Deregulatory Disappointment:

Transatlantic Free Trade Agreement Negotiations

Trade negotiators from the United States and the European Union on July 8 2013 opened the first round of talks for a Trans Atlantic free trade agreement -- or, as it is formally known, the Transatlantic Trade and Investment Partnership. Because tariffs are already quite low on both sides of the Atlantic, it unfortunately appears that TAFTA negotiations will focus on lowering regulatory "barriers" to transatlantic trade and investment.[1] Such "barriers" include environmental and public health protections -- such as those related to food safety, genetically-engineered organisms, and toxic chemicals, among many others. In the alleged interest of making trade easier, environmental and public health regulations are at risk of being "harmonized down" to the lowest common denominator.

Based on the model of past U.S. trade agreements, statements by officials, and published documents (including a U.S.-E.U. "High Level Working Group" report outlining the objectives for negotiations), it appears that the goal of TAFTA negotiations is to grant transnational corporations and trade bureaucrats expanded "rights" to challenge the policies of democratic governments before international tribunals. For example, in its short report, the Working Group proposes an agreement that would focus on environmental and other regulations that allegedly interfere with free market efficiency, rather than traditional trade issues such as lowering tariffs. In some areas, such as sanitary measures (which governs food safety and genetically modified organisms), services (which can cover water sanitation and energy), and so-called "technical barriers to trade" (read: regulations), the HLWG report explicitly recommends going beyond even World Trade Organization provisions that already threaten to vitiate environmental protections.

Friends of the Earth - U.S. strongly believes that TAFTA negotiators must:

- *End the Secrecy.* Secret negotiations prevent a meaningful public debate. The TAFTA negotiating text must be released to the public on a timely basis throughout negotiations.
- *Provide more certainty in exclusion of environmental measures from coverage.* Rather than making TAFTA apply to all environmentally-sensitive economic sectors and governmental measures (unless they are specifically excluded on a "negative list"), TAFTA should only apply to only those sectors and measures which governments commit to on a "positive list."

[1] According to a European Commission statement on the launch of U.S.-E.U. trade talks: "In today's transatlantic trade relationship, the most significant trade barrier is not the tariff paid at the customs, but so-called "behind-the-border" obstacles to trade, such as, for example, different safety or environmental standards for cars." European Commission, European Union and United States to Launch Negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, available at, http://trade.ec.europa.eu/doclib/press/index.cfm?id=869.*See generally*, Final Report of the U.S.-E.U. High Level Working Group on Jobs and Growth, February 11, 2013,hereinafter HLWG, available at http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg.

- *Provide across the board environmental exceptions.* The TAFTA should not prohibit governments from taking measures that protect the climate, natural resources, public health, and the environment.

As elaborated in the following sections, Friends of the Earth-U.S. has the following recommendations:

- *Investment chapter.* Including investor-state arbitration in TAFTA is unnecessary given the robust legal systems in the U.S. and Europe. It would also be dangerous, creating a separate and biased "court" for wealthy investors.
- *Environment chapter.* An environment chapter, based on the U.S. model, should be incorporated into TAFTA. The U.S. and the E.U. should be required to enforce domestic environmental laws and multilateral environmental agreements.
- *Services chapter.* The High Level Working Group recommendation that "in the services area the goal should be to bind the highest level of liberalization that each side has achieved in trade agreements to date" greatly concerns Friends of the Earth.[2] The HLWG seems to be encouraging deregulation and privatization of services related to the environment based on broad ideological criteria.
- *Sanitary and phytosanitary chapter.* The High Level Working Group has called for "SPS-plus" provisions in the U.S.-E.U. agreement, making it easier to challenge safeguards related to food safety and genetically-modified organisms.
- *Technical barriers to trade chapter.* Recent WTO decisions on country of origin labeling, and dolphin-safe tuna labels pose risks to important environmental and public health labeling measures. The HLWG call for "TBT-plus" obligations in the TTIP text ignores these risks, and also poses a serious threat to the effective European system of toxic chemicals regulation.
- *Regulatory coherence chapter.* TAFTA regulatory coherence provisions are likely to encourage regulatory impact assessments which will stymie the promulgation of environmental and public health regulations.
- *Intellectual property chapter.* The IP chapter text should not cover and protect patents on plants, animals, or other life forms.
- *Government procurement chapter.* Government green purchasing preferences should not be limited by TAFTA rules that force governments to buy goods and services based almost exclusively on product cost and performance.
- *Chapter on trade in goods,* Any TAFTA language on trade in goods should be carefully drafted to discourage green energy trade wars, fossil fuel exports, and the commoditization or privatization of water.

