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Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment, and Climate Change

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There has been much controversy over the *Trans-Pacific Partnership* (TPP)—a plurilateral trade agreement involving a dozen nations from throughout the Pacific Rim—and its impact upon the environment, biodiversity, and climate change.¹

The secretive treaty negotiations involve Australia and New Zealand; countries from South East Asia such as Brunei Darussalam, Malaysia, Singapore, Vietnam, and Japan; the South American nations of Peru and Chile; and the members of the *North American Free Trade Agreement* 1994 (NAFTA), Canada, Mexico and the U.S.² There was an agreement reached between the parties in October 2015.³ The participants asserted: “We expect this historic agreement to promote economic growth, support higher-paying jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and to promote transparency, good governance, and strong labor and environmental protections.”⁴ The final texts of the agreement were published in November 2015.⁵

There has been discussion as to whether other countries—such as Indonesia,⁶ the Philippines, South Korea, Taiwan, and Sri Lanka—will join the deal. There have been similar concerns about the *Trans-Atlantic Trade and Investment Partnership* (TTIP)—a proposed trade agreement between the United States and the European Union.⁷

There has been much debate about the impact of the TPP upon the environment, biodiversity and climate change. In 2011, the U.S. Trade Representative developed

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1. *The Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp> (last visited Mar. 30, 2016). For commentary, see JANE KELSEY, HIDDEN AGENDAS: WHAT WE NEED TO KNOW ABOUT THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPPA) (2013); NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT (Jane Kelsey ed., 2010); THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST-CENTURY TRADE AGREEMENT (C. L. Lim, Deborah K. Elms & Patrick Low eds., 2012); TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (Tania Voon ed., 2013).
 2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].
 3. Press Release, U.S. Trade Representative, Trans-Pacific Partnership Minister’s Statement (Oct. 5, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>.
 4. *Id.*
 5. Trans-Pacific Partnership, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP].
 6. Julie Hirschfeld Davis, *President Joko Widodo of Indonesia Joins Trans-Pacific Partnership*, N.Y. TIMES (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/us/politics/president-joko-widodo-of-indonesia-joins-trans-pacific-partnership.html>.
 7. *Trans-Atlantic Trade and Investment Partnership (T-TIP)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited Mar. 30, 2016). For commentary, see Glyn Moody, *TTIP Updates – The Glyn Moody Blogs*, COMPUTERWORLD UK (Feb. 25, 2015), <http://www.computer-worlduk.com/blogs/open-enterprise/ttip-updates-the-glyn-moody-blogs-3569438>; FERDI DE VILLE & GABRIEL SILES-BRÜGGE, TTIP: THE TRUTH ABOUT THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (2016).

a Green Paper on trade, conservation, and the environment in the context of the TPP.⁸ In its rhetoric, the U.S. Trade Representative has maintained that it has been pushing for strong, enforceable environmental standards in the TPP. The U.S. Trade Representative has provided this public outline of the Environment Chapter of the TPP:

A meaningful outcome on environment will ensure that the agreement appropriately addresses important trade and environment challenges and enhances the mutual supportiveness of trade and environment. The TPP countries share the view that the environment text should include effective provisions on trade-related issues that would help to reinforce environmental protection and are discussing an effective institutional arrangement to oversee implementation and a specific cooperation framework for addressing capacity building needs. They also are discussing proposals on new issues, such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and environmental goods and services.⁹

The proponents of the TPP have promoted the agreement as a boon to the environment. The U.S. Trade Representative discussed the report, *Trade for a Greener World* on World Environment Day in 2015.¹⁰ The report provides a blueprint of the philosophy of the U.S. government in respect of trade and the environment. After the release of the TPP text, Rohan Patel, the Special Assistant to the President and Deputy Director of Intergovernmental Affairs, sought to defend the environmental credentials of the TPP in November 2015.¹¹ He suggested that the agreement was supported by environmental groups.

The U.S. Congress, though, has been conflicted about the U.S. Trade Representative's arguments about the TPP and the environment.¹² In 2012, members of the U.S. Congress—including Senator Ron Wyden (D-OR), Olympia

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8. *USTR Green Paper on Conservation and the Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE (Dec. 5, 2011), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership>.
 9. Press Release, U.S. Trade Representative, *Outlines of the Trans-Pacific Partnership* (Nov. 12, 2011), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.
 10. U.S. TRADE REPRESENTATIVE & U.S. DEP'T OF STATE, *STANDING UP FOR THE ENVIRONMENT: TRADE FOR A GREENER WORLD* (2015), available at <https://ustr.gov/sites/default/files/USTR-Standing-Up-for-the-Environment-2015-Report.pdf>.
 11. Rohan Patel, *What Environmental and Conservation Advocates Are Saying About TPP's Environment Chapter*, WHITE HOUSE BLOG (Nov. 6, 2015), <https://www.whitehouse.gov/blog/2015/11/04/what-environmental-and-conservation-advocates-are-saying-about-tpps-environment>.
 12. Ilana Solomon, *Senators Agree: Trade Must Protect the Environment*, HUFFPOST GREEN BLOG (Oct. 23, 2012), http://www.huffingtonpost.com/ilana-solomon/trans-pacific-partnership-_b_1982368.html.

Snowe (R-ME), and John Kerry (D-MA)—wrote a letter, arguing that the trade agreement needs to provide strong protection for the environment: “We think a ‘21st century agreement’ must have an environment chapter that guarantees ongoing sustainable trade and creates jobs, and this is what American businesses and consumers want and expect also.”¹³ The group stressed that “[a] binding and enforceable TPP environment chapter that stands up for American interests is critical to our support of the TPP.”¹⁴

Over several years, senior members of the Democratic leadership expressed their opposition to granting President Barack Obama a fast-track approval authority in respect of the TPP. After initially expressing reservations about granting “fast-track authority,” U.S. House of Representatives Minority Leader Nancy Pelosi (D-CA) provided strong opposition to such a proposal during debate in the United States Congress.¹⁵ Senate Minority Leader Harry Reid (D-NV) also stood in opposition to granting Obama a fast-track authority in respect of the TPP.¹⁶ Senator Elizabeth Warren (D-MA) has been particularly critical of the process and the substance of the negotiations in the TPP. She commented: “From what I hear, Wall Street, pharmaceuticals, telecom, big polluters and outsourcers are all salivating at the chance to rig the deal in the upcoming trade talks.”¹⁷ Elder Congressman Sander Levin (D-MI) also warned that the TPP failed to provide proper protection for the environment.¹⁸

Nonetheless, in 2015, President Barack Obama was able to secure the overall support of the U.S. Congress for his fast-track authority.¹⁹ This was made possible

13. Letter from Ron Wyden, Chairman of the Senate Finance Subcommittee on International Trade, et al. to Ron Kirk, U.S. Trade Representative (Oct. 17, 2012), *available at* <http://www.citizen.org/documents/senate-letter-to-kirk-on-tpa-and-the-environment.pdf>.

14. *Id.*

15. Vicki Needham, *Pelosi Comes Out Against Fast Track Bill*, THE HILL (Feb. 12, 2014), <http://thehill.com/homenews/house/198297-pelosi-comes-out-against-fast-track-bill>; Nancy Pelosi, *Trade Promotion Authority on its Last Legs*, USA TODAY (June 15, 2015), <http://www.usatoday.com/story/opinion/2015/06/15/congress-trade-fast-track-tpa-pelosi-column/71270294>.

16. Eric Bradner & Manu Raju, *Reid Rejects President Obama's Trade Push*, POLITICO (Jan. 29, 2014), <http://www.politico.com/story/2014/01/harry-reid-barack-obama-trade-deals-102819.html>.

17. George Zornick, *Elizabeth Warren Reveals Inside Details of Trade Talks*, THE NATION (May 15, 2014), <http://www.thenation.com/blog/179885/elizabeth-warren-reveals-inside-details-trade-talks>. See also ELIZABETH WARREN, *A FIGHTING CHANCE* (2014).

18. Congressman Sander Levin, Ranking Member, U.S. House of Representatives Ways and Means Committee, Report Prepared for Discussion at the Council on Foreign Relations, *The Trans-Pacific Partnership Negotiations: The Need for Congress to Get Fully in the Game* (Sept. 18, 2014), *available at* <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Levin%20Report%20to%20CFR%20on%20TPP.pdf>.

19. Paul Lewis, *Barack Obama Given “Fast-Track” Authority Over Trade Deal Negotiations*, GUARDIAN (June 24, 2015), <http://www.theguardian.com/us-news/2015/jun/24/barack-obama-fast-track-trade-deal-tpa-senate>.

by the Republicans and dissident Democrats. Notably, Senator Ron Wyden (D-OR) switched sides and was transformed from a critic of the TPP into a supporter of the TPP. Obama still needs to secure the passage of the TPP through the U.S. Congress in a straight vote in 2016, before the end of his Presidency.

