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Analysis of Leaked Environment Chapter Consolidated Text

Today, WikiLeaks published [a draft environment chapter](#) of the proposed Trans-Pacific Partnership (TPP) free trade agreement (FTA). TPP governments have billed the agreement as an "ambitious, 21st-century trade agreement." However, the joint analysis by the Natural Resources Defense Council (NRDC), Sierra Club, and World Wildlife Fund (WWF) reveals that the current TPP environment chapter text does not meet that goal.

Below is an analysis of some of the key provisions of the leaked text. The analysis focuses on our organizations' top priorities for the TPP environment chapter, as described in a November 2013 letter sent [to United States Trade Representative Michael Froman](#). The analysis also examines how the provisions in the leaked text compare to the [bipartisan consensus](#) on trade reached in May 2007 between Congress and the Bush administration. Unfortunately, as evidenced below, the today's leaked text does not meet the standard set by Congress.

Article SS.4: Multilateral Environmental Agreements

Article SS.4 on Multilateral Environmental Agreements (MEAs)—agreements between a set of governments designed to protect the environment—represents a clear step back from the May 2007 bipartisan agreement on trade. In that agreement, Congress and the Bush Administration agreed to “incorporate a specific list of multilateral environmental agreements” in its free trade agreements (FTAs)¹ and to commit Parties to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfill its obligations under each MEA.

Critically, the May 2007 Agreement also stipulated that obligations to uphold commitments made under MEAs must be binding and subject to dispute settlement. As the United States government said in the 2007 agreement, “the United States takes seriously its obligations under these MEAs. We have nothing to fear from taking on FTA commitments for these agreements as well and subjecting those commitments to the FTA dispute settlement process where trade or investment are affected.”²

The obligation to uphold commitments made under MEAs and subject those commitments to the same dispute settlement procedures as commercial obligations is critical. It helps give parity to environmental and commercial obligations in trade agreements. More fundamentally, it helps ensure that countries do not waive or weaken their obligations under MEAs in order to attract trade or investment, and ensures that a country faces consequences if it does.

Unfortunately, the leaked text takes a significant step back from the May 2007 agreement. Instead of committing TPP countries to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfill its obligations under MEAs and subject those obligations to dispute settlement, each TPP country is merely committed to “affirm its commitment” to implement the MEAs to which it is a Party (Article SS.4.1).

Finally, it is important to recognize that *Report from the Chairs* noted that the United States is helpfully calling for obligations to “adopt, maintain, and implement measures to fulfill specific MEAs...into the TPP enforceable through the DS (*dispute settlement*)”—the May 2007 language. But the *Report from the Chairs* noted that Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, and Vietnam—all TPP countries except for Malaysia—oppose the US proposal.

Article SS.12: Consultation/Dispute Resolution

Article SS.12 on Consultation/Dispute Resolution represents an enormous rollback from the dispute resolution process laid out in the May 2007 agreement and, therefore, from recent FTAs. The May 2007 Congressional agreement stipulated that “all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements—same remedies, procedures, and sanctions. Previously, our environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws.”

Therefore, as a result of the May 2007 agreement, violations of the obligations in the environment chapter could be treated just as violations of commercial chapters of the agreement. This enforcement mechanism is *critical* in order to help give meaning to the environmental provisions in FTAs and ensure that there are consequences for violations of the chapter.

The consolidated text of the TPP environment chapter, however, sends countries back to a pre-2007 world. If one country suspects a potential violation of the TPP environment chapter, a Party can request consultations with another Party (Article SS.12.1); set up a Committee to review the issue (Article SS.12.2); and refer the issue to relevant Ministers of consulting Parties (Article SS.12.3). If the issue remains unresolved, a Party can request an arbitral tribunal which would consider the matter (Article SS.12.4) and present the disputing Parties a report (Article SS.12.11). If the arbitral panel finds that one of the Parties has failed to comply with its obligations in the environment chapter, the Parties “shall endeavor” to agree on a “mutually satisfactory action plan” (Article SS.12.12).

Unfortunately, the process in the consolidated text ends here, with a final report and an action plan. If the action plan is ignored or not implemented adequately, there is no recourse. This vastly insufficient process is an unacceptable rollback of previous commitments and renders the obligations in this chapter virtually meaningless.