General concerns about the TAFTA

Secrecy/transparency. As trade negotiators on both sides of the Atlantic hammer out the details on the transatlantic trade agreement, one problem is salient: the negotiating process must be transparent and the negotiating text must be made public. This has not been the practice in the

[2] HLWG, p.2.

U.S.'s other major regional trade pact, the proposed Trans Pacific Partnership. Most of the TPP negotiating materials[3] are kept secret from the public, but not from the official corporate advisors who are pushing hard for this "NAFTA of the Pacific." While the majority of the public is barred from knowing what is taking place in TPP negotiations, approximately 600 corporate representatives have been named "cleared advisors" for the United States, giving them regular access. This disgraceful secrecy must not be replicated in TAFTA negotiations.

Provide more certainty in exclusion of environmental measures from coverage. In assessing the environmental impact of a particular chapter, the first question is whether a specific environmental measure (law, regulation, or enforcement action) is covered -- in other words, whether the rules and obligations of that chapter apply at all to the environmental measures in question. There are two ways the environment could be covered by a trade chapter: under either a positive or negative list of commitments.[4]

A negative list approach means that the "default position" is that all government measures in all economic sectors are covered under TAFTA (such as non-discrimination, for example), unless a specific reservation is listed for a specific sector (water transport, for example) or government measure (Maryland's regulation of toxic chemicals in toys, for example). By contrast, under a positive list approach, such as that used under much of the WTO services agreement (GATS), specific economic sectors or government measures are voluntarily listed on a national schedule.[5]

The positive list approach should be used in TAFTA chapters, especially those that are most likely to generate conflicts with environmental and climate measures, including the chapters on services, procurement, investment, sanitary and phyto-sanitary measures, and technical barriers to trade, among others. Only a positive list of commitments provides reasonable certainty about which green policies are covered and which are not. It also provides far more policy space for the adoption of new measures and amendments to existing environmental policies. Finally, it is just more practical: it is a monumental task to list every measure conceivably subject to inappropriate trade agreement litigation on a negative list.

Across-the-board environmental exceptions. Across-the-board exceptions should be included in TAFTA to better ensure that environmental laws, regulations, and enforcement actions are not undermined. The World Trade Organization GATT article XX exception[6] related to trade in

[3] Except for leaked documents including the investment chapter, regulatory coherence chapter, and provisions of the intellectual property chapter.

[4] One must also look at the definitions section of the chapter to see if a specific measure is covered by definition: for example the definition of "investment" in an investment chapter.

[5] See generally, Organization of American States, Foreign Trade Information System, Dictionary of Trade Terms, 2013, http://www.sice.oas.org/dictionary/SV_e.asp.

[6] GATT article XX provides an exception to the overall agreement on trade in products "**necessary** to protect human, animal or plant life or health" and "related to conservation of exhaustible natural resources" (provided that they are linked to domestic resource conservation measures). The article XX "necessity" test can be hard to meet. Alternative regulatory schemes for addressing environmental problems in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts

goods and the GATS article XIV[7] exception for trade in services are frequently seen as models for environmental exceptions in other free trade agreements. However, they are flawed models that are stingy in carving out policy space for essential government action related to climate, natural resources, public health, and other environmental policies. Furthermore, trade agreements generally do not provide across-the-board exceptions to all relevant chapters. In particular, the failure to provide strong environment exceptions in international investment agreements and agreements on technical barriers to trade has opened the floodgates to damaging lawsuits challenging sound environmental policies.

Concerns about specific TAFTA chapters.

Environment chapter. A TAFTA environment chapter should do more than simply establish, in theoretical legal principle, an obligation to enforce domestic environmental measures and abide by multilateral environmental agreements. Friends of the Earth believes that the environment chapter must itself be enforceable through dispute resolution.[8]

The core provision of a TAFTA environment chapter should be an obligation for countries to enforce their domestic environmental laws and all multilateral environmental agreements which they have joined and are on the list of multilateral environmental agreements[9] covered in the chapter. The environment chapter also should address, for example, issues of biodiversity conservation, illegal logging, illegal wildlife trade and economic subsidies that lead to overfishing and illegal fishing more generally.

The TAFTA environment chapter should also include robust provisions on public participation in the implementation process. This would include provision for public access to information about enforcement and a process for environmentalists and other members of civil society to communicate their concerns. This process should include a formal administrative mechanism for citizen and civil society submissions regarding enforcement of environmental laws, compliance

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give to economic regulations. In addition to that, the "chapeau" or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **"means of arbitrary or unjustifiable discrimination**," or a "**disguised restriction** on international trade." Terms of art such as "unjustifiable discrimination" and "disguised restriction" are vague and subjective.