For their part, information activists, green political parties, and civil society organizations have been concerned about the secretive nature of the negotiations as well as the substantive implications of the treaty for the environment. On January 15, 2014, WikiLeaks released the draft Environment Chapter of the TPP²⁰—along with a report by the Chairs of the Environmental Working Group. Julian Assange, WikiLeaks' publisher, stated: "Today's WikiLeaks release shows that the public sweetener in the TPP is just media sugar water."²¹ He observed: "The fabled TPP environmental chapter turns out to be a toothless public relations exercise with no enforcement mechanism."²²

Environmental groups and climate advocates have been skeptical of the environmental claims made by the White House for the TPP.²³ The Green Party of Aotearoa New Zealand, the Australian Greens, and the Green Party of Canada have released a joint declaration on the TPP observing: "More than just another trade agreement, the [TPP] provisions could hinder access to safe, affordable medicines, weaken local content rules for media, stifle high-tech innovation, and even restrict the ability of future governments to legislate for the good of public health and the environment."²⁴ In the U.S., civil society groups such as the Sierra Club,²⁵ Public

20. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, <https://wikileaks.org/tpp-enviro> (last visited Mar. 30, 2016); *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Chairs Report*, WIKILEAKS, <https://wikileaks.org/tpp-enviro> (last visited Mar. 30, 2016).

21. Press Release, WikiLeaks, *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text* (Jan. 15, 2014), <https://wikileaks.org/tpp-enviro/pressrelease.html>.

22. *Id.*

23. Steven Mufson, *Obama's Environmental Allies Not Buying His Trade Pitch on Climate*, WASHINGTON POST (June 16, 2015), http://www.washingtonpost.com/business/economy/obamas-environmental-allies-not-buying-his-trade-pitch-on-climate/2015/06/16/b91964a6-1378-11e5-9ddc-e3353542100c_story.html.

24. Press Release, Green Party of Aotearoa New Zealand, *Joint Statement on the Trans-Pacific Partnership Agreement* (Aug. 19, 2012), <https://home.greens.org.nz/press-releases/joint-statement-trans-pacific-partnership-agreement-green-party-aotearoa-new-zealand>.

25. See Press Release, Sierra Club, *Secretive Trade Negotiations Begin in Leesburg: Environmentalists, Congress Demand Transparency* (Sept. 6, 2012), http://action.sierraclub.org/site/MessengerViewer?em_id=249026.0.

Citizen,²⁶ WWF,²⁷ the Friends of the Earth,²⁸ the Rainforest Action Network,²⁹ and 350.org³⁰ have raised concerns about the TPP and the environment. Allison Chin, President of the Sierra Club, complained about the lack of transparency, due process, and public participation in the TPP talks and said the agreement “is shaping up to be a stealth affront to the principles of our democracy.”³¹ Maude Barlow’s The Council of Canadians has also been concerned about the TPP and environmental justice.³² New Zealand Sustainability Council executive director Simon Terry said the agreement showed “minimal real gains for nature.”³³ A number of groups have joined a grand coalition of civil society organizations, which are opposed to the grant of a fast-track authority.³⁴

This article provides a critical examination of the Environment Chapter of the TPP focusing on the negotiations, leaked drafts, and the final text. As leading international environmental scholars like Professor Daniel Bodansky have shown, a commentary upon an international agreement requires a full consideration of the

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26. See *Trans-Pacific Partnership (TPP): More Job Offshoring, Lower Wages, Unsafe Food Imports*, PUBLIC CITIZEN, <http://www.citizen.org/tpp> (last visited Mar. 30, 2016).
 27. See Vanessa Dick, *Promoting Sustainable and Legal Trade*, WORLD WILDLIFE FUND (May 18, 2015), <http://www.worldwildlife.org/stories/promoting-sustainable-and-legal-trade>.
 28. See *Trans-Pacific Partnership*, FRIENDS OF THE EARTH, <http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership> (last visited Mar. 30, 2016).
 29. See *Pages Tagged “TPP,”* RAINFOREST ACTION NETWORK, <http://www.ran.org/tags/tpp> (last visited Apr. 8, 2016) (showing two blog posts about the TPP).
 30. See *Say No to Corporate Power Grabs – Reject the Trans-Pacific Partnership*, 350.ORG, <http://campaigns.350.org/petitions/say-no-to-corporate-power-grabs-reject-the-trans-pacific-partnership> (last visited Mar. 30, 2016) (showing a petition for a campaign against the TPP).
 31. Allison Chin, *The TPP Trade Pact: An Affront to Democracy*, SIERRA CLUB’S COMPASS BLOG, (Sept. 7, 2012), <http://sierraclub.typepad.com/compass/2012/09/tpp-allison-chin.html>.
 32. *Trans-Pacific Partnership (TPP)*, THE COUNCIL OF CANADIANS, <http://www.canadians.org/tpp> (last visited April 8, 2016). See also MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD’S WATER* (2002); MAUDE BARLOW, *BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER* (2007); MAUDE BARLOW, *BLUE FUTURE: PROTECTING WATER FOR PEOPLE AND THE PLANET FOREVER* (2013.). See generally Matthew Rimmer, *Blue Future: Maude Barlow, Water Rights, Investor Clauses, and Trade Deals*, INFOJUSTICE.ORG (Aug. 5, 2014), <http://infojustice.org/archives/33100> (commenting on Barlow’s three books on water rights and the impact of trade and investment agreements upon such rights).
 33. Nicky Hager, *Leak Reveals Ongoing TPP Tussles*, NZ HERALD (Jan. 16, 2014), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11187155. See also Simon Terry, *TPP Backers Have Questions to Answer*, NZ HERALD (Feb 24, 2015), http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11406607; SIMON TERRY, *THE ENVIRONMENT UNDER TPPA GOVERNANCE* (2016), available at <https://tpplegal.files.wordpress.com/2015/12/ep4-environment.pdf>.
 34. See *Stop Fast Track*, FIGHT FOR THE FUTURE, <https://www.stopfasttrack.com> (last visited Mar. 30, 2016) (showing a petition as part of a campaign to stop fast-track approval and a list of more than 100 organizations that support the campaign).

negotiations.³⁵ Looking at a final text in isolation is inadequate and insufficient. There is need to consider the full context of the negotiations. The overall argument of the article is that the Environment Chapter of the TPP is an exercise in greenwashing—meaning it is a public relations exercise by the U.S. Trade Representative, rather than a substantive regime for the protection of the environment in the Pacific Rim.

Greenwashing has long been a problem in commerce, in which companies make misleading and deceptive claims about the environment. In his 2012 book, *Greenwash: Big Brands and Carbon Scams*, Guy Pearse considers the rise of green marketing and greenwashing.³⁶ Government greenwashing is also a significant issue. In his book *Storms of My Grandchildren*, the climate scientist James Hansen raises his concerns about government greenwashing.³⁷ Such a problem is apparent with the TPP, in which there is a gap between the assertions made by the U.S. government and the reality of the agreement. The TPP represents a disturbing new development in the greenwashing of international environmental law.

This article contends that the TPP fails to meet the expectations created by President Barack Obama, the White House, and the U.S. Trade Representative about the environmental value of the agreement. First, this piece considers the relationship of the TPP to multilateral environmental treaties. Second, it explores whether the provisions in respect of the environment are enforceable. Third, this article examines the treatment of trade and biodiversity in the TPP. Fourth, this study considers the question of marine capture fisheries. Fifth, there is an evaluation of the cursory text in the TPP on conservation. Sixth, the article considers trade in environmental services under the TPP. Seventh, this article highlights the tensions between the TPP and substantive international climate action. It is submitted that the TPP undermines effective and meaningful government action and regulation in respect of climate change. The conclusion laments the weak overall Environment Chapter of the TPP. It also highlights that a number of other chapters of the TPP will also have a negative impact upon the protection of the environment—including the Investment Chapter, the Intellectual Property Chapter, the Technical Barriers to Trade Chapter, and the text on public procurement. Such areas deserve further academic study to obtain a comprehensive understanding of the TPP.

35. See Daniel Bodansky, *The U.N. Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993).

36. See GUY PEARSE, *GREENWASH: BIG BRANDS AND CARBON SCAMS* (2012). This book was marketed and released under a different title in the U.S. See also GUY PEARSE, *THE GREENWASH EFFECT: CORPORATE DECEPTION, CELEBRITY ENVIRONMENTALIST, AND WHAT BIG BUSINESS ISN'T TELLING YOU ABOUT THEIR GREEN PRODUCTS AND BRANDS* (2014).

37. See JAMES HANSEN, *STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY* (2009).

1. The Relationship of the TPP to Multilateral Environmental Treaties

In a key statement in 2014, the U.S. Trade Representative Mike Froman maintained: “Our proposals in the TPP are centered around the enforcement of environmental laws, including those implementing multilateral environmental agreements (MEAs) in TPP partner countries, and also around trailblazing, first-ever conservation proposals that will raise standards across the region.”³⁸ Froman has maintained: “Our values also tell us that the future global economy should be more sustainable than it is today.”³⁹ He maintained that the Environment Chapter of the TPP would establish high standards of protection: “We are working to set the world’s highest standards in the environment chapters of our trade agreements.”⁴⁰ Froman commented: “As we do with labor provisions, we have insisted that environmental commitments be on equal footing with commercial obligations.”⁴¹ He vowed: “Commitments to protect endangered species, for example, must be taken just as seriously as commitments to lower tariffs and protect intellectual property, including being subject to enforceable dispute settlement.”⁴²

Coral Davenport, the environmental correspondent for *The New York Times*, broke the story of the WikiLeaks’ publication of the TPP.⁴³ She observed: “The Obama administration is retreating from previous demands of strong international environmental protections in order to reach agreement on a sweeping Pacific trade deal that is a pillar of President Obama’s strategic shift to Asia.”⁴⁴ Davenport noted: “The negotiations over the TPP, which would be one of the world’s biggest trade agreements, have exposed deep rifts over environmental policy between the United States and 11 other Pacific Rim nations.”⁴⁵ She stressed: “As it stands now, the documents, viewed by The New York Times, show that the disputes could undo key global environmental protections.”⁴⁶

38. *The United States and Environmental Protections in the Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE BLOG (Jan. 16, 2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/January/The-US-and-Environmental-Protections-in-the-TPP>.

