

Trans Pacific Partnership trade negotiations: environmental issues

“The trade ministers get together to set the rules of trade. They don’t worry about the environment; that’s somebody else’s agenda. Trade above all — that’s the way they approach it. And as a result of that, we get a trade agenda that puts environmental and other concerns below.”

- Joseph Stiglitz, winner of the Nobel Prize, Economics, 2001 interview PBS The Ascent of Money

The TPP negotiating text: A secret roadmap to a giant trade deal

Currently, Singapore, Malaysia, Chile, New Zealand, Brunei, Australia, Peru, Vietnam and the United States are participating in the talks. In late May, Canada and Mexico were welcomed into the TPP negotiating process. Japan, the Philippines, and others may seek to join in the future. In fact, U.S. Trade Ambassador Ron Kirk has said he looks forward to the day when China can join the TPP. As Professor Robert Stumberg, of Georgetown University Law Center has said, “It’s part of the roadmap to coming up with a bigger trading bloc that is not the World Trade Organization.”

The most urgent concern of TPP critics about this roadmap to a giant trade deal is that the negotiating text is not available to the press, Congress, or general public. Only “cleared advisors” have access to the text and U.S. negotiating proposals. Almost all of these 600 or so cleared advisors represent multinational corporations and large trade associations.

The TPP negotiations are conducted in secrecy, even though that is no longer a standard practice. The World Trade Organization, for example, posts negotiating text on its website. Senator Ron Wyden, chair of the Senate Finance Subcommittee on Trade and many other members of Congress from both parties have complained that they also have significant problems in accessing the negotiating text and in communicating with the U.S. Trade Representative’s office on the progress of negotiations. Two-thirds of the Democrats in the House of Representatives have written to Ron Kirk, the U.S. Trade Representative, complaining that they have been denied access to the negotiating text.

The TPP environment chapter

Negotiators are expected to focus on whether the environment chapter will include enforceable obligations for parties to implement domestic environmental laws and abide by global environmental agreements. The U.S. delegation agrees with green groups that environmental obligations should be enforceable through dispute resolution in the same way trade obligations are enforced. Most of the other delegations appear to be cautious about this approach or are resisting the idea of enforceable environmental standards outright.

A completed TPP without enforceable labor and environmental standards is likely to be highly controversial with the U.S. Congress, unless it gives its sign-off first — and that appears improbable. Democrats are not alone in demanding enforceable standards: there appears to be bipartisan agreement on Capitol Hill that enforcement of environmental and labor standards through formal dispute resolution before tribunals is necessary for legislative approval of a completed TPP agreement. Should U.S. negotiators ignore or unduly compromise standing congressional negotiating instructions to make environmental standards enforceable without their approval, it is likely to be regarded as an institutional affront by many members, especially on the committees of jurisdiction. This is because the Commerce Clause of the U.S. Constitution invests Congress with exclusive power over trade policy, not only between the states and but also with foreign countries.

Some measure of controversy also appears to be on the horizon with respect to substantive issues within the environmental chapter. These issues include language to address biodiversity conservation; illegal logging and wildlife trade; economic subsidies that lead to overfishing; and illegal, unreported, or unregulated fishing more generally.

The TPP investment chapter

Another chapter with significant implications for the environment is the investment chapter. The investment chapter will likely have greater environmental consequences than the environment chapter. The negotiating text of the TPP investment chapter has been leaked, and the draft text would authorize foreign investors to seek awards of money damages from international tribunals in compensation for the cost of complying with environmental and other public interest regulations.

If the TPP negotiations result in adoption of an investment chapter based on the leaked text, multinational investors would be able to sue governments directly when they believe domestic laws or regulations, including environmental measures, impinge upon broad investor rights provided to them by the agreement. The substantive and procedural rights of “property” are far more broadly defined in the leaked text than in U.S. constitutional law or the legal practice of nations around the world, generally.

Greater substantive rights follow from, among other provisions, a sweeping definition of investment that includes the expectation of gain or profit. This potentially allows regulations that incidentally thwart multinational corporations’ expectations of future profits to be treated as if they were a government “taking” — similar to how a government is required to pay a landowner fair value

for taking property to widen a highway. By contrast, it is very difficult for a U.S. company to use U.S. courts to challenge a regulation for reducing its profits, so long as there is some “rational basis” for the regulatory policy.

A TPP investment chapter based on the leaked text would also establish greater procedural rights for multinational investors. The usual practice in international law is for claims to be arbitrated on a government-to-government basis, but the leaked text would put multinational investors on the same level as nation-states. In effect, the leaked text would create a separate “court” for international capital, in which the “judges” would be business-friendly arbitrators appointed on an ad hoc basis. Such arbitrators often serve as corporate plaintiff’s counsel in one investment case and “judge” in the next.

In other trade agreements, such as the U.S.-Peru trade agreement, similar investment provisions have spawned international investment lawsuits that have threatened the ability of governments to enforce environmental laws. For example, La Oroya, Peru is one of ten most polluted places on earth. Renco, a U.S. company, has repeatedly failed to meet its contractual and legal deadlines to clean up the pollution caused by its metallic smelter at La Oroya. Under the Peru Free Trade Agreement, Renco has sued Peru before an international investment tribunal, seeking \$800 million in damages for the cost of complying with Peru’s environmental and mining laws.



La Oroya, Peru. Photo credit: Matthew Burpee, <http://www.flickr.com/photos/mburpee>



Other TPP chapters

Most of the chapters have not been leaked, but many are expected to pose serious environmental concerns. The TPP government procurement chapter, for example, may hamper the ability of governments to build environmental and other social criteria into their purchasing decisions. International rules on government procurement often seek to confine public purchasing decisions to economic and engineering criteria such as price and performance, thus constraining green purchasing policies by government, especially those that require that the means of producing a good or service meet environmental standards.

The TPP is about so much more than trade

A key reason why so many TPP chapters, and not just the environmental chapter, have significant environmental implications is because 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 the TPP, deal not only with “at the border” discrimination, but also impose rules related to government regulation, taxation, purchasing, and economic development policies that are 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, according to critics, principles of what might be described as market fundamentalism. In other words, the agreements are alleged to 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 of negotiations, the United States is expected to push for a TPP deal that not only integrates the trade policies of Pacific nations, but also deregulates their economies in the region. In the view of many experts, 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 effective means of answering this question would be to release of the secret negotiating text of the TPP. In that way, the public and parliaments of the region could make an informed judgment.

For more information contact Bill Waren, trade policy analyst at wwaren@foe.org or 202.222.0746.