[7] GATS article XIV excuses conflict with services chapter trade rules if a necessity test is met and the purpose of the government measure is to protect public morals, to protect human or animal health, to protect privacy or prevent fraud, or to safeguard essential security interests. Significantly, the exception does not cover natural resources, plant or other life forms, and the climate in general.

[8] In the same way, a TAFTA labor chapter should provide for obligations to enforce domestic labor laws and labor rights protections established by the International Labor Organization that are themselves enforceable by dispute resolution.

[9] The list of MEAs covered by the TAFTA environment chapter should include but not be limited to the Convention on International Trade in Endangered Species (CITES); Montreal Protocol on Ozone Depleting Substances; Convention on Marine Pollution; Inter-American Tropical Tuna Convention; Ramsar Convention on Wetlands; International Whaling Convention; and Convention on Conservation of Antarctic Marine Living Resources

with multilateral environmental agreements, and initiation of dispute resolution against other TAFTA parties.

Investment chapter.[10] The U.S. Trade Representative's office has confirmed press reports that it will seek to include investor-state arbitration in the TAFTA, presumably based on the flawed template of the U.S. Model Bilateral Investment Treaty.[11] Under the U.S. model, investors may seek awards of money damages, of unlimited size, in compensation for the cost of complying with environmental and other public interest regulations, including climate change measures. A large portion of suits brought under existing trade agreement investment chapters and bilateral investment treaties involve challenges to environmental policy, in particular cases related to mining, oil production and water policy.

The U.S. model would allow foreign investors to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment.[12] Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias.

Investor rights are broadly and imprecisely defined in the U.S. Model BIT. They include the designation of expected future profits as a property interest and provide procedural rights that are unavailable under domestic law. Also, the substantive rights such as "expropriation" and especially the "minimum standard of treatment under international law" are vague and have been read broadly and narrowly by different tribunals. The broad readings go considerably beyond the general practice of nations for protecting property rights and due process.

Friends of the Earth believes that it is unnecessary to provide for investor-state arbitration in TAFTA. The U.S. and E.U have well-developed and generally fair court systems to resolve allegations of property rights and due process violations resulting from environmental and public health violations.

Services chapter. Services provisions in trade agreements broadly affect the environment, including services related to wastewater, solid waste, hazardous waste, electricity, pollution control, transportation, oil/gas pipeline transportation, and other energy services, to name a just a few. As a consequence, the High Level Working Group recommendation that "in the services

[10] For background see, Robert Stumberg, Professor of Law, Georgetown University, "Reform of Investor Protections," Testimony before U.S. House Ways and Means Subcommittee on Trade, May 14, 2009. http://waysandmeans.house.gov/media/pdf/111/stumberg.pdf.

[11] 2012 U.S. Model Bilateral Investment Treaty, available at, http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

[12] See generally, Sarah Anderson et al, The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique, Institute for Policy Studies, May 2012, http://www.ips-dc.org/reports/the_new_us_model_bilateral_investment_treaty_a_public_interest_critique

area the goal should be to bind the highest level of liberalization that each side has achieved in trade agreements to date" greatly concerns Friends of the Earth.[13]

The HLWG seems to be encouraging deregulation and privatization of services related to the environment based on broad ideological criteria. This could lead to implementation of TAFTA services provisions that ignore appropriate distinctions between what economists call public goods, such as mass transit systems, and true private goods. In particular, given the experience with some existing trade agreements, in cases where the privatization of public services (such as water services) has gone badly wrong, it could hinder governments from returning service provision to the public sector.

Furthermore, heavy government regulation, rather than "the highest level of liberalization," would appear to be appropriate given the mixed public-private or even the monopolistic character of some services, such as electric and water utilities. In the same way, the cost of serious environmental externalities, in the case of some private services, argues for government regulatory intervention, rather than "leaving it to the market to decide."

Finally, problems with the "commoditization of the commons" could arise. The essential nature of water and sanitation for human health and survival sets this area apart from other sectors. The human right to water and sanitation, recognized by the United Nations General Assembly in July 2010[14], means that extra care must be taken before water policy in any form is subject to services chapter obligations.

Sanitary and phytosanitary measures chapter. The U.S.-E.U. High Level Working Group has called for "SPS-plus" provisions in the TAFTA.[15] Friends of the Earth is concerned that this nomenclature suggests that TAFTA provisions would make it easier to challenge safeguards that fall into the categories of sanitary measures related to food safety, such as bacterial contamination, and phyto-sanitary measures related to animal and plant health, such as animal diseases.