Yet, the *Report from the Chair* notes that *all* TPP countries except for the United States agree to the consultation and arbitral tribunal process outlined in the consolidated text. Critically, the United States considers the consultation process linked to a dispute settlement process that would potentially follow. Moreover, the United States “requires that the obligations in the Environment Chapter be subject to the same arbitral tribunal process as the obligations found else in the TPP”—including “the application of trade sanctions in cases where compliance with an arbitral panel ruling is not achieved.”

It is absolutely critical that the TPP countries raise their ambition and agree to have the entire environment chapter subject to the dispute settlement procedures available to commercial chapters of the agreement. At the same time, it is critical to ensure not only a robust enforcement mechanism in the chapter, but also robust environmental commitments.

Article SS.16: Marine Capture Fisheries

Importantly, Article SS.16 on Marine Capture Fisheries recognizes the role of TPP countries as major consumers, producers and traders of fisheries products and the global problem of overfishing arising from inadequate fisheries management, fisheries subsidies and illegal, unreported and unregulated (IUU) fishing. By including actions to address the problems of overfishing and the unsustainable use of fisheries resources, it sets an important precedent for future agreements. However, the obligations in many cases are weak and the failure to subject any of the commitments to binding dispute settlement severely undermines their credibility. Below are some key marine capture fisheries provisions that must be strengthened.

Fisheries Management Systems, including Shark Finning

Article SS.16.3 says that each Party “shall *seek* to operate a fisheries management system . . . that is designed to prevent overfishing and overcapacity. . .” (emphasis added) and references the key international instruments. However, Article SS.16.4, which addresses fisheries bycatch, does not contain any clear requirements for a ban on shark finning, despite the role of TPP countries as shark fishing nations and traders in shark fins, and the requirement under U.S. law that it seek such bans from other countries.³ It is also important to note that Malaysia, New Zealand, Australia and Japan cannot agree to the fisheries management language on bycatch as it is currently drafted.

Fisheries Subsidies

The fisheries subsidies prohibitions of Articles SS.16.6 – SS.16.13 are very weak and are limited to “subsidies that target the fishing of fish stocks that are in an overfished condition” (16.6(a)) and subsidies provided to any fishing vessel listed for IUU fishing (16.6(b)) as opposed to restrictions on *all* subsidies that contribute to overcapacity and overfishing.

After years of discussions in the WTO on fisheries subsidies, the language in the leaked text is a major scaling-back of the scope of prohibitions recognized by “Friends of Fish” countries as needed to curtail growing overcapacity and overfishing. The leaked text appears to allow continued subsidies for vessel construction and modernization that directly increase fishing capacity and for operating activities that support overfishing. With regard to the first prohibition (SS.16.6 (a)), very few subsidy programs are likely to be specifically targeted on species that are overfished; rather, vessels that benefit from subsidies may fish on a number of stocks including those that are depleted and overfished. According to the Chair’s report, it appears that the U.S. proposes to broaden the application of the first prohibition to cover subsidies that negatively affect overfished stocks.

Finally, while stronger language on fisheries subsidies is included in Article SS.16.8, this provision only says that countries “shall make *best efforts* to refrain” (emphasis added) from introducing new subsidies that contribute to overcapacity and overfishing. Such “best effort” language is weak and legally unenforceable.

Illegal, Unreported, and Unregulated (IUU) Fish

Article SS.16.14 recognizes the importance of addressing IUU fishing and cites the relevant international instruments and agreements. This provision is important to prevent depletion of fish stocks, but the text merely calls for countries to “endeavor to improve cooperation” to address IUU fishing rather than requiring countries to address IUU fishing.

While Article SS.16.15 lists important ways that TPP countries can work to deter trade in IUU products, the failure to subject environmental provisions to binding dispute settlement means that there is no effective recourse to ensure that TPP countries implement, for example, the critical port state measures (SS.16.15.(c)) necessary to exclude illegally caught fish from entering international supply chains. Nor does Article SS.16.15(c) specifically reference the commitments of the 2009 Agreement on Port State Measures, which sets forth the steps that countries should take to prevent illegally caught fish from being landed at their ports.

