examples of such local, national or international laws and measures include: logging bans and harvest restrictions; certification and labeling schemes; procurement and usage policies; and protections against exotic pests and diseases. We also encourage the inclusion in the TPP of language patterned on the Lacey Act that requires all TPP Parties to ban the importation of any wood or wood products taken in violation of the laws of the country of origin. Because illegal trade extends beyond just wood products as well, this language can also be helpfully expanded to include all products taken in violation of the laws of the country of origin, including, importantly for the TPP marine species.

After logging itself, mining projects are the most significant threat to frontier forests in Latin America; fisheries and other ecosystems are also threatened by the toxic pollutants and heavy

¹ The set of Multilateral Environmental Agreements include the Convention on the International Trade of Endangered Species (CITES), Montreal Protocol on Ozone-Depleting Substances, the Convention on Biological Diversity (CBD), 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 Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, the Convention for the Establishment of an Inter-American Tropical Tuna Commission.

siltation from mines. The TPP should therefore not include tariff reductions and other trade liberalization measures that will lead to rapidly increased mining activities.

Shipping transport is a significant worldwide threat to the environment, and trade liberalization with TPP countries should only be conducted following full consideration of the impacts in this sector. Ninety-five percent of the commercial goods imported to the U.S. arrive aboard ships, and air and marine pollution due to emissions and discharges from shipping vessels will therefore likely rise substantially due to implementation of the TPP. Worldwide air pollution caused by ocean-going ships already is remarkably high; ship pollution currently represents 14 percent of global nitrogen pollution and 16 percent of global sulfur pollution from petroleum sources. In addition, increased shipping transport can cause serious threats to ecosystems in the waters through which ships pass, including to coral reefs. The TPP should include provisions to address the significant environmental damage caused by shipping transport. Such provisions should, at minimum, address the emissions from ocean-going ships and the impact of ocean-going ships on the waters and eco-systems through which they travel.

The TPP includes many of the most biodiverse regions on earth. Australia is the largest with more than 11,000 species of fauna and flora; the smallest is Brunei with almost 2,000 species. Each of these countries is habitat to Critically Endangered species threatened by, among other things, illegal and/or unsustainable commercial exploitation (including the Hawksbill Turtle, Kangaroo Island Dunnart, Javan Rhinoceros, Grey Ox, Yellow Crested Cockatoo, Chatham Albatross, Sumatran Rhinoceros, among others) and Endangered species (Tiger, Sunda Pangolin, Hammerhead Shark, Green Turtle, Marine Otter, Blue Whale, Sei Whale, Fin Whale, Northern Brown Kiwi, among many others). Unfortunately, governments are largely ignoring the need for biodiversity protection, allowing the rate of species decline to continue at an alarming rate. We strongly encourage the range of countries currently negotiating this agreement to achieve their own goals for conservation and significantly reduce the current rate of biodiversity loss resulting from current trade patterns.

Lastly, we note that the increasingly severe climate crisis is an overarching environmental problem that will soon affect all sectors of the economy in all parts of the world, if it does not already. The environmental review should explore a range of options to ensure that trade policy maximally contributes to equitable mitigation of greenhouse gas emissions and adaptation to the adverse impacts of climate change. To that end, a clear hierarchy should be established between trade and climate rules to safeguard the policy space required by communities and governments to mitigate and adapt to the adverse effects of climate change.

Tariff Benefits for Environmentally Beneficial Technologies.

An accelerated phase-out of tariffs and non-tariff barriers to the transfer of environmentally beneficial technologies and services should be established. We emphasize that such a phase-out should not be granted to so-called “environmental goods and services” across the board. The definition in the GATS context of “environmental goods and services” includes many environmentally-harmful technologies, such as waste incinerators. Clear distinctions between environmentally beneficial and harmful technologies must therefore be made. We would not want to see a good benefit from reduced tariffs due to environmental justifications but not be

used for environmental purposes. We suggest the establishment of a working group to evaluate these issues and develop recommendations for the purposes of the TPP discussions.

The TPP should also ensure a “win-win-win” approach on environmental goods and services by ensuring product coverage that is favorable to developing countries, higher tariff cuts for developed than developing countries, enhanced provisions for special and differential treatment, capacity building to support technology transfer and financial assistance, other incentives to facilitate the transfer of environmentally beneficial technologies, and continued follow through to ensure long term operation and maintenance of the technology transferred.

Environmentally Harmful Subsidies

The proposed TPP should assess and propose options to eliminate environmentally harmful subsidies, including, without limitation, biofuels and fisheries subsidies.