The history of successful U.S. suits in the WTO challenging European policies on genetically engineered organisms and food safety under the SPS agreement should be a warning.[16] The broad concept of SPS-plus is even more of a threat to GE and food safety regulations than WTO rules.

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[13] HLWG, p.2.

[14] United Nations, The Human Right to Water and Sanitation, Media Brief, 2010, http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf.

[15] HLWG, p.4.

[16] Public Citizen, Backgrounder: The U.S. Threats Against Europe's GMO Policy and the WTO SPS Agreement, http://www.citizen.org/documents/GMObackgrndr.pdf; Doug Palmer, US farmers urge sanctions against EU's GM crop ban, Reuters, July 26, 2010, available at http://in.reuters.com/article/2010/07/27/idINIndia-50441920100727.

Friends of the Earth believes that genetic engineering of commercial products presents many known and suspected risks to people and nature that require government regulation based on the precautionary principle: in other words, the burden of proof for demonstrating a new product's or technology's safety should fall on those who would introduce it into the marketplace. The SPS-plus concept could limit the ability of governments to appropriately implement the precautionary principle in regulating GE products and technologies. Friends of the Earth also is concerned that the U.S. Trade Representatives' 2013 Report on Sanitary and Phyto-Sanitary measures targets E.U. measures related to GE products as "substantial barriers to trade."[17]

Similarly, we are concerned about how other food safety disputes would be treated under an SPS-plus regime. Among the many areas of our concern are E.U. food safety measures targeted as trade barriers in the USTR 2013 SPS report, including restrictions on imports of beef treated with growth hormones, chicken washed in chlorine, and meat produced with growth stimulants (rectopamine). The 2013 USTR SPS report targets France in particular for its 2012 ban on use of materials produced using Bisphenol A (which is linked to brain and hormone problems in fetuses and children) in food contact surfaces for food products designed for infants, pregnant women or lactating women.

Technical barriers to trade chapter. Several TBT challenges in the WTO have succeeded in undermining important environmental and public health measures, particularly those related to product labels. For example, the WTO Appellate Body found that the U.S. dolphin safe labeling program violates the WTO TBT agreement.[18] Similarly, plaintiffs have recently succeeded in a WTO TBT challenge to U.S. measures related to country of origin labeling.[19] The dolphin safe and COOL labeling cases suggest that environmental and public health labeling measures, more generally, could be at risk of a TBT-plus challenge, including government measures related to eco-labels and labels for energy efficiency, organic food, and sustainable agriculture. The text of any TAFTA chapter on technical barriers to trade should preclude tribunal decisions similar to the WTO decisions in *US – Tuna II* and *US-COOL*.

Toxic chemicals regulation such as the European REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) system similarly is put at risk. The U.S. Trade Representative has already targeted REACH[20] in a 2013 USTR report on Technical Barriers to

[17] Available at, http://www.ustr.gov/sites/default/files/2013%20SPS.pdf.

[18] *US-Tuna II*, available at, http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf

[19] *US-COOL*, available at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

[20] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT

Trade, which particularly names important elements of REACH as trade barriers.[21] The United States also raised objections to REACH at the time the program was developed[22], as well as more recently in the World Trade Organization Committee on Technical Barriers to Trade[23] and in other fora. Advocates for U.S. chemicals companies argue that registration, data gathering and notification requirements under REACH impose higher costs on chemical products imported into the E.U., and they have prepared detailed analyses that, in effect, lay out the argument for why major elements of REACH are illegal trade barriers under international trade law.[24]

All this would strongly encourage the downward harmonization of E.U. toxic chemicals regulation toward the lowest common denominator -- namely, the U.S. Toxic Substances Control Act. TSCA has been characterized by the President's Cancer Panel as perhaps "the most egregious example of ineffective regulation of chemical contaminates."[25] Similarly, the bi-partisan compromise bill, introduced in May by U.S. Senators Lautenberg and Vitter, allegedly makes some improvements in TSCA but falls far short of the European standard for safeguarding the public from dangerous toxic chemicals.

Regulatory coherence chapter. The HLWG report calls for the TAFTA to include a cross-cutting discipline on regulatory coherence "for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services."[26] In all probability, this

[21] U.S. Trade Representative, 2013 Report Technical Barriers to Trade, available at, http://www.ustr.gov/sites/default/files/2013%20TBT.pdf.

