

RAW DEAL

How the Trans-Pacific Partnership Could Threaten our Climate



EXECUTIVE SUMMARY

The Trans-Pacific Partnership (TPP) is a trade agreement being negotiated between 12 Pacific Rim countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Eventually, every Pacific Rim nation may be included.

While the TPP would have significant consequences for our global climate and the ability of governments to tackle the crisis, it has been negotiated with an astonishing lack of transparency. After more than three years of negotiation, not a single word of draft text or U.S. government proposals has been released to the public. In fact, the full text of the TPP may not be made available until after President Obama has signed the agreement, leaving little room for substantive public input.

Despite the lack of transparency, we do know a lot about the TPP based on leaked documents, conversations with negotiators, and analysis of existing trade pacts. Below is a summary of some of the provisions directly related to environmental and climate protection, and the risks of this pact.

THE ENVIRONMENT CHAPTER

One of the 29 TPP chapters is dedicated to the environment. We understand that the United States Trade Representative has put forward an ambitious conservation proposal that would ban trade in illegally harvested timber and illegally taken wildlife, include disciplines on subsidies that contribute to overfishing, and include actions to deter shark-finning.

The fate of the environment chapter, however, is unclear; all other TPP countries oppose elements of the U.S. proposal, including the fact that the environment chapter would be legally enforceable. What is certain, however, is that while a strong environment chapter is critical, it is not at all sufficient to ensure the protection of our climate and our environment.

Many TPP provisions outside the environment chapter would seriously harm the environment and our climate, as discussed below. Moreover, while the provisions

of the environment chapter may be strong on paper, similar provisions in other trade pacts that allow one trading partner to challenge the environmental practices of another trading partner have never before been utilized.

MORE NATURAL GAS EXPORTS, FRACKING, AND COAL

The TPP would lead to an expansion of U.S. liquefied natural gas (LNG) exports without any review and without proper protections in place to help safeguard the American public and our global climate. In fact, if the TPP includes so-called “national treatment for trade in natural gas”—as we understand that it will—the U.S. Department of Energy would be legally bound to automatically approve all exports of U.S. LNG to countries in the agreement, including Japan, the world’s largest LNG importer, without any review, modifications, or delay.

Large-scale LNG exports, which the TPP would facilitate, would put more pressure to frack in the United States in order to feed foreign markets; require significant new investment in fossil fuel infrastructure, such as pipelines and LNG terminals, at a time when we should be investing in renewable energy; increase climate emissions; and shift the energy markets back toward coal due to the increase in natural gas prices that would result from significant LNG exports.

NEW RIGHTS TO THE FOSSIL FUEL INDUSTRY

The investment chapter of the TPP—one of three leaked TPP chapters—would give corporations expansive new rights, including the right to sue governments in non-transparent trade tribunals over public interest regulations that corporations allege would reduce their expected profits.

Using rules similar to those that included in the TPP, corporations such as ExxonMobil, Dow Chemical, Chevron, and Occidental Oil, have launched more than 500 cases against 95 governments.¹ Approximately 60 percent of the time, the corporation wins or the case settles, often with a concession to the corporation.² Listed below are just two investor-state



FRACKING FIELDS, CREDIT: ECOFLIGHT

suits that exemplify how investment rules can limit a government's ability to enact climate change measures and protect the environment.

Fracking in Quebec: In September 2013, Lone Pine Resources, a U.S. oil and gas firm, filed lawsuit against Canada for U.S. \$250 million under the North American Free Trade Agreement (NAFTA). The crime: A bill passed by Quebec's National Assembly that instituted a moratorium on shale gas exploration and development, including fracking, under the St. Lawrence River.³

Nuclear Energy in Germany: Following Japan's Fukushima Daiichi nuclear disaster in 2011, the German Parliament made a decision to phase out its nuclear power program and shift toward cleaner renewable energy sources. In response, Vattenfall, a Swedish energy firm with investments in German nuclear energy, used investment provisions in the EU Energy Charter Treaty, an EU trade and investment agreement, to sue Germany for future losses that it may sustain during the nuclear phase-out.⁴ Vattenfall is now seeking U.S. \$4.6 billion in damages from the German people.