39. Michael Froman, U.S. Trade Representative, U.S. Dep’t of State, Speech at the Center for American Progress, A Values-Driven Trade Policy (Feb. 18, 2014), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P.

40. *Id.*

41. *Id.*

42. *Id.*

43. Coral Davenport, *Administration Is Seen as Retreating on Environment in Talks on Pacific Trade*, N.Y. TIMES (Jan. 15, 2014), <http://www.nytimes.com/2014/01/15/us/politics/administration-is-seen-as-retreating-on-environment-in-talks-on-pacific-trade.html>.

44. *Id.*

45. *Id.*

46. *Id.*

A joint analysis of the draft text by the Sierra Club, WWF, and NRDC was highly critical of the language in the TPP on multilateral environmental treaties.⁴⁷ The leading environmental groups comment that the language represents a regression from previous trade deals:

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) and to commit Parties to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfil its obligations under each MEA.⁴⁸

The environmental groups urged the Obama administration to revise its approach to the enforcement of multilateral environmental agreements under the TPP.

In October 2015, the text of the TPP was agreed to by negotiating parties. In November 2015, the final text of the TPP was published. Article 20.2 of the TPP deals with the objectives of the Environment Chapter.⁴⁹ Article 20.2.1 of the TPP provides: “The objectives of this Chapter are to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation.”⁵⁰ Article 20.2.2 emphasizes: “Taking account of their respective national priorities and circumstances, the Parties recognize that enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance and complement the objectives of this Agreement.”⁵¹ Article 20.2.3 is suspicious, though, of protectionist behaviour: “The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.”⁵² Article 20.3 addresses general commitments of the parties—including “the importance of mutually supportive trade and environmental policies and practices to improve

47. Press Release, Sierra Club, WWF & NRDC, Analysis of Leaked Environment Chapter Consolidated Text (Jan. 15, 2014), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPP_Enviro_Analysis.pdf.

48. *Id.*

49. TPP, *supra* note 5, art. 20.2.

50. *Id.* at art. 20.2.1.

51. *Id.* at art. 20.2.2.

52. *Id.* at art. 20.2.3.

environmental protection in the furtherance of sustainable development.”⁵³ There is a gap between the aspirations of the objectives and commitments of the Environment Chapter of the TPP and the weak text of the agreement itself.

Article 20.4 deals with multilateral environmental agreements.⁵⁴ Article 20.4.1 provides: “The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements.”⁵⁵ Article 20.4.1 also acknowledges: “Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.”⁵⁶ Article 20.4.2 discusses mutual supportiveness: “The Parties emphasise the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements.”⁵⁷ This language of recognition, affirmation, and dialogue seems to be quite weak in dealing with the multilateral commitments of nation states in respect of environmental agreements.

Somewhat surprisingly, the final text of TPP does explicitly address the protection of the ozone layer in Article 20.5.⁵⁸ Article 20.5.1 provides that “[t]he Parties recognise that emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment.”⁵⁹ Article 20.5.1 emphasizes that “each Party shall take measures to control the production and consumption of, and trade in, such substances.”⁶⁰ Article 20.5.2 insists that “[t]he Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures concerning the protection of the ozone layer.”⁶¹ Article 20.5.2 observes: “Each Party shall make publicly available appropriate information about its programmes and activities, including cooperative programmes, that are related to ozone layer

53. *Id.* at art. 20.3.1.

54. *Id.* at art. 20.4.

55. TPP, *supra* note 5, art. 20.4.1.

56. *Id.*

57. *Id.* at art. 20.4.2.

58. *Id.* at art. 20.5.

59. *Id.* at art. 20.5.1.

60. *Id.*

61. TPP, *supra* note 5, art. 20.5.2.

protection.”⁶² Article 20.5.3 discusses cooperation on matters of mutual interest related to ozone-depleting substances—including “environmentally friendly alternatives to ozone-depleting substances,” “refrigerant management practices, policies and programmes,” “methodologies for stratospheric ozone measurements,” and “combating illegal trade in ozone-depleting substances.”⁶³

A grand alliance of Green Groups has demanded that the U.S. Congress vote against the TPP unless it includes binding rules and obligations in the Environment Chapter.⁶⁴ The group called for the inclusion of “All of the ‘May 10th’ standards, which are also all included in the Trade Priorities and Accountability Act of 2015.”⁶⁵ The Green Groups demanded:

The binding obligation to uphold commitments made under all seven [Multilateral Environmental Agreements] MEAs and subjecting 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 that a country faces consequences if it does weaken its safeguards.⁶⁶

The Green Groups maintained that all the TPP countries should adopt, maintain, and implement their obligations under a comprehensive list of agreements, including the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES); *The Montreal Protocol on Substances that Deplete the Ozone Layer*; *The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*; *The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (The Ramsar Convention)*; *The International Convention for the Regulation of Whaling*; *The Convention on the Conservation of Antarctic Marine Living Resources*; and *The Convention for the Establishment of an Inter-American Tropical Tuna Commission*.⁶⁷ Moreover, the Green Groups insisted that compliance with the *Minamata Convention on Mercury* be made mandatory under the TPP.⁶⁸

Overall, the TPP fails to build upon the framework of existing multilateral environmental agreements.

62. *Id.*

63. *Id.* at art. 20.5.3.

64. Letter from 350.org et al. to Members of Congress (Oct. 29, 2015), available at <http://static.politico.com/69/cc/35a9fd894eebb11bd98522ca122c/environment-consumer-groups-letter-to-congress-on-tpp.pdf> (last visited Apr. 8, 2016).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

2. Enforcement

The U.S. Trade Representative, Michael Froman, insisted that the TPP would have strong enforcement mechanisms for the Environment Chapter of the TPP: “U.S. negotiators have made clear where we don’t agree with weaker TPP proposals on environmental provisions, and just how serious we are about making sure that the obligations in the environmental chapter are subject to the same enforcement processes as obligations elsewhere in the TPP, including recourse to trade sanctions.”⁶⁹

Michael Froman, insisted that the agreement would promote enforcement of environmental standards: “We are asking our trading partners to commit to effectively enforce environmental laws, including those laws implementing multilateral environmental agreements—and we are committed to making sure our partners follow through.”⁷⁰ He commented that the TPP “encourages [the trading partners of the U.S.] to take a more sustainable approach to development and it levels the playing field for those companies, including American companies, who maintain high standards for their workers and the communities where they operate.”⁷¹

In 2012, members of the U.S. Congress—including Senator Ron Wyden (D-OR), Olympia Snowe (R-ME), John Kerry (D-MA)—insisted that the effective enforcement of multilateral environmental agreements was critical to the TPP.⁷² The politicians stressed: “The environment chapters in recent U.S. trade agreements strengthened by the 2007 bipartisan agreement include a) the effective enforcement of multilateral environmental agreements with a clear trade nexus, b) the non-derogation from a party’s environmental laws, and c) the application of dispute settlement provisions to the environmental obligations in the same manner as commercial obligations.”⁷³ In their view, such measure were essential in ensuring transparency, accountability, and high regulatory standards with trading partners.

In March 2015, Brian Deese, Senior Advisor to President Obama, and Christy Goldfuss, Managing Director at the White House Council on Environmental Quality, asserted that “we plan to make those environmental commitments fully enforceable in the core of the TPP agreement, on equal footing with the economic obligations our

69. U.S. TRADE REPRESENTATIVE BLOG, *supra* note 38.

70. Froman, *supra* note 39.

71. *Id.*

72. Letter from Ron Wyden, *supra* note 13.

73. *Id.*

trading partners take on.”⁷⁴

In its analysis of the 2013 draft text, WikiLeaks observed that “the Environment Chapter does not include enforcement mechanisms serving the defence of the environment; it is vague and weak, and adheres to the lowest common denominator of environmental interests.”⁷⁵ Ilana Solomon of the Sierra Club commented: “It rolls back key standards set by Congress to ensure that the environment chapters are legally enforceable, in the same way the commercial parts of free-trade agreements are.”⁷⁶ Carter Roberts, president and CEO of the World Wildlife Fund, said: “The lack of fully-enforceable environmental safeguards means negotiators are allowing a unique opportunity to protect wildlife and support legal sustainable trade of renewable resources to slip through their fingers.”⁷⁷ Professor Jane Kelsey of the University of Auckland said: “Instead of a 21st century standard of protection, the leaked text shows that the obligations are weak and compliance with them is unenforceable.”⁷⁸ New Zealand Green Party MP Gareth Hughes commented: “There is a double standard with weak enforcement measures for breaching environmental rules, but strong enforcement measures in areas like mining and copyright.”⁷⁹

Peter Lehner, executive director of the NRDC, commented: “Environmental protections are only as effective as their enforcement provisions, and a trade agreement with weak enforcement language will do little or nothing to protect our communities and wildlife.”⁸⁰ He observed: “Starting with the Bush administration, the United States has insisted that all trade pacts include enforceable environmental protections, and we should settle for nothing less in the TPP.”⁸¹ He maintained: “Considering the dire state of many fisheries and forests in the Asia-

74. Brian Deese & Christy Goldfuss, *What They're Saying: Environmental Advocates Point to the Trans-Pacific Partnership as a Historic Opportunity to Protect our Oceans, Forests, and Wildlife*, WHITE HOUSE BLOG (March 31, 2015), <https://www.whitehouse.gov/blog/2015/03/31/what-theyre-saying-environmental-advocates-point-trans-pacific-partnership-historic->.