[22] The Congressional Research Service reports that:' The U.S. Government was actively engaged throughout the development of REACH. The Bush Administration expressed concerns about its trade implications for U.S.-produced chemicals. Specific concerns included, increased costs of and time lines for testing chemicals exported to the EU; placement of responsibility on businesses (as opposed to governments or consumers) to generate data, assess risks, and demonstrate the safety of chemicals; possible inconsistency with international rules for trade adopted by the World Trade Organization (WTO); and the effect of the legislation on efforts to improve the coherence of chemical regulatory approaches among countries in the Organization for Economic Cooperation and Development (OECD).Some U.S. chemical industry representatives believe that REACH is "impractical." Industry has expressed objections to the proposed list of "high concern" chemicals, some of which are essential building blocks for the manufacture of other chemicals." Linda-Jo Schierow, Chemical Regulation in the European Union: Registration, Evaluation, and Authorization of Chemicals, Congressional Research Service, March 1, 2012, p.3, available at,. http://www.fas.org/sgp/crs/row/RS22673.pdf

[23] USTR, 2013 Report TBT, supra, p. 62-64

[24] Lawrence Kogan, Is REACH a Trade Barrier? Chemical Watch, Global Business Briefing, December 2012-Janusry 2013, pp 20-21, available at. http://www.koganlawgroup.com/uploads/CW53_December12_Kogan.pdf; Lawrence Kogan, REACH Revisited: A Framework for Evaluating Whether a Non-Tariff Measure Has Matured into an Actionable Non-Tariff Trade Barrier, American University International Law Review, Vol. 28, No. 2, September, 2012, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149756.

[25] The President's Cancer Panel Report, available at, http://www.saferchemicals.org/resources/presidents-cancer-panel.html

[26] HLWG, p.3.

recommendation by the HLWG contemplates something similar to the draft regulatory coherence chapter of the Trans Pacific Partnership agreement.

The leaked draft of the regulatory coherence chapter of the Trans Pacific Partnership trade agreement[27] encourages countries to conduct regulatory impact assessments when developing regulations, including environmental regulations, which have more than a minimal cost burden on business and the economy. The draft specifically encourages the use of cost-benefit analysis to determine the net benefit of environmental regulations.

In the view of Friends of the Earth, the cost of environmental and other government regulations should not be ignored, but it ought to be looked at with a wider perspective. And, seemingly definitive "ratios of benefit to costs" should be considered with balanced skepticism. Identifying and quantifying the costs of environmental regulation can be inflated by assumptions, analyst bias, and flaws in data gathering. Quantifying the benefits of environmental regulation can be difficult, for example, because public health data is not as comprehensively collected as economic data. Or, it can be impossible: an attempt to attribute a price to the intrinsic value of human life, living things and nature itself. In our view, cost-benefit analysis, in many circumstances, can be at odds with a fundamental principle of environmental regulation: application of the precautionary principle in the face of an immeasurable environmental risk and inescapably uncertain outcomes.[28]

An excellent example of an environmental issue involving uncertain outcomes -- that requires application of the precautionary principle, not cost-benefit analysis -- is regulation of synthetic biology. While genetic engineering involves the exchange of genes between species, synthetic biology involves artificially creating new genetic code and inserting it into organisms. Synthetic organisms self-replicate. No one knows how they will interact with naturally occurring organisms or the consequences for the ecosystem as a whole. Standard forms of risk assessment and cost-benefit analyses used by current biotechnology regulatory approaches are inadequate to guarantee protection of the public and the environment.[29]

Intellectual property chapter. Intellectual property issues, related to patents, trademarks, and copyrights, will be among the most technically complex under consideration in TAFTA negotiations. Friends of the Earth fears that U.S. negotiators will propose, as they have in Trans

[27] Available from Public Citizen at, http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf

[28] The Wingspread Consensus Statement on the Precautionary Principle is available at: http://www.sehn.org/wing.html.

[29] See a landmark report published by Friends of the Earth, the International Center for Technology Assessment, and the ETC group, The Principles for the Oversight of Synthetic Biology, available at http://libcloud.s3.amazonaws.com/93/ae/9/2287/1/Principles_for_the_oversight_of_synthetic_biology.pdf.

Pacific Partnership trade negotiations, IP chapter text that covers and protects patents on plants, animals, and other life forms.[30.]

Friends of the Earth supports a ban on gene patenting, including not only human genes but also all the genes that occur naturally on the planet. Gene patents are dangerous and unfair, in our view. They give corporations monopolies over the use of parts of the genetic code that have evolved naturally and are part of our common natural and human heritage.