NEW LIMITS ON CLIMATE AND ENVIRONMENT REGULATIONS

Other chapters of the TPP would impose additional limits on the ability of governments to tackle climate change and other environmental imperatives. For

example, the TPP includes a chapter on Technical Barriers to Trade that could limit the ability of governments to put in place new climate and environmental regulations related to environmental and climate labeling and technical regulations and standards. And a chapter on Government Procurement would likely limit the ability of governments to mandate "green purchasing" in government procurement contracts. This means that requirements in government contracts to purchase paper made from recycled content or energy from renewable sources could be exposed to challenge in the TPP.

The environmental risks of the TPP are broad and extensive. While a chapter on the environment may help address some core conservation challenges of the region, the broader implications of the TPP are that governments would lose ability to put in place policies to address the climate crisis while corporations would gain the ability to challenge climate and environmental laws and policies. A new model of trade that protects communities and the environment is urgently needed.



INTRODUCTION

The Trans-Pacific Partnership (TPP) is a trade agreement being negotiated between twelve countries across the Pacific Rim, including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Eventually, every Pacific Rim nation may be included.

The Sierra Club is deeply concerned about both the process and the substance of the TPP. Our concerns include the lack of transparency in negotiations; a potential roll-back of the TPP environment chapter from past trade pacts; the expansion of natural gas exports, hydraulic fracturing, and use of coal; new rights to fossil fuel corporations; and new limits on climate and environmental regulations.

NEGOTIATED IN SECRET

Despite the fact that the TPP would impact nearly every aspect of our lives and our environment, from the quality of our food, water, jobs, wages, and more, it has been negotiated behind closed doors with little meaningful public input or participation.

After more than three years of negotiation, not a single word of draft text or U.S. government proposals has been released to the public. In fact, the full text of the TPP will likely not be made available until after President Obama has signed the agreement. Additionally, negotiators from the United States and other countries are forbidden to talk in specific about the negotiations, making meaningful public input and participation impossible.

Despite the limited public input, a handful of non-corporate advisers and more than 600 business executives are actively involved in shaping TPP texts in their capacity as official trade advisors to the United States Trade Representative (USTR). Those worried about the climate implications of the TPP need look no further than the Energy Advisory Committee to the USTR, comprised predominantly of executives from the fossil fuel industry, including from Chevron, Halliburton, Nuclear Energy Institute, General-Electric Oil and Gas, Caterpillar, and other major fossil fuel corporations.⁵

This heavy industry bias combined with a severe lack of transparency is deeply concerning.

It is important to note that governments have negotiated the TPP with even less transparency than previous trade agreements. For example, a full draft of the Free Trade Area of the Americas (FTAA) agreement was released in 2001 and the World Trade Organization posts negotiating texts on its website. Particularly for an agreement as expansive as the TPP, the Sierra Club strongly opposes the lack of transparency in these talks.

THE ENVIRONMENT CHAPTER

One of the 29 TPP chapters is dedicated to the environment. We understand that the USTR has put forward an ambitious conservation proposal that would ban trade in illegally harvested timber and illegally taken wildlife, include disciplines on subsidies that contribute to overfishing, and include actions to deter shark-finning. The U.S. has advocated that the chapter be legally binding and subject to dispute settlement and include obligations for countries to uphold not only domestic environmental laws, but also commitments under agreed multilateral environmental agreements (MEAs).

The fate of the environment chapter is unclear—all other TPP countries oppose elements of the U.S. proposal, including that the environment chapter be legally enforceable and include a list of MEAs. What is certain, however, is that while a strong environment chapter is critical, it is not at all sufficient to ensure the protection of our climate and our environment. As described in this brief, there are many TPP provisions outside the environment chapter that would have a negative impact on the environment, such as investment chapter provisions that empower the fossil fuel industry to attack climate policies and rules that would remove the ability of the U.S. government to even analyze the impacts of natural gas exports.