75. Press Release, WikiLeaks, TPP – Sacrificing the Environment for Corporate Interests (Jan. 15, 2014), <https://wikileaks.org/tpp-sacrificing-the-environment.html>.

76. Coral Davenport, *supra* note 43.

77. Press Release, Sierra Club, Green Groups: Leaked Trans-Pacific Partnership Environment Chapter Unacceptable (Jan. 15, 2014), <http://content.sierraclub.org/press-releases/2014/01/green-groups-leaked-trans-pacific-partnership-environment-chapter>.

78. JANE KELSEY, TPPA ENVIRONMENT CHAPTER & CHAIR'S COMMENTARY POSTED BY WIKILEAKS: ISSUES FOR NZ (2014), *available at* <http://www.itsourfuture.org.nz/wp-content/uploads/2014/01/TPPA-Environment-Chapter.pdf>. *See also* Jane Kelsey, *Trans-Pacific Partnership's Toothless Environment Chapter Gets the Wikileaks Treatment*, THE CONVERSATION (Jan. 22, 2014), <https://theconversation.com/trans-pacific-partnerships-toothless-environment-chapter-gets-the-wikileaks-treatment-22135>.

79. Press Release, Green Party of Aotearoa New Zealand, Government Failing the Environment in TPP Talks – Green Party Media Release (Jan. 16, 2014), <https://home.greens.org.nz/press-releases/govt-failing-environment-tpp-talks-green-party-media-release>.

80. Sierra Club, *supra* note 77.

81. *Id.*

Pacific region and the myriad threats to endangered wildlife, we need a modern trade agreement with real teeth, not just empty rhetoric.”⁸²

The joint analysis by the Sierra Club, WWF, and NRDC was highly critical of the language in the TPP and lamented the lack of enforcement in respect of environmental obligations.⁸³ The groups observe that “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.”⁸⁴ The groups noted: “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.”⁸⁵ The leading environmental groups concluded that the TPP failed to honor that agreement: “This vastly insufficient process is an unacceptable rollback of previous commitments and renders the obligations in this chapter virtually meaningless.”⁸⁶

In November 2015, the final text of the TPP was published. There is a mismatch between the rhetorical emphasis upon enforcement by the participants and the actual text. It is notable that the criticisms made by environmental and climate groups about the draft texts had not been addressed. Indeed, in a number of respects, the problems in respect of environmental protection were exacerbated. It is striking how the U.S. Trade Representative has seemed impervious to criticism of the Environment Chapter of the TPP.

Article 20.2 of the TPP speaks of the need to “promote high levels of environmental protection and effective enforcement of environmental laws.”⁸⁷

Article 20.19 establishes an Environment Committee and Contact Points.⁸⁸ Article 20.20 deals with consultations on the environment.⁸⁹ Article 20.21 deals with senior representative consultations.⁹⁰ Article 20.22 concerns ministerial consultations.⁹¹ Article 20.23 deals with dispute settlement.⁹² Article 20.23.1 observes:

If the consulting Parties have failed to resolve the matter under Article 20.20 (Environmental Consultations), Article 20.21 (Senior Representative Consultations)

82. *Id.*

83. Sierra Club, *supra* note 47.

84. *Id.*

85. *Id.*

86. *Id.*

87. TPP, *supra* note 5, art. 20.2.

88. *Id.* at art. 20.19.

89. *Id.* at art. 20.20.

90. *Id.* at art. 20.21.

91. *Id.* at art. 20.22.

92. *Id.* at art. 20.23.

and Article 20.22 (Ministerial Consultations) within 60 days after the date of receipt of a request under Article 20.20, or any other period as the consulting Parties may agree, the requesting Party may request consultations under Article 28.5 (Consultations) or request the establishment of a panel under Article 28.7 (Establishment of a Panel).⁹³

With the announcement of an agreement in October 2015, Michael Brune of the Sierra Club commented: “The TPP’s environment chapter might look nice on the surface but will be hollow on the inside, and history gives us no reason to believe that TPP rules on conservation challenges such as the illegal timber or wildlife trade will ever be enforced.”⁹⁴

Emma Gibson, Head of Program for Greenpeace Australia Pacific said: “What we are seeing is mere lip service to environmental protection from the parties to the agreement, which has been touted as the largest ever free trade deal.”⁹⁵ She lamented: “Given the scope of the agreement and the time it has taken to negotiate, there is a complete lack of leadership and vision where it comes to environmental protection.”⁹⁶ Gibson highlighted the lack of appropriate protection of the environment: “The chapter on the environment is deeply disappointing because there are no new standards for environmental protection, merely a reinforcement of existing national and multilateral laws.”⁹⁷ She noted: “There are no new enforcement mechanisms to ensure that countries uphold their own environmental standards, and the mechanisms to enhance environmental performance are only voluntary.”⁹⁸

A Coalition of Green Groups called upon the U.S. Congress to reject the TPP—unless there was meaningful enforcement of environmental rules and standards.⁹⁹ It noted: “Strong obligations with weak or no enforcement would render the chapter meaningless.”¹⁰⁰ The group observed: “Our organizations are also extremely concerned that the provisions agreed to in the environment chapter will not be enforced.”¹⁰¹ The green groups commented: “The United States has never once brought a trade dispute against another country for failing to live up to its

93. TPP, *supra* note 5, art. 20.23.1.

94. Press Release, Sierra Club, Congress Should Reject Polluter-Friendly Trans-Pacific Partnership (Oct. 5, 2015), <http://content.sierraclub.org/press-releases/2015/10/sierra-club-congress-should-reject-polluter-friendly-trans-pacific>.

95. Press Release, Greenpeace, TPP Environmental Provisions a Major Disappointment (Nov. 6, 2015), <http://www.greenpeace.org/australia/en/mediacentre/media-releasesclimate/TPP-environmental-provisions-a-major-disappointment>.

96. *Id.*

97. *Id.*

98. *Id.*

99. Letter from 350.org et al., *supra* note 64.

100. *Id.*

101. *Id.*

environmental obligations in trade deals even when there has been documented evidence of non-compliance with environmental obligations.”¹⁰² In particular, there was concern about the failure by the U.S. Trade Representative to take action under the *U.S.-Peru Trade Promotion Agreement* to combat the problem of illegal logging. The Green groups contended that “given the failure of the current dispute settlement system to monitor and address issues of non-compliance, we urge a new approach to dispute settlement resolution for environmental complaints.”¹⁰³ The Coalition suggested: “One approach could be to establish and empower an independent body to continuously monitor countries’ compliance with environment chapter obligations, report on best-practices and compliance, and bring cases directly to a dispute settlement body if and when it finds non-compliance with environmental obligations.”¹⁰⁴

The TPP will be unable to realize its objectives and goals in respect of environmental protection because of the lack of an effective enforcement mechanism.

3. Trade and Biodiversity

There has been concern about the efficacy of the multilateral framework for the protection of biodiversity.¹⁰⁵

The Pacific Rim features a rich and diverse environment, with ecosystems such as the Great Barrier Reef,¹⁰⁶ The Amazon, and a third of all the threatened species on earth.

The U.S. Trade Representative, Michael Froman, has argued that the TPP would address conservation challenges, which were particularly prevalent in the Asia-Pacific region:

Our TPP partners include many “biodiversity hotspots” some of which have served as conduits for illegal trade and smuggling in threatened animal, timber, plant and marine species. This makes TPP a unique opportunity to improve regional cooperation and enforcement of the rules of the Convention on International Trade in Endangered Species (CITES), from the islands of Southeast Asia to the interior of Vietnam, from the forests of Chile and Peru to the plains of Australia. Whether

102. *Id.*

103. *Id.*

104. *Id.*

105. CHARLES LAWSON, *REGULATING GENETIC RESOURCES: ACCESS AND BENEFIT SHARING IN INTERNATIONAL LAW* (2012).

106. IAIN MCCALMAN, *THE REEF: A PASSIONATE HISTORY: THE GREAT BARRIER REEF FROM CAPTAIN COOK TO CLIMATE CHANGE* (1st ed., 2014).

protecting big-leaf mahogany or tigers, sharks and chinchillas, stronger legal frameworks, more cooperation, and better enforcement will improve the chances that these species survive.¹⁰⁷

Froman has maintained: “Similarly, the broader U.S. proposals on conservation, also detailed in our Green Paper, would elevate other TPP countries’ commitments toward our own congressionally-set standards on issues such as the conservation of wildlife, forests, and protected areas.”¹⁰⁸

In 2012, members of the U.S. Congress—including Senator Ron Wyden (D-OR), Olympia Snowe (R-ME), John Kerry (D-MA)—emphasized the need for biodiversity protection and environmental conservation:

An agreement that is good for American businesses, good for the environment, creates jobs, and keeps the playing field across the Pacific region can only be achieved by strengthened the legal and sustainable trade of natural resources and combating trade in illegal timber, fish, and wildlife. Without such provisions, the rich biodiversity of the Pacific Rim and the legitimate businesses and good jobs it sustains will continue to be threatened, ultimately undermining legal trade and the U.S. economy.¹⁰⁹

Draft Article SS.13 of the Environment Chapter of the TPP addresses the topic of trade and biodiversity.¹¹⁰ The language echoes some of the key principles in the *Convention on Biological Diversity* 1992,¹¹¹ the *Bonn Guidelines* 2002,¹¹² and the *Nagoya Protocol* 2010.¹¹³

Draft Article SS.13.1 of the TPP recognises the “importance of conservation and sustainable use of biological diversity and their key role in achieving sustainable development.”¹¹⁴ The text promotes access to genetic resources, benefit-sharing, and the protection of Indigenous Knowledge.