Government procurement chapter. Procurement chapters in free trade agreements generally forbid local preferences in government purchasing and require market access for foreign bidders on public contracts. Although some environmental exceptions have been granted in recent U.S. agreements, there is a danger that TAFTA rules on government procurement will require that decisions about the award of public contracts must be almost exclusively based on product cost and performance, even when the contract bidding process is open to foreign firms.[31]

Friends of the Earth believes that green purchasing preferences should not be limited by government procurement rules based almost exclusively on product cost and performance or any other similar basis. For example, a TAFTA procurement chapter should allow governments to impose procurement rules that require products to be made with recycled or organic materials or meet energy efficiency standards. And, governments should be able to discriminate against products made with environmentally destructive methods. In addition, trade agreement prohibitions on "buy local" purchasing policies should not undercut government policies intended to encourage the growth of green industries, such as solar and other renewable energy ventures that provide green jobs to local workers who may be displaced by government policies disfavoring carbon intensive industries that contribute to global warming. Similarly, school lunch programs that favor healthy food produced by local farmers, rather than giant agribusiness, should not be endangered.

Chapter on trade in goods. Friends of the Earth is concerned about TAFTA provisions on trade in goods that may conflict with important areas of environmental policy, such as renewable energy, fossil fuel exports and water law.

- *Green energy trade wars.* In the past two years, we have witnessed an alarming rise in the number of international trade disputes related to renewable energy and climate policies, including a WTO Appellate Body ruling that the Ontario's "feed-in tariff" program for clean generation of electricity violates international trade law.[32] The WTO decision comes at a time when a trade war on solar energy policy is well under way. The United States has imposed a 31 percent tariff on solar panels imported from China, alleging violation of U.S.

[30] Available from Public Citizen at http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

[31] Harrison Institute for Public Law, 2012 Trade Policy Assessment, prepared for the Maine Citizen Trade Policy Commission, June,25, 2012, pp. v-vii, available at, http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf.

[32] World Trade Organization, Dispute DS 426, Canada – Measures Relating to Feed in Tariff Program, May 6, 2013, available at,. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.

law on unfair subsidies and "dumping" of excess inventory on the U.S. market.[33] China has retaliated by threatening to impose tariffs on poly-silicon imported from the U.S. used to make solar energy products[34], and by bringing a World Trade Organization complaint against U.S. imposition of countervailing duties on a number of Chinese products, including solar panels. [35] Similarly, the U.S. has threatened a WTO suit challenging domestic content provisions in Indian renewable energy programs, and India has suggested the possibility of retaliatory suits challenging similar programs in U.S. states.[36]

This alarming trend of international trade disputes poses significant risks to global efforts to curb climate change. Trade tribunals that focus on theoretical free market efficiency are becoming the de facto forums for resolving international disputes over climate policy. Long delays and ambiguous results in trade litigation of this character can dry up both private and public investment in clean energy. Investors of both kinds need substantial certainty and stability in international trade rules before they commit the billions of dollars needed to build a green energy economy. Nor can delay be justified. The global atmosphere is warming rapidly.

Climate policy should not be decided by TAFTA, WTO or similar dispute resolution panels, based on trade law. The last thing we need is an expanded and long-lasting green energy trade war. Solar and other renewable energy products must be excluded from coverage under any TAFTA chapter on trade in goods and must not be incorporated by reference of WTO obligations on trade in goods. [37]

- *Fossil fuel exports.* A boom in oil, coal and natural gas exports is fueling climate change, but international trade and investment agreements generally treat these high carbon products the same as other goods. Friends of the Earth believes that TAFTA negotiators should steer a different course: one that leaves enough policy space for bold governmental action on fossil fuel exports by governments in future years.

[33] Keith Bradsher, Diane Campbell, "US Slaps High Tariff on Chinese Solar Panels, New York Times, May 17, 2012, available at, http://www.nytimes.com/2012/05/18/business/energy-environment/us-slaps-tariffs-on-chinese-solar-panels.html?pagewanted=all&_r=0.

[34] Ray Yu, Chinese Polysilicon Makers Come Back to an Uncertain future, Solar PV Investor News, April 23, 2013, available at http://solarpvinvestor.com/spvi-news/480-chinese-polysilicon-makers-come-back-to-uncertain-future

[35] WTO establishes panel to examine US countervailing duties against China, Global Times, September 29, 2012, available at http://www.globaltimes.cn/content/736060.shtml.

[36] Kavitha Rao, India's Grand Solar Plans threatened by Ugly U.S. Trade Spat, The Guardian, April 23, 2013, available at, http://www.globaltimes.cn/content/736060.shtml

[37] Comprehensive exclusions of coverage of climate measures and strongly worded exceptions for such measures should also be part of any transatlantic agreement.