Moreover, it is important to note that while the provisions of the environment chapter may be

strong on paper, similar provisions in other trade pacts that allow one trading partner to challenge the environmental practices of another trading partner have never once been utilized. This is in stark contrast to the investment rules, and specifically the investor-state dispute settlement, which corporations have used to bring more than 500 cases against 95 governments.⁶

It is therefore critical to look at and beyond the environmental chapter when analyzing the environmental impacts of the TPP.

MORE NATURAL GAS EXPORTS, FRACKING, AND COAL

The TPP would lead to an expansion of U.S. liquefied natural gas (LNG) exports without any review and without proper protections in place to help safeguard the American public and our global climate. In fact, if the TPP includes so-called “national treatment for trade in natural gas”—as we understand that it will—the U.S. Department of Energy (DOE) would be legally bound to automatically approve all exports of U.S. LNG to countries in the agreement, including Japan, the world’s largest LNG importer, without any review, modifications, or delay.

The origins of automatic exports of U.S. LNG date back to the U.S. Natural Gas Act. As amended in 1992, the Act stipulates that the DOE must approve permit applications to export natural gas to countries with which the United States has a free trade agreement requiring national treatment for trade in natural gas.⁷ Importantly, if no free trade agreement is in place, the DOE must conduct a careful and public analysis to determine whether exports are inconsistent with the public interest before granting a license.⁸

Automatic exports of U.S. LNG are particularly dangerous in the TPP. Japan, one of the TPP countries, is the largest LNG importer in the world, importing 4112.608 billion cubic feet of natural gas in 2011.⁹ And the fact that the TPP is a docking station for additional countries to join in the future means that the TPP creates an expanding web of countries with automatic access to gas from the United States. While language in the TPP could be drafted to protect the Department of Energy’s authority, our understanding is that no such language has even been proposed.

Large-scale LNG exports, which the TPP would

facilitate, would threaten our environment and climate in a number of ways, including:

- **Increased Unconventional Gas Production, Including Fracking:** Exporting natural gas stimulates increased gas production—most of which will come from unconventional gas sources, including hydraulic fracturing, or “fracking.” An intrusive procedure, fracking involves pumping millions of gallons of water, sand, and chemicals underground to create tremendous pressure which forces out natural gas. Unconventional gas production can emit large amounts of hazardous, smog-forming, and climate-altering pollutants into our air, and is a serious threat to our water supply. Unconventional gas production operations also have negative impacts on communities, forests, and parks. According to the expert Shale Gas Production Subcommittee of DOE’s Secretary of Energy Advisory Board, faulty and inadequate regulations mean that unconventional gas production comes with “a real risk of serious environmental consequences.”¹⁰
- **Exacerbating Climate Change:** LNG itself is a carbon-intensive fuel,¹¹ with life-cycle emissions significantly greater than that of natural gas. The energy needed to cool, liquefy, and store natural gas for overseas shipment makes LNG more energy- and greenhouse-gas-intensive than ordinary pipeline gas and even some fuel oils.¹² Opening our natural gas reserves to unlimited exports will therefore increase the world’s dependency on a fossil fuel with significant climate impacts.
- **Locking in Fossil Fuel Infrastructure and Methane Emissions:** LNG export requires a large new industrial infrastructure that includes a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that all require thorough environmental review. For example, whether exporters are expanding old pipelines or building new ones, these construction projects can cut across private property and public land, further fragmenting landscapes and increasing pollution. There are also environmental impacts associated with the building of natural gas export terminals, which may require the dredging of sensitive estuaries to make room for massive LNG tankers. Expanding facilities and ship traffic will also take a toll on coastal communities and the environment. Additionally, natural gas production and infrastructure, including wells and pipelines, have



been found to leak methane, a potent greenhouse gas that traps nearly 25 times as much heat as carbon dioxide over a 100-year period.¹³ Increased exports, therefore, will also likely drive increased methane emission and exacerbate climate change.