Draft Article SS.13.2 provides that “the Parties are committed to promoting and encouraging the conservation and sustainable use of biological diversity and sharing

107. Froman, *supra* note 39.

108. U.S. TRADE REPRESENTATIVE BLOG, *supra* note 38.

109. Letter from Ron Wyden, *supra* note 13.

110. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

111. *Convention on Biological Diversity* 1992, opened for signature 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 December 1993).

112. *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, in Report Secretariat of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/6/20 (2002).

113. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, Feb. 2, 2011-Feb. 1, 2012 [hereinafter *Nagoya Protocol*].

114. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

in a fair and equitable way the benefits arising from the utilization of genetic resources.”¹¹⁵

Draft Article SS.13.3 emphasizes that “the Parties reiterate their commitment to, subject to national legislation, respecting, preserving and maintaining the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”¹¹⁶

Draft Article SS.13.4 emphasizes that “the Parties recognize the sovereign rights of States over their natural resources, and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”¹¹⁷

Draft Article SS.13.5 stresses: “The Parties recognize that, subject to national legislation, access to genetic resources for their utilization, where granted, should be subject to the prior informed consent of the Party providing such resources, unless otherwise determined by that Party.”¹¹⁸ The provision maintains that “the Parties further recognize that benefits arising from the utilization of these genetic resources should be shared in a fair and equitable way.” It stresses that “such sharing should be upon mutually agreed terms.”¹¹⁹

Draft Article SS.13.6 comments that “the Parties also recognize the importance of public participation and consultations, as provided for by domestic law or policy, on matters concerning the conservation and sustainable use of biological diversity.”¹²⁰ It suggests: “Each Party should make publicly available information about its programs and activities, including cooperative programs, related to the conservation and sustainable use of biological diversity.”¹²¹

Draft Article SS.13.7 promotes cooperative activity “in areas of mutual interest related to biological diversity.”¹²² Cooperation includes “the conservation and sustainable use of biological diversity” as well as “the protection and maintenance of ecosystem and ecosystem services” and “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

121. *Id.*

122. *Id.*

genetic resources.”¹²³

As revealed by the draft texts, the U.S. has provided opposition to this language on the basis that it was not a member of the *Convention on Biological Diversity* 1992. As such, the TPP will do little to protect the magnificent biodiversity of the Pacific Rim. Neither the draft texts nor the final texts of the TPP adequately address the international environmental framework in respect of the conservation of biodiversity.

On the topic of biodiversity, Professor Jane Kelsey from the University of Auckland was critical of the failure of the Environment Chapter of the TPP to properly address Indigenous rights.¹²⁴ She commented: “Prior consent to accessing genetic resources and fair and equitable sharing of the benefits in paragraph 5 relates to the state, not to indigenous peoples or local communities.”¹²⁵ Such an approach is less than what is required under the *Convention on Biological Diversity* 1992, the *Bonn Guidelines* 2001, and the *Nagoya Protocol* 2010. Moreover, Kelsey observed: “This falls far short of the *UN Declaration on the Rights of Indigenous Peoples* 2007.”¹²⁶

The problem was further compounded by the final version of the Intellectual Property Chapter of the TPP.¹²⁷ There has long been a close interaction between intellectual property, access to genetic resources, and Indigenous intellectual property.¹²⁸ The final text of the TPP has only soft language about cooperation by nation states in respect of the protection of traditional knowledge. Little wonder Maori groups and communities are challenging the validity and legitimacy of the TPP under the *Treaty of Waitangi* 1840.¹²⁹

In a letter to the U.S. Trade Representative in July 2015, a group of 19 Democrats in the House of Representatives—led by Earl Blumenauer—expressed concerns about the Environment Chapter of the TPP.¹³⁰ The group highlighted that the “TPP countries represent some of the most resource-rich regions in the world.”¹³¹ The House Democrats warned:

123. *Id.*

124. KELSEY, *supra* note 78.

125. *Id.*

126. *Id.*

127. *TPP Treaty: Intellectual Property Rights Chapter – 5 October 2015*, WIKILEAKS, <https://wikileaks.org/tpp-ip3> (last visited Apr. 9, 2016).

128. INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH (Matthew Rimmer ed., 2015).

129. *Waitangi Tribunal Claim*, TPP LEGAL BLOG (Aug. 23, 2015), <https://tpplegal.wordpress.com/2015/08/23/waitangi-tribunal-claim>.

130. Letter from Earl Blumenauer, Member of Congress, et al. to Michael Froman, U.S. Trade Representative (July 29, 2015), available at http://blumenauer.house.gov/images/pdf/072915_letter_TPP.pdf.

131. *Id.*

From Vietnam's Mekong Delta to the Peruvian Amazon to Chile's Patagonia wilderness to the rich Pacific Ocean that ties all TPP countries together, we cannot forego an opportunity to improve environmental protections, enforce conservation standards, and prohibit the illegal trade in wildlife, forest, and living marine resources to a degree that no level of foreign aid could accomplish.¹³²

The final text of the TPP does contain language on trade and biodiversity in Article 20.13, but it is minimalist text, which has been cut down from the earlier drafts.¹³³ Article 20.13.1 provides: "The Parties recognise the importance of conservation and sustainable use of biological diversity and their key role in achieving sustainable development."¹³⁴ Article 20.13.2 states: "Accordingly, each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy."¹³⁵ Article 20.13.3 provides: "The Parties recognise the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity."¹³⁶ It is noticeable here that there is some small reference to Indigenous rights in respect of access to genetic resources. Article 20.13.4 notes: "The Parties recognise the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party's international obligations."¹³⁷ Moreover, the Parties also recognize that some Parties "require, through national measures, prior informed consent to access such genetic resources in accordance with national measures and, where such access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of such genetic resources, between users and providers."¹³⁸ Article 20.13.5 provides: "The Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures concerning the conservation and sustainable use of biological diversity."¹³⁹ Article 20.13.5 also stresses: "Each Party shall make publicly available information about its programmes and activities, including cooperative programmes, related to the conservation and sustainable use

132. *Id.*

133. TPP, *supra* note 5, art. 20.13. See also *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20 (providing the draft text of the Environment Chapter of the TPP).

134. TPP, *supra* note 5, art. 20.13.1.

135. *Id.* at art. 20.13.2.

136. *Id.* at art. 20.13.3.

137. *Id.* at art. 20.13.4.

138. *Id.*

139. *Id.* at art. 20.13.5.

of biological diversity.”¹⁴⁰ Article 20.13.6 observes that “the Parties shall cooperate to address matters of mutual interest,” including “the conservation and sustainable use of biological diversity” and “the protection and maintenance of ecosystems and ecosystem services” as well as “access to genetic resources and the sharing of benefits arising from their utilization.”¹⁴¹

In my view, the TPP fails to promote the conservation of biodiversity in the Pacific Rim, and that should be a reason and cause for regret. There was a missed opportunity to provide a substantive regime in respect of the protection of biodiversity.

4. Marine Capture Fisheries

The U.S. Trade Representative has argued that the TPP would provide groundbreaking new tools to protect our oceans.¹⁴² The 2011 Green Paper emphasized: “The United States and other TPP countries have proposed TPP disciplines on subsidies that contribute to overcapacity and overfishing, potentially lighting the way for a WTO multilateral agreement on fisheries subsidies.”¹⁴³ The U.S. Trade Representative also hoped to promote regional fisheries management organizations. The Green Paper stresses: “Shark populations in the region are at particular risk, and the United States has proposed specific obligations in this area, such as actions to deter “shark-finning” practices.”¹⁴⁴ There has been much debate about whether the TPP has realized such ambitions.

On the topic of marine protection, the U.S. Trade Representative has maintained that the TPP would overcome previous difficulties within the WTO:

And when it comes to oceans, for decades the WTO has tried—unsuccessfully—to reach agreement to constrain subsidies that encourage overfishing and ruin our marine life. TPP and TTIP [Transatlantic Trade and Investment Partnership] are not-to-be-missed opportunities for a breakthrough on fishing subsidies which would be important in its own right and as a step toward breaking international deadlock on this issue.¹⁴⁵

The U.S. Trade Representative has maintained: “The groundbreaking conservation and marine fisheries provisions proposed by the United States in the TPP talks—fully explained in our December 2011 ‘Green Paper’ online—go beyond

140. TPP, *supra* note 5, art. 20.13.5.

141. *Id.* at art. 20.13.6.