As a result of environmentally-destructive hydraulic "fracking" and other new technologies, the fastest-growing natural gas and oil producer on the planet is now the United States.[38] U.S. energy companies are seeking new liquefied natural gas terminals for export to global markets,[39] where they can demand higher prices for LNG (a far more potent contributor to global warming than ordinary natural gas). As the U.S. dependence on coal slackens, the coal industry is attempting to export it abroad.[40] Meanwhile, Canada wants to transport tar sands oil through the Keystone XL pipeline to refineries in Texas and then ship it overseas where they can sell it far more profitably than in the United States.[41]

All of this is terrible news for an overheated planet. The ongoing expansion of international trade in these fossil fuels promises to sharply increase greenhouse gas emissions, potentially pushing global warming to a catastrophic tipping point. Friends of the Earth believes that swift and strong action is necessary to mitigate the worst impacts of climate change, including rising seas, melting ice, superstorms and crippling drought. This will require an end to the "all of the above" energy policy of the United States and more regulation of fossil fuel exports. Currently, fossil fuel export regulation in the U.S. is limited to oversight of natural gas exports -- and even those provisions of the Natural Gas Act do not apply to countries with which the United States has a free trade agreement.[42]

Unfortunately, TAFTA provisions on market access and trade in goods, if modeled on the WTO General Agreement on Tariffs and Trade, might unnecessarily chill future legislative action on fossil fuel exports, if the claims of some industry lobbyists are accepted. Some apologists for fossil fuels argue that GATT article XI:1 on "General Elimination of

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[38] International Energy Agency, World Energy Outlook 2012, available at, http://www.iea.org/publications/freepublications/publication/English.pdf; Mark Mills, Unleashing the North American Energy Colossus, Manhattan Institute, July 2012, available at http://www.manhattan-institute.org/html/pgi_01.htm.

[39] U.S. Department of Energy, Applications Received by DOE/FE to Export Domestically Produced LNG, available at, http://www.fossil.energy.gov/programs/gasregulation/reports/summary_lng_applications.pdf.

[40] Thomas K. Grose, "As U.S. Cleans Its Energy Mix, It Ships Coal Problems Abroad," National Geographic News, March 15, 2013, available at, http://news.nationalgeographic.com/news/energy/2013/03/130315-us-coal-exports/.

[41] Oil Change International. Exporting Energy Security: Keystone XL Exposed.September 2011. pp. 7-9. http://dirtyoilsands.org/files/OCIKeystoneXLExport-Fin.pdf.;Natural Resources Defense Council, The Keystone XL tar sands pipeline will hurt not help job creation in America." available at http://www.nrdc.org/energy/files/keystonejobs-4pgr.pdf.

[42] 15 U.S.C. 717b(c); Note that the Natural Gas Act requires natural gas exporters to get a permit from the Energy Department. The Act further provides that DOE must approve an application for a permit to export natural gas to countries with which the U.S. does not have a free trade agreement, unless there is a finding that it would be inconsistent with the "public interest." The department also is authorized to attach terms and conditions to the export permit, which it finds are appropriate to protect "the public interest." A number of factors are considered in the DOE public interest review including environmental considerations.

Quantitative Restrictions" prohibits restrictions on the export of products[43], including fossil fuels, to another WTO member, other than duties, taxes or other charges.[44]

Friends of the Earth, therefore, recommends that TAFTA negotiators reject any incorporation of GATT Article XI: 1 on export controls into the U.S.-E.U. agreement: directly, by reference, or by implication. In light of approaching climate calamity, democratic institutions must have the "policy space" to act in the future, without the article's chilling effect. Ideally, it would be useful to exclude fossil fuels from the definition of a good or product altogether, to ensure they are not covered and subjected to export control obligations. Also as noted above, a general exception for climate, environmental, natural resources and public health measures must apply to TAFTA chapters and certainly to any chapter or provision related to trade in goods or market access. Finally, this general environmental exception must be drafted in more clear and certain terms than GATT article XX.[45]

- *Water*. Freshwater resources are in danger. Reckless industrial pollution, corporate agricultural practices, global warming, and commercial exploitation are degrading the quality and availability of fresh water. The time for treating water as an abundant and endlessly available resource is long past. Some international water firms and investors recognize this, but rather than calling for water to be managed as a common resource, they aspire to take ownership of water resources and turn water into a tradable commodity, perhaps on a very large scale in future years. Peter Brabeck, the former CEO of Nestle, has stated bluntly that access to water should not be a public right.[46]