Adopt Environmentally Beneficial Trade Policies

The TPP can achieve environmentally-beneficial aims through more traditional trade policy mechanisms. Tariffs, quotas, export subsidies, and other policies can have substantial environmental effects by creating incentives or disincentives in specific sectors. These more traditional methods, combined with new incentives, technology transfer and capacity building assistance should enable this agreement to maximize its positive environmental impact.

REGULATORY IMPACTS

The environmental review should consider the potential impacts on U.S. and other TPP countries’ environmental regulations, statutes, and other binding obligations such as multilateral environmental agreements, and on environmental policy instruments and other commitments.

Environmental Governance

In many TPP countries, poor governance, lack of enforcement and/or the existence of contradictory and perverse legislative policies remain real issues. It is therefore critical that the TPP serve to improve and reinforce good governance, sustainable development and sustainable management of the world’s natural resource base, and that it not directly or indirectly undermine these efforts. Good governance needs to be promoted on the national, regional and local level and specifically address the drivers that are leading to deforestation, illegal trade in wood, wildlife and marine species and the overexploitation of all natural resources.

To this end, the TPP trade negotiations should be subject to environmental assessments that analyze the current state of environmental governance in the potential trading partner(s), the likely impact of the agreement on the environment in the trading partner countries, and the cost to the U.S. (federal and state governments) of assisting trading partner(s) in implementing the environmental provisions. Such an assessment will help ensure that the United States and its trading partners fully understand the potential environmental consequences of greater trade

liberalization in order to put in place the appropriate institutional and legal capacity to cope with environmental problems before they emerge.

There are many positive actions that benefit both trade and environment, and should be part of the TPP. For example, many countries in the TPP negotiations have tropical forests, wildlife and marine species that are being devastated as a result of illegal trade. 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. 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 to ban the import of wood, wildlife or products thereof that were taken in contravention of the laws of the country of origin. The agreement should also strengthen enforcement actions already ongoing or envisioned among many TPP countries. For example, the U.S. could build upon existing initiatives, such as ASEAN Wildlife Enforcement Network, CITES decision on increased cooperation, Interpol, regional expansion of the Indonesian MOU on illegal logging, among others.

Investor Rights and Responsibilities

Investment rules should provide foreign investors “no greater substantive rights” than U.S. citizens receive under U.S. law, as mandated by the Trade Act of 2002 and as explicitly stated in the preamble of the Peru FTA according to the May 2007 congressional compromise on trade policy. President Obama has also signaled his commitment to this principle. The TPP provides an unprecedented opportunity to ensure that this principle is fully realized in future trade policy.

As we have noted before, the procedural and substantive investor protections included in our trade agreements present a serious threat to the ability of governments to regulate in the public interest. It is therefore necessary and legitimate to include the impact of these provisions in the scope of the environmental review. While we believe that the environmental review should comprehensively address global and transboundary effects of the proposed trade policy, the potential magnitude of the threat posed by these investor protections to trading partner countries, as well as to our own laws and regulations, warrants its inclusion in the global and transboundary review as provided for in the implementing guidelines of Executive Order 13141.

As the U.S. government charts a new course for investment rules that emphasize a balanced approach to ensuring both investor rights and responsibilities, we believe that the following procedural and substantive policy changes to previous trade agreements are required to ensure the “no greater rights” standard is met. Consideration of the following policy fixes, at a minimum, should be included in the environmental review.

Future trade agreements should replace investor-state dispute settlement with a state-to-state mechanism, as contained in the U.S.-Australia FTA. Allowing private foreign investors to bring claims over such sensitive matters to international commercial arbitration tribunals is particularly disturbing when the disputes raise constitutional questions. 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. This is in keeping with principles of international law and with requirements in U.S. law that administrative remedies be exhausted before takings cases are

brought to domestic courts. That mechanism should also provide a screen to prevent frivolous claims or claims which otherwise may cause serious public harm.

We recommend that the administration consider narrowing the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk. The TPP should ensure that in order to constitute an "indirect expropriation" a host state must seize or appropriate an investment for its own use or the use of a third party, and that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment do not constitute acts of indirect expropriation. We also recommend excluding derivatives and caution against the inclusion of carbon offset contracts.

We recommend that the administration consider codifying the State Department's position in *Glamis* regarding the content of the minimum standard of treatment as well as the standard of proof for identifying principles of Customary International Law (CIL). The State Department rejected *Glamis*'s assertion that the minimum standard of treatment prohibits either conduct that frustrates an investor's expectations concerning an investment. The asserted right to compensation for government measures that a tribunal deems "arbitrary" would similarly provide greater rights than the comparable standard under U.S. law. Not only would an international "arbitrary" standard of review for economic legislation provide greater rights than the highly deferential standard of review for substantive due process claims, it would also exceed the standard of protection afforded under the domestic law of other developed countries.