142. U.S. TRADE REPRESENTATIVE, *supra* note 8.

143. *Id.*

144. *Id.*

145. Froman, *supra* note 39.

the multilateral agreements on fisheries management to which the United States and some of the other countries are already parties.”¹⁴⁶ He insisted: “We are proposing that the TPP include, for the first time in any trade or environment agreement, groundbreaking prohibitions on fish subsidies that set a new and higher baseline for fisheries protections.”¹⁴⁷

In 2012, members of the U.S. Congress—including Senator Ron Wyden (D-OR), Olympia Snowe (R-ME), John Kerry (D-MA)—emphasized the need to protect ocean resources: “Without adequate protection, the threats to the Pacific Rim’s natural resources are clear.”¹⁴⁸ The members of the U.S. Congress were concerned that government-sponsored fishing subsidies were “driving the depletion of fish resources in the Pacific Rim and they put the U.S. fish and seafood industries at an economic disadvantage, limiting their ability to compete in domestic and foreign markets.”¹⁴⁹ The protection of dolphins, sharks, and whales is a particularly significant issue in the TPP.

The Sierra Club, WWF, and NRDC are critical of the text in respect of Marine Capture Fisheries revealed by the WikiLeaks publication:

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.¹⁵⁰

The environmental groups made a number of recommendations for revision and reform in this particular area.

In her analysis, Coral Davenport highlighted the weak language in respect of shark-finning in the TPP.¹⁵¹ She commented:

In addition, the draft does not contain clear requirements for a ban on shark finning, which is the practice of capturing sharks and cutting off their fins—

146. *Id.*

147. *Id.*

148. Letter from Ron Wyden, *supra* note 13.

149. *Id.*

150. Sierra Club, *supra* note 47.

151. Coral Davenport, *Administration Is Seen as Retreating on Environment in Talks on Pacific Trade*, N.Y. TIMES (Jan. 15, 2014), <http://www.nytimes.com/2014/01/15/us/politics/administration-is-seen-as-retreating-on-environment-in-talks-on-pacific-trade.html>.

commonly used in shark-fin soup—and throwing back the sharks to die. The dish is a delicacy in many of the Asian negotiating countries. At this point the draft says that the countries “may include” bans “as appropriate” on such practices.¹⁵²

A number of the negotiating parties in the TPP—Australia and Japan—have been involved in a significant international dispute over whaling in the International Court of Justice.¹⁵³ Samantha Page reported that whaling was a contentious issue in respect of the TPP negotiations.¹⁵⁴ She noted that “Japan has been pushing back against potential whale-hunting prohibitions.”¹⁵⁵ There remains deep concern that Japan has shown little respect for environmental protection in respect of sharks, whales, dolphins.

Russell Simons, Simone Reyes, and a number of celebrities—including Sean Penn, Mia Farrow, Cher, Moby, and Emily Deschanel—have called upon President Barack Obama and Ambassador Caroline Kennedy to refuse to let Japan join the TPP until it abandons its practices of the slaughter of cetacean species.¹⁵⁶ The group observed that “we feel the only way to end these heinous crimes against dolphins migrating through Japan’s waters is to inject our position into the current conversation regarding the trade agreement.”¹⁵⁷ The signatories called upon White House to make the slaughter of dolphins and captive trade a key factor in the negotiations ahead in respect of the TPP. Such efforts to ban Japan from the TPP have been unsuccessful.

A number of environmental organizations have focused upon the issue of marine fisheries. The Sea Shepherd has been particularly concerned about the impact of the agreement. Omar Todd of the Sea Shepherd has argued:

The TPP has since its inception been kept in the shadows, negotiated without the public eye and out of sight from the general public. Sea Shepherd supports the importance of biodiversity and open consultative dialogue for any trade agreements.¹⁵⁸

152. *Id.*

153. *See Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, I.C.J. (Mar. 31 2014), <http://www.icj-cij.org/docket/files/148/18160.pdf> (providing a summary of the judgment). *See also* PETER GARRETT, *BIG BLUE SKY: A MEMOIR* (2015) (recounting the conflict within the former Australian Environment Minister’s biography).

154. Samantha Page, *What Does The New Environmental Chapter Mean For The TPP? Not Much, Activists Say*, THINK PROGRESS (July 31, 2015), <http://thinkprogress.org/climate/2015/07/31/3686695/tpp-environmental-chapter>.

155. *Id.*

156. *Celebrities Demand President Make Japan’s Dolphin Slaughter “A Key Factor” in Next Round of TPP Negotiations*, THE SPARROW PROJECT (Feb. 6, 2014), <http://www.sparrowmedia.net/2014/02/trans-pacific-partnership-taiji-dolphin-celebrities-tpp>.

157. *Id.*

158. Press Release, Common Dreams, New Campaign Launched: “10 Days to Stop Fast Track” Brings Together Diverse Network of Labor, Internet, and Environmental Activists (Jan. 23, 2014),

Accordingly, the Sea Shepherd has joined the coalition of civil society organizations, which have opposed the U.S. Congress supporting the TPP.

In a consideration of the issue for Shark Week, Ilana Solomon from the Sierra Club expressed concerns about the text on Marine Capture Fisheries in the TPP.¹⁵⁹ She commented: “Unfortunately, a massive trade agreement currently under negotiation between the United States and 11 other Pacific Rim countries seems to leave shark fins on the chopping block.”¹⁶⁰ Solomon worried: “In fact, many of the 12 Pacific Rim countries negotiating the secretive trade pact—Malaysia, Vietnam, and Singapore, to name a few—have a long and bloody history in the shark fin trade.”¹⁶¹ She was concerned that “the TPP includes only very vague references to shark finning—not the full ban on shark finning and associated trade that we need.” Solomon was also concerned about the operation of the Investment Chapter: “Other parts of the TPP would allow corporations to sue governments over environmental safeguards—like protections for sharks—that might decrease their profits.”¹⁶² In her view, “This could mean a huge step backward in the fight to protect sharks.”¹⁶³

The final text of the TPP does contain language on marine capture fisheries in Article 20.16.¹⁶⁴ Article 20.16.1 emphasizes:

The Parties acknowledge their role as major consumers, producers and traders of fisheries products and the importance of the marine fisheries sector to their development and to the livelihoods of their fishing communities, including artisanal or small-scale fisheries. The Parties also acknowledge that the fate of marine capture fisheries is an urgent resource problem facing the international community. Accordingly, the Parties recognise the importance of taking measures aimed at the conservation and the sustainable management of fisheries.¹⁶⁵

Moreover, the agreement notes: “Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures.”¹⁶⁶ Much will depend upon the voluntary efforts of member states of the

<http://www.commondreams.org/newswire/2014/01/23/new-campaign-launched-10-days-stop-fast-track-brings-together-diverse-network>.

159. Ilana Solomon, *Predators, Prey, and the Trans-Pacific Partnership*, HUFFPOST GREEN BLOG (Aug. 12, 2014), http://www.huffingtonpost.com/ilana-solomon/predators-prey-and-the-tr_b_5671765.html.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. TPP, *supra* note 5, art. 20.16.

165. *Id.* at art. 20.16.1.

166. *Id.* at art. 20.16.4.

TPP.

Greenpeace USA researcher Charlie Cray commented: “The text includes toothless ocean conservation provisions with slippery language that encourages but does not require bans on trade in illegal timber, shark finning, commercial whaling and illegal, unreported and unregulated (IUU) fishing.”¹⁶⁷ Cray said that “there are better ways to protect the world's oceans than what's in the TPP.”¹⁶⁸

A Coalition of Green Groups made a number of recommendations in respect of fisheries, oceans, and marine protection.¹⁶⁹ The alliance maintained that there should be “legally binding commitments to address illegal, unreported, and unregulated (IUU) fishing.”¹⁷⁰ Moreover, there should be “legally binding rules to prohibit subsidies that contribute to overcapacity and overfishing.”¹⁷¹ Furthermore, the Green Groups pressed for “legally binding prohibitions on shark finning and associated trade and commercial whaling.”¹⁷² The coalition said: “With respect to whaling, it is critical that countries are required to adopt, maintain, and implement its obligations under the *International Convention for the Regulation of Whaling*.”¹⁷³ The Green Groups warned: “Language that recognizes the problems of shark finning and commercial whaling without specific and enforceable obligations to address these problems would put sharks and whale populations at increased risk by making potential markets for these illegal products larger.”¹⁷⁴

Overall, the TPP does not fulfil its promises of providing stronger protection in respect of the oceans of the Pacific Rim.

5. Conservation

In 2011, the U.S. Trade Representative developed a Green Paper on trade, conservation, and the environment in the context of the TPP.¹⁷⁵ The Green Paper stressed: “The significance of existing problems with illegal wildlife and wild plant trade warrant bold measures in the TPP.”¹⁷⁶ The Green Paper promised: “Our proposal for a conservation framework in the TPP environment chapter reflects our

167. Rodrigo Estrada Patino, *Greenpeace Response to the Trans-Pacific Partnership Text*, GREENPEACE (Nov. 5, 2015), <http://www.greenpeace.org/usa/news/greenpeace-response-to-the-trans-pacific-partnership-text>.