[43] This claim, of course, may overlook GATT article XX, which provides an exception to the overall agreement on trade in products "**necessary** to protect human, animal or plant life or health" and "related to conservation of exhaustible natural resources" (provided that they are linked to domestic resource conservation measures). Article XX is not as strongly worded as a should be, but if there were ever a measure that falls under the exception, it ought to be a climate change measure, such as a control on fossil fuel exports. The very survival of the life on the planet as we know it is at stake. Certainly, such export controls are not disguised protectionist measures. Friends of the Earth, nonetheless, believes that if the TAFTA incorporates all or part of the GATT Article XI:1 even indirectly, by implication, or by reference, then the article XX "necessity" test might be unnecessarily hard to meet, especially as interpreted by an unsympathetic dispute resolution panel. Alternative regulatory schemes for addressing the climate crisis in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts give to economic regulations. The "related to conservation" test could also be problematic. In addition, the "chapeau" or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **"means of arbitrary or unjustifiable discrimination**." The term "unjustifiable" is vague and subjective.

[44] Article XI: 1 of the WTO General Agreement on Tariffs and Trade (General elimination of quantitative restrictions), available from the WTO at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_05_e.htm.

[45] Although beyond the jurisdiction of the U.S. Trade Representative's office, Friends of the Earth also recommends that Congress amend the Natural Gas Act so that LNG export regulations apply when exporting to a country with which the U.S. has a trade agreement.

[46] Robyn Pennacchia, "Nestle CEO: 'Access to water should not be a public right," available at, http://www.deathandtaxesmag.com/197822/nestle-ceo-access-to-water-should-not-be-a-public-right/

The threat of widespread commoditization of water should not be dismissed as theoretical. Massive international trade and transport of bulk water on the model of the oil transport and distribution system is admittedly a long-term prospect, not a current, large scale reality in most places. In decades to come, however, as water shortages increase and conditions of absolute water scarcity expand in more places around the globe, multinational corporations will have a huge incentive to control the supply of fresh water and build a global transportation network for its distribution (at their asking price).

Now is the time to firmly establish in the text of TAFTA and in international law on trade in goods generally that water is part of the public commons. Bulk water should not be considered a good or product subject TAFTA or any other trade agreement provisions on trade in goods.[47]

In sum, it is essential that nations that are parties to TAFTA negotiations retain authority to adopt water policy measures that:

- Protect the public health and the environment;
- Ensure sustainable supplies of water at a fair price for individual consumption and commercial use;
- Regulate or prohibit groundwater extraction for export to internal and international markets;
- Keep water in the public domain to preserve the right of access to water; and
- Stop any attempt by international corporate and financial interests to turn water into a mere commodity owned by investors and traded on international markets.

TAFTA is about so much more than trade

A key reason why TAFTA has significant environmental implications is the changing nature of trade agreements. Prior to 1994, trade agreements dealt primarily with issues of discrimination against foreign imports in the form of tariffs, quotas, customs duties and other "at the border" measures. And like most international agreements, they were enforced primarily by diplomatic suasion.

The post-1994 agreements, starting with the NAFTA and WTO agreements up to and including TAFTA deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing, and economic development policies that are

[47] In the same way, TAFTA chapters on services and investment should reflect the principles that water is part of the public commons and that access to water is a human right. With respect to a TAFTA services chapter, the omission of any exception for natural resources and water in particular in the WTO General Agreement Trade in Services should not be replicated. And, the lack of a strong environmental, natural resources, and water exception in the U.S. model investment agreement should be avoided at all costs. Indeed, water services, water transport services, and sanitation are so essential to human survival and the health of ecosystems that they should be excluded altogether by definition, reservation, or schedule of commitments from coverage under TAFTA services and investment chapters.

regarded as potential non-tariff barriers to trade by the drafters of the agreements. These rules related to non-tariff barriers to trade seek to encourage international commerce by promoting deregulation, expansion of property rights, and principles of what might be described as market fundamentalism. In other words, the agreements regulate governments -- based on the assumption that government stands in the way of global prosperity that will result from relatively unfettered markets and capital accumulation. Plus, violations of post 1994 agreements are enforceable by sanctions such as higher tariffs or money damages in investment cases.

In the coming months and years of negotiations, the United States is expected to push for a TAFTA deal that not only integrates the trade policies of Atlantic nations, but also deregulate their economies. The U.S. negotiating agenda, with its laissez-faire approach, would limit the role of governments in environmental protection. The question is whether this is what the public wants.

One step towards answering this question would be for negotiators to release the negotiating text of TAFTA as it develops. In that way, the public, in the United States and Europe, could make an informed judgment.

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