- **Shifting the Domestic Gas Market Toward Coal:**

U.S. exports of natural gas would raise demand for U.S. natural gas, causing an increase in domestic gas prices. While the magnitude of the price increase will depend on the amount of gas exported and the elasticity of supply, a recent report commissioned by Dow Chemical estimates that natural gas prices in the U.S. could triple by 2030 under a high-export scenario.¹⁴ Analysis also shows that the price increase in natural gas will shift the domestic gas market back toward coal.¹⁵ As the U.S. Energy Information Administration (EIA) notes, “the decrease in natural gas consumption is replaced with increased coal consumption.”¹⁶ As a result, LNG exports likely increase CO² emissions from U.S. power generation, according to the EIA.

Despite all these impacts, the TPP would strip the ability of the United States to even examine whether exports

are in the national interest, and cause the United States to forever cede its control over this natural resource.

NEW RIGHTS TO FOSSIL FUEL CORPORATIONS TO CHALLENGE CLIMATE POLICIES

The investment chapter of the Trans-Pacific Partnership agreement—one of three leaked TPP chapters—would give corporations expansive new rights, including the right to sue governments in non-transparent trade tribunals over public interest regulations that corporations allege reduce their expected profits. Using rules similar to those that included in the TPP, corporations such as ExxonMobil, Dow Chemical, Chevron, and Occidental Oil have launched more than 514 known cases against 95 governments.¹⁷

Among the harmful investment rules in the TPP are:

- **Definition of Investment:** The definition of investment in the TPP goes far beyond real property and capital investments, but includes, for example, the “expectation of gain or profit.”¹⁸ This broad definition of investment opens governments up to a wide range of lawsuits not even related to actual investments.

- **Minimum Standard of Treatment and Fair and Equitable Treatment:** The TPP guarantees investors a “minimum standard of treatment” and “fair and equitable treatment” when they invest or plan to invest in a TPP country. These vaguely worded provisions, which have been included in previous trade and investment agreements, leave governments vulnerable to lawsuits from foreign corporations simply for introducing or amending laws and policies in their own countries.
- **Indirect Expropriation:** The TPP would protect foreign corporations from “indirect” expropriation, which can include any law or regulatory measure that merely reduces the value of a foreign firm’s future expected profits.¹⁹ For example, a new regulation in the natural gas industry that reduces the profits of an investor, such as additional permit requirements, could be considered not only a violation of fair and equitable treatment described above, but also indirect expropriation.
- **Investor-state Dispute Settlement:** When a corporation believes its minimum standard of treatment or other rights have been violated, the investor-state dispute settlement allows it to sue a host country’s government in private trade tribunals. Not only do these tribunals give corporations the same legal standing as democratically elected governments, but they also lack transparency and public oversight.²⁰ Moreover, since there is no cap on the amount of damages a tribunal can award to a corporation, the mere threat of an investor-state suit can be enough to dissuade governments from enacting important public-protecting measures.

These are not hypothetical dangers. In fact, current trends demonstrate that investor-state cases challenging public-interest regulations are quickly becoming the norm. Listed below are just a few investor-state suits that exemplify how investment rules can limit a government’s ability to enact climate change measures, protect the environment, and ensure the safety of its citizens.

Fracking in Quebec

In September 2013, Lone Pine Resources, a U.S. oil and gas firm, filed a lawsuit against Canada for U.S. \$250 million under the North American Free Trade Agreement (NAFTA). The crime: A bill passed by Quebec’s National Assembly that instituted a

moratorium on shale gas exploration and development, including fracking, under the St. Lawrence River.²¹ According to Lone Pine representatives, the Quebec government acted “with no cognizable public purpose,” and violated the Enterprise’s “valuable right to mine for oil and gas under the St. Lawrence River,” despite the fact that the fracking process is known to contaminate drinking water, pollute the air, and cause earthquakes.²² Lone Pine, however, argues that its loss of a “stable business and legal environment” violated its minimum standard of treatment and should be counted as expropriation.²³