Intellectual Property and Biological Diversity

Provisions in the intellectual property chapter have long had both significant direct impact on the environment and directly affect countries ability to effectively manage natural resources.

In particular, Parties should explicitly be able to retain the right granted under Article 27.3(b) of the WTO TRIPS agreement not to patent plants or animals. Recent FTAs negotiated by the U.S. have removed this explicit right. In addition, parties should not be forced to adopt UPOV 1991, which restricts the ability of governments to ensure that local and indigenous communities can rely on benefit-sharing of genetic resources. UPOV 1991 is in potentially direct conflict with the benefit-sharing provisions of the Convention on Biological Diversity and is therefore an inappropriate requirement of FTAs.

Similarly, the environmental review can facilitate positive environmental outcomes and can contribute to ongoing efforts under the United Nations Framework Convention on Climate Change by assessing how flexibilities available within the current intellectual property regime can improve the accessibility, affordability and adaptability of technologies to reduce emissions and enhance adaptation to climate change. Importantly, the environmental review should consider options to strengthen the use of compulsory licensing and other flexibilities in intellectual property rights rules to enable widespread use of technologies to reduce emissions and improve adaptation to climate change and to strengthen the development of endogenous technologies and capacities in developing countries, including through preferential measures favoring industries in developing countries.

Services

Services provisions in the TPP could have significant environmental impacts in those sectors in which liberalization disciplines, including national treatment and market access, will be applied. In particular, the relaxation of restrictions in such sectors as transport, energy, tourism, water, mining and environmental services (which is focused in sewage and waste disposal) can have substantial environmental consequences. When assessing any potential liberalization in these sectors, the United States must ensure that necessary environmental protections are included in the TPP.

Sanitary and Phytosanitary Measures Concerning Harmful Invasive Species

Increased shipping and other modes of transport due to the TPP will likely increase the number of potentially harmful invasive species entering all TPP countries. The U.S. should ensure that any provisions on Sanitary and Phytosanitary measures serve to strengthen and enhance efforts to address non-native species. It is widely recognized that prevention is the only efficient means of responding to the invasive species threat. It is therefore imperative that SPS measures in the TPP do not impair the ability of domestic regulatory authorities in any country to regulate high-risk pathways or restrict imports of known or potential invasives.

Existing Agreements

We also note with particular interest the unique approach required in undergoing an environmental review of a regional initiative where the United States already has in place existing trade agreements in various stages of implementation with four of the proposed trading partner countries (Peru, Chile, Singapore and Australia). We believe that now is a critical time to review the relative success of these agreements to ensure that future negotiations with existing trading partners take stock of challenges and ensure the greatest possible environmental outcomes moving forward.

In particular, we note the case of Peru. The Peruvian TPA Annex on Forest Sector Governance contains many critical provisions regarding good governance with respect to natural resources. While many of the provisions are explicit to Peru and not directly transferable to a multilateral trade agreement, the underlying policy issues addressed in the Forest Annex 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. These are not necessarily exhaustive.

That said, it is also important to highlight the case of Peru in the context of reviewing the successes and challenges of extant agreements in the region. While Peru deserves credit for its initial forestry reforms, including the creation of a new environmental ministry and strengthened penalties for a wide suite of environmental crimes, as we have noted before, the country continues to face several implementation challenges. The environmental review must assess Peru's progress toward full implementation in priority areas such as: compliance with CITES and other MEAs under Annex 18.2, improvement of timber chain of custody systems, strengthen capacity for indigenous communities to manage their timber production legally, and without exploitation, among others. The extent of participation and input into the process through which

Peru has modified its national Forestry and Wildlife Law in keeping with FTA requirements will also be important to address under the rubric of environmental governance.

The implementation process of the Peru TPA provides unique and valuable lessons on which the USTR should reflect before pursuing future trade policy, including the considerations it brings for an appropriate schema for monitoring and evaluation that will be necessary to achieving these outcomes. Importantly, where policies and institutions to improve environmental governance are considered, the review should examine what transparent and predictable processes are needed to ensure effective and inclusive implementation, both in the US and among trading partners.

Finally, each trade agreements should create an Environmental Committee to provide advice on implementation and other relevant issues. Each such committee must include representatives of public-interest environmental organizations entitled to participate fully in the committee's deliberations and conclusions.

We appreciate the opportunity to provide comments on what should be included in the scope of the environmental review, including the potential environmental effects that might flow from the trade agreement and the potential implications for environmental laws and regulations. We look forward to working with the United States Trade Representative (USTR) and the Council on Environmental Quality (CEQ) to fully achieve the goals of the environmental review.

Sincerely,

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