168. *Id.*

169. Letter from 350.org et al., *supra* note 64.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. U.S. TRADE REPRESENTATIVE, *supra* note 8.

176. *Id.*

determination to negotiate a truly 21st-century result for trade and the environment.”¹⁷⁷

Apparently, during the negotiations, Australia voiced reservations about the U.S. conservation proposal, because of a belief that it is overly prescriptive and fails to take into account individual variation in national laws. Australia was also concerned about preserving the precautionary principle under the TPP—the tenet which stipulates that decision-makers should be cautious when assessing potential health and environmental risks in the absence of full scientific knowledge.¹⁷⁸

Mike Baker, the chief executive of World Animal Protection was a supporter of the TPP.¹⁷⁹ He argued that the “TPP can potentially enhance and embed international standards for wildlife.”¹⁸⁰ He contended that “the deal’s environment chapter can potentially help curb one of the severest transnational crimes: wildlife trafficking.”¹⁸¹ In his view, “with Asia-Pacific countries on both the supply and demand side of the trade, and the United States as the second largest market for illegal wildlife products, the TPP presents a unique opportunity to help combat this insidious trade.”¹⁸² He maintained: “The TPP’s environment chapter can potentially enhance and embed standards for wildlife and marine animals.”¹⁸³ However, his endorsement does not address whether the provisions of wildlife trafficking will be substantive, meaningful, or enforceable.

In 2013, Carter Roberts, the President and CEO of WWF, pressed the U.S. government to take a stronger line on conservation in the TPP talks. He observed that “there remain unrealized opportunities to incorporate environmental provisions into the framework of the TPP.”¹⁸⁴ Roberts argued that “it is critical that international trade agreements, such as the emerging TPP, incorporate strong conservation provisions to ensure that natural resources are legally harvested and traded and developed sustainably in source countries.”¹⁸⁵ Carter Roberts commented: “Where natural resources are poorly managed, the demand generated

177. *Id.*

178. JACQUELINE PEEL, *THE PRECAUTIONARY PRINCIPLE IN PRACTICE: ENVIRONMENTAL DECISION-MAKING AND SCIENTIFIC UNCERTAINTY* (2005).

179. Mike Baker, *The TPP Has Potential to Help Protect the World’s Animals*, ABC NEWS (Australia) (Aug. 3, 2015), <http://www.abc.net.au/environment/articles/2015/08/03/4284834.htm>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Carter Roberts, President and CEO, World Wildlife Fund, Testimony Before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee, *Rebalance to Asia III: Protecting the Environment and Ensuring Food and Water Security in East Asia and the Pacific* (July 24, 2013), available at http://www.foreign.senate.gov/imo/media/doc/Roberts_Testimony.pdf.

185. *Id.*

by TPP markets can drive illegal activities and unsustainable practices.”¹⁸⁶

Article 20.17 of the final text of the TPP addresses the topic of “Conservation and Trade.”¹⁸⁷ Article 20.17.1 has a simple recognition that “affirm the importance of combating the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.”¹⁸⁸ Article 20.17.2 acknowledges that “each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).”¹⁸⁹ Article 20.17.3 observes: “The Parties commit to promote conservation and to combat the illegal take of, and illegal trade in, wild fauna and flora.”¹⁹⁰ There is a discussion of exchange of information, joint activities, and best endeavours to implement CITES resolutions. Article 20.17.4 loosely talks about taking appropriate measures to protect and conserve wild fauna and flora, as well as capacity-building and cooperation.¹⁹¹ Article 20.17.5 discusses deterrence of the illegal trade of wild fauna and flora.¹⁹² Article 20.17.6 highlights the discretion of individual parties.¹⁹³ Article 20.17.7 discusses law enforcement co-operation and sharing.¹⁹⁴

With the agreement on the TPP in October 2015, the White House sought to promote the trade agreement as being good for the environment.¹⁹⁵ The White House used an array of social media advertisements on the TPP, featuring endangered animals, such as tigers, rhinoceros, and elephants.¹⁹⁶ Following the White House’s talking points, The New York Times published a story entitled, “Environmentalists Praise Wildlife Measures in Trans-Pacific Trade Pact.”¹⁹⁷ The story provided this gloss on the text:

186. *Id.*

187. TPP, *supra* note 5, art. 20.17.

188. *Id.* at art. 20.17.1.

189. *Id.* at art. 20.17.2.

190. *Id.* at art. 20.17.3.

191. *Id.* at art. 20.17.4.

192. *Id.* at art. 20.17.5.

193. TPP, *supra* note 5, art. 20.17.6.

194. *Id.* at art. 20.17.7.

195. Press Release, The White House, President Barack Obama, *Statement on the Trans-Pacific Partnership*, (Oct. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership>.

196. See the Social Media of the White House and the United State Trade Representative in respect of the TPP.

197. Rob Nixon & Coral Davenport, *Environmentalists Praise Wildlife Measures in Trans-Pacific Trade Pact*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/business/environmentalists-praise-wildlife-measures-in-trans-pacific-trade-pact.html>.

The [TPP]... places new limits on wildlife trafficking and subsidies for illegal fishing. The United States and several of the Asian countries participating in the trade deal are sources of and crucial markets for illegal animal parts like African rhinoceros horns, ivory and tiger bones. In Asia, some exotic animal parts end up as meals or in medicine shops, where they are sold as cures for various ailments including impotence. In Western countries, some smuggled items, like lion heads, end up in living rooms as trophies. Worldwide, the illegal trade is estimated at about \$20 billion a year by Interpol, the international police agency.¹⁹⁸

The piece quoted David McCauley from the World Wildlife Fund as saying, “The provisions in the TPP go beyond what we have seen in other trade agreements.”¹⁹⁹ There was heavy criticism of the article for creating the misleading impression that the majority of environmental groups were supportive of the TPP.²⁰⁰

Conservation groups, though, were disappointed by the text of the TPP in respect of conservation. Nav Dayanand, the Managing Director of Fauna & Flora International in the U.S., has considered whether free trade agreements work for wildlife conservation.²⁰¹ Dayanand has noted the volatile nature of the discussions:

Certain key tenets of the TPP chapter as released by USTR’s [U.S. Trade Representative’s] earlier Green Paper leads observers following the process to believe that the US is calling for core environment and conservation challenges to be addressed through the same dispute settlement provisions as commercial chapters that are binding on all parties, which would also follow instructions in the 2007 bipartisan agreement.²⁰²

Dayanand observed that the inclusion of Japan in the talks “drew concern among some in the conservation community about the reduced potential for the trade agreement to help regulate shark fisheries.”²⁰³ Dayand maintained that there needed to be “a binding environment chapter with wildlife safeguards subject to dispute resolution similar to other business chapters of the agreement.”²⁰⁴ He observed that “Free Trade Agreement environment chapters—if negotiated properly—can also offer specific protections for trafficked or threatened wildlife,

198. *Id.*

199. *Id.*

200. See David Keppel et al., Letter to the Editor, *Evaluating the Trans-Pacific Partnership Pact*, N.Y. TIMES (Oct. 5 2015), available at <http://www.nytimes.com/2015/10/08/opinion/evaluating-the-trans-pacific-partnership-pact.html>.

201. See Nav Dayanand, *Can Free Trade Agreements Work for Wildlife Conservation?*, BIORES, Mar. 2014, at 6-7, available at <http://www.ictsd.org/downloads/bioresreview/biores8-2.pdf>.

202. *Id.*

203. *Id.*

204. *Id.*

such as unlawfully taken flora or vulnerable fisheries.”²⁰⁵

Ben Beachy from the Sierra Club questioned the argument of the U.S. Trade Representative that “the deal would help protect endangered wildlife like rhinos and elephants.”²⁰⁶ He made several criticisms of such promises. First, he noted that “TPP-like deals have repeatedly failed to live up to promises of environmental protection.”²⁰⁷ Second, he said that the environmental terms were weaker than the unenforced provisions of the Peru trade deal. Third, Beachy warned: “The TPP could exacerbate threats to endangered species by incentivizing wider destruction of their habitats.”²⁰⁸ Finally, he noted that there were other more effective existing tools to reduce illegal wildlife trade.²⁰⁹

Many other environmental groups repudiated the claims of the White House, saying that they did not support this trade pact.²¹⁰ Erich Pica, President of Friends of the Earth, was scathing about the final version of the TPP: “The compromises that struck will further enrage environmentalists and other progressive opposition, and threatens to undermine the razor thin majority that gave President Obama Fast Track trade authority.”²¹¹

Ilana Solomon of the Sierra Club documented the criticism of the Environment Chapter of the TPP from over a dozen environmental and climate organizations.²¹² She commented that “there is no evidence to support claims that the pact will help save endangered species like the elephant or rhino.”²¹³

Institute for Policy Studies Climate Policy Program Director Janet Redman commented: “Stopping the trade of illegally taken plants and wildlife is a noble cause, but in the case of the TPP, it's a dangerous distraction.”²¹⁴ She warned: “The trade pact strengthens the ability of corporations to sue countries when they pass

205. *Id.*

206. Ben Beachy, *Four Reasons Not To Trust the TPP to Save Endangered Animals*, HUFFINGTON POST (Sept. 23, 2015), http://www.huffingtonpost.com/ben-beachy/four-reasons-not-to-trust_b_8185594.html?ir=Australia.