Furthermore, TPP countries are not obligated to abide by the trade related provisions of regional fisheries management organizations (RFMOs), which are critical to prevent illegally caught fish from entering international trade. Instead, countries are called on only to “endeavor” not to undermine them (SS.16.15 (e)). Given the history of some TPP countries as transshipment ports for illegally caught Chilean sea bass,⁴ this failure to require adherence to fundamental RFMO trade provisions would allow TPP market access to facilitate trade in illegally caught fish products.

Article SS.17: Conservation and Trade

Article SS.17 on Conservation and Trade is critical to address the role of TPP countries as traders in forest products, wildlife, and living marine resources. TPP countries are significant exporters and importers of a wide range of wildlife products to meet growing demand for wildlife as food, luxury goods, pets and trophies. The trade in wildlife products in the Asia-Pacific region has led to dramatic declines in biodiversity and the populations of many endangered species. TPP negotiating partners also include major timber producer, processing, and consumer countries, and all are impacted by illegal logging and associated trade that has a devastating impact on the environment, local livelihoods, and economic development opportunities. Below are some provisions related to conservation and trade that must be strengthened.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is one of the most important instruments that exists to combat illegal trade in threatened and endangered plants and animals. However, in Article SS.17.2, each TPP country merely “affirms its commitment to take measures to ensure that international trade of wild flora and fauna does not threaten the survival of such species by implementing its obligations under... CITES.” All TPP countries are signatories to CITES, but commitments are sometimes poorly implemented with devastating effects on species. For example, surging demand for rhino horns in Vietnam has led to a 3000% increase in rhino poaching in South Africa in the last four years.⁵ The leaked text simply reflects the weak commitments by TPP countries in this area and, according to the *Report from the Chairs*, only the U.S. supports making the CITES commitments under the TPP legally enforceable by dispute settlement mechanism.

Prohibiting Trade in Illegally Taken Forest, Wildlife, and Living Marine Resources

Article SS.17.5 recognizes the role that illegal trade plays in undermining global efforts to conserve wild flora, fauna, and forests. Importantly, the Article calls on each Party to “adopt or maintain” appropriate measures that “allow it to take action” to prohibit the trade, transshipment or transaction of flora and fauna taken in violation of laws designed to conserve, protect, or manage wild fauna or flora. The provision, however, stops short of *obligating* countries to take action to stop illegal trade in flora, fauna, wood, and wood products. Moreover, according to the *Chairs Report*, most countries (Australia, Brunei, Chile, Japan, Mexico, Malaysia, Peru, Singapore, and Vietnam) are opposed to including the current language.

Finally, it must be emphasized again that none of the provisions discussed are subject to binding dispute settlement. Countries that are members of a “high standard 21st-century trade agreement” must be under binding obligations to ensure that their trade does not increase pressures on threatened or endangered species or undermine other countries’ efforts to sustainably manage their resources by importing or otherwise trading in illegally taken flora or fauna.

Endnotes

¹The list of MEAs included in all U.S. trade pacts since 2007 include. 1) Convention on International Trade in Endangered Species, 2) Montreal Protocol on Ozone Depleting Substances, 3) International Convention for the Prevention of Pollution from Ships, 4) Ramsar Convention on Wetlands, 5) International Whaling Convention, 6) Convention on Conservation of Antarctic Marine Living Resources, and 7) Inter-American Tropical Tuna Convention.

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

² See the May 2007 bipartisan Congressional Agreement

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

³ US Shark Conservation Act of 2010 makes illegal the landing of sharks without the fins naturally attached. It also directs the United States to seek similar measures from other countries which do not have as strong legislation in place.

⁴ World Wildlife Fund. November 9, 2010. *Singapore and Malaysia asked to close ports to toothfish pirates*. http://wwf.panda.org/wwf_news/?196524/Singapore-and-Malaysia-asked-to-close-ports-to-toothfish-pirates. Singapore and Malaysia have been cited by CCAMLR regarding the landing of illegally caught Patagonian toothfish (Chilean sea bass).

⁵ TRAFFIC, <http://www.traffic.org/rhinos/>