Nuclear Energy in Germany

Following Japan’s Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German parliament made a decision to phase out its nuclear power program and shift toward cleaner renewable energy sources. In response, Vattenfall, a Swedish energy firm with investments in German nuclear energy, filed a request for arbitration against Germany at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID).²⁴ Citing the fair and equitable treatment provisions of the Energy Charter Treaty—an EU trade and investment agreement for the energy sector—Vattenfall is now seeking U.S. \$4.6 billion in damages from the German people for future losses that it may sustain during the nuclear phase-out.²⁵

Toxic Chemical Bans in Canada

In 1995, Canada banned the export of polychlorinated biphenyl, or PCB, wastes to the United States. PCBs are a group of man-made chemicals that were found to pose serious risks to human health and the environment. In response to the ban, S.D. Myers, Inc., an Ohio-based corporation that processes and disposes of PCB waste, filed an investor-state claim against Canada under NAFTA, claiming violations to minimum standard of treatment, among other provisions. While Canada defended its measures as justified by environmental considerations—and despite the fact that Canada, as a signatory of Basel Convention, the multilateral environmental treaty on toxic-waste trade, was committed to banning the trade of toxics—the tribunal ruled in favor of SD Myers and ordered Canada to pay \$5 million.²⁶

Oil Exploration in Ecuador

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon forest. In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government approval, thereby providing government officials the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to be cautious of foreign oil companies. For three decades, Texaco (which was acquired by Chevron in 2001) drilled for oil in Ecuador's Amazon rainforest, during which time it dumped over 18 billion gallons of toxic waste into the ecosystem.²⁷

Just one year later, however, Occidental violated its contractual agreement—and Ecuadorian law—when it sold 40 percent of its production rights to Alberta Energy Company without formally informing or seeking authorization from the Ecuadorian government. In response, Ecuador terminated its contract with Occidental, which prompted Occidental to initiate investor-state proceedings under the U.S.-Ecuador Bilateral Investment Treaty.²⁸ Although the investor-state court agreed that Ecuador was within its legal rights to annul the contract, the international tribunal ultimately sided with Occidental and fined Ecuador U.S.\$ 1.8 billion (\$2.4 billion including compound interest), the largest investor-state award ever to be issued by an ICSID tribunal. The panel justified their decision by using an extremely broad interpretation of “minimum standard of treatment,” “fair and equitable treatment,” and “indirect expropriation.”

NEW LIMITS ON CLIMATE AND ENVIRONMENT REGULATIONS

Other chapters of the TPP would impose additional limits on the ability of governments to tackle climate change and other environmental imperatives. For example, the TPP includes a chapter on Technical Barriers to Trade (TBT) that could limit the ability of governments to put in place new climate and environmental regulations related to environmental and climate labeling and technical regulations and standards. The TPP's TBT chapter builds on the World Trade Organization (WTO) TBT Agreement, and includes commitments to ensure that technical

regulations do not create “unnecessary obstacles to international trade” and are not “more trade-restrictive than necessary.” These and other arbitrary tests have led to a recent string of anti-consumer and anti-environment TBT cases.

In just the last year, for instance, the WTO ruled that dolphin-safe tuna labels, a ban on candy-flavored cigarettes, and country-of-origin meat labeling all violated the TBT agreement. The expansion of these rules in the TPP would likely leave even less room for climate and environmental labels and standards.

In another example of new limits that would be imposed on governments as a result of the TPP, the pact's chapter on Government Procurement would likely limit the ability of governments to mandate “green purchasing” in government procurement contracts. This means that requirements in government contracts to purchase paper made from recycled content or energy from renewable sources could be exposed to challenge in the TPP.

CONCLUSION

The environmental risks of the TPP are broad and extensive. While a chapter on the environment may help address some core conservation challenges of the region, the broader implications of the TPP are that governments would lose ability to put in place policies to address the climate crisis while corporations would gain the ability to challenge climate and environmental laws and policies. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that departs from the model espoused in the Trans-Pacific Partnership Agreement.

ENDNOTES

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