207. *Id.*

208. *Id.*

209. *Id.*

210. Zach Carter, *White House Says Enviros Love This Trade Pact, But Enviros Say Otherwise*, HUFFINGTON POST (Apr. 4, 2015), http://www.huffingtonpost.com.au/2015/04/03/environmentalists-tpp-trade-pact_n_7001184.html?ir=Australia.

211. Press Release, Friends of the Earth, *The U.S. Cuts an Ugly Deal on Trans-Pacific Trade Agreement*, (Oct. 5, 2015), <http://www.foe.org/news/news-releases/2015-10-the-us-cuts-an-ugly-deal-on-trans-pacific-trade-agreement#sthash.eWLueGX2.iNSdgBGg.dpuf>.

212. Ilana Solomon, *More Than a Dozen Environmental Organizations Warn of Trans-Pacific Partnership Risks*, HUFFINGTON POST BLOG (Oct. 7, 2015), http://www.huffingtonpost.com/ilana-solomon/more-than-a-dozen-enviromon_b_8253990.html?ir=Australia.

213. *Id.*

214. *Id.*

rules to protect rapidly disappearing wildlife and the places they live.”²¹⁵

Green groups demanded a “legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources.”²¹⁶ The organizations warned: “Language that requires countries to “combat,” “deter,” or otherwise address illegal trade in flora and fauna without an obligation to establish and implement a clear prohibition will be insufficient to address the problems of illegal timber and wildlife trade.”²¹⁷

The Defenders of Wildlife were disappointed by the final text of the TPP.²¹⁸ Jamie Rappaport Clark, President and CEO of Defenders of Wildlife, said: “The environment chapter is weak and fails to provide the necessary requirements and stronger penalties desperately needed to better fight poaching, protect wildlife habitat and shut down the illegal wildlife trade.”²¹⁹ Clark said: “Although presented as a groundbreaking trade agreement in regards to wildlife, the TPP includes no commitments not already present in existing international and regional agreements for regulating wildlife trade or preventing wildlife trafficking.”²²⁰ The President of Defenders of Wildlife commented: “We urge Congress to reject the TPP and call for a plan that would actually make a difference for wildlife and our natural heritage.”²²¹

In its final published version, the TPP will endanger the protection of the environment, the rich biodiversity of the Pacific Rim, and the climate.

6. Trade in Environmental Services and Goods

There has been much discussion as to whether the TPP will promote trade in environmental services and goods. The U.S. Trade Representative, Michael Froman, has argued: “We are working to reduce barriers on the trade of green goods and services which will create jobs here at home while expanding the availability of new, clean technologies that will help make progress on climate change.”²²²

The leaked draft text by WikiLeaks provided an indication of the content in this

215. *Id.*

216. Letter from 350.org et al, *supra* note 169.

217. *Id.*

218. Press Release, Defenders of Wildlife, Trans-Pacific Partnership Falls Short for Wildlife (Nov. 5 2015), <http://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife>.

219. *Id.*

220. *Id.*

221. *Id.*

222. Froman, *supra* note 39.

area.²²³ By and large, such themes were present in the final 2015 negotiating text. The final text of the TPP provides a brief, abridged discussion of “environmental goods and services.”²²⁴ Article 20.18.1 provides: “The Parties recognise the importance of trade and investment in environmental goods and services as a means of improving environmental and economic performance and addressing global environmental challenges.”²²⁵ Article 20.18.2 notes: “The Parties further recognise the importance of this Agreement to promoting trade and investment in environmental goods and services in the free trade area.”²²⁶ Article 20.18.3 emphasizes: “Accordingly, the Committee shall consider issues identified by a Party or Parties related to trade in environmental goods and services, including issues identified as potential non-tariff barriers to that trade.”²²⁷ Moreover, the Parties “shall endeavour to address any potential barriers to trade in environmental goods and services that may be identified by a Party, including by working through the Committee and in conjunction with other relevant committees established under this Agreement, as appropriate.”²²⁸ Article 20.18.4 provides: “The Parties may develop bilateral and plurilateral cooperative projects on environmental goods and services to address current and future global trade-related environmental challenges.”²²⁹ Overall, this TPP text on the environment is rather hollow and empty, and does little to promote trade in environmental goods and services.

Joshua Meltzer from the Brookings Institute has argued that the TPP can help achieve a range of environmental goals: “Similar to the way the TPP can help countries improve a broad range of environmental challenges by shifting their economies into cleaner, less polluting industries, the TPP can assist countries’ transition on to low-carbon pathways by providing access to pertinent goods, services and investment.”²³⁰ He contended that “reduced tariffs on environmental goods can support domestic efforts towards environmental conservation and reducing GHG emissions.”²³¹

David Levine, the president and CEO of the American Sustainable Business Council, based in Washington, D.C, and opponent of fast-track, has argued that

223. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

224. TPP, *supra* note 5, Art 20.18.

225. *Id.* at art 20.18.1.

226. *Id.* at art 20.18.2.

227. *Id.* at art 20.18.3.

228. *Id.*

229. *Id.* at art 20.18.4.

230. Joshua Meltzer, *The Trans-Pacific Partnership Agreement, the Environment and Climate Change*, in *TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* 207, 220 (Tania Voon ed., 2013).

231. *Id.*

there is a need to develop a better model of trade, which supports a green economy.²³² He maintained “that trade deals should boost worker and environmental standards, not lower them.”²³³ Levine insisted: “We should preserve the right and ability of our federal, state and local governments to set standards and guidelines.”²³⁴ He commented: “We should seek the highest common ground, not the lowest.”²³⁵ Levine stressed: “We no longer need to choose between advancing our businesses and promoting sustainability in the workplace and in the environment.” He contended: “We can do all three.”²³⁶ Levine maintained: “By protecting the environment and public health, and instituting better working conditions for employees, we will ensure our economy is stronger for the long-term.”²³⁷ He observed: “The best trade deal will ensure that countries build their standards even further, speeding us to a global economy built on high-road and sustainability standards.”²³⁸

Rose Marcario of Patagonia said that her firm would oppose the TPP.²³⁹ She noted: “Because beyond being in business to make money, we’re a mission-driven company working to use business to inspire and implement solutions to the environmental crisis.”²⁴⁰ Rose Marcario stressed that the TPP did not uphold the company’s environmental values: “We also seek to promote better, safer and healthier living and working conditions for the people who make our clothing and gear.”²⁴¹ She commented: “We oppose TPP because the costs for the environment, workers, consumers, communities and small businesses would outweigh any potential gains.”²⁴²

Taking a stronger stand, Ilana Solomon of the Sierra Club has provided a critical analysis of developments in respect of the “trade in environmental goods.”²⁴³ She worries about the trade discourse in this area. Solomon agreed that “as we transition to a clean energy economy, we should increase the use of and trade in

232. David Levine, *Trading up for a Better Deal than Trans-Pacific Trade Pact*, AUGUSTA FREE PRESS (July 27, 2015), <http://augustafreepress.com/david-levine-trading-up-for-a-better-trade-deal>.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Levine, *supra* note 233.

239. Rose Marcario, *TPP: We Must Ask Who Benefits?*, LINKEDIN (Nov. 13, 2015), <https://www.linkedin.com/pulse/tpp-we-must-ask-who-benefits-rose-marcario>.

240. *Id.*

241. *Id.*

242. *Id.*

243. Ilana Solomon, *Trade in Environmental Goods May Not Actually Be So Good*, HUFFPOST GREEN BLOG (Jan. 27, 2014), http://www.huffingtonpost.com/ilana-solomon/trade-in-environmental-goods_b_4666328.html.

environmentally friendly technologies.”²⁴⁴ She insisted, however: “But unlocking the clean energy revolution should not be under the thumb of the WTO or through a purely “free-market approach.”²⁴⁵ Solomon maintained: “Instead, key to unlocking clean energy is developing home-grown approaches to renewable energy production and manufacturing that lift up and protect workers within and outside of the U.S.”²⁴⁶ Ilana Solomon maintains that there is a need to promote technology transfer: “If we’re going to face this climate crisis together, developed nations—those historically responsible for producing the greatest amount of climate-disrupting pollution—must also provide finance and clean technology to developing countries.”²⁴⁷ She observed that “Developed countries like the U.S. must step up and share resources that actually help the environment and communities.”²⁴⁸

7. Trade and Climate Change

There have been tensions between Barack Obama’s promises for action on climate change, and his trade agenda. Ilana Solomon of the Sierra Club has warned: “Our current model of free trade is once again interfering with sound climate policy.”²⁴⁹

There has been much debate as to whether the TPP will facilitate action on climate change. Some commentators, such as Joshua Meltzer from the Brookings Institute, were confident that the trade agreement could play a useful role in addressing climate change.²⁵⁰ He commented: “As new challenges have arisen, particularly climate change, new bargains need to be struck about how trade rules should be used to support efforts to address this challenge.”²⁵¹ Meltzer maintained:

As a 21st century trade agreement, the TPP is currently the best opportunity to address current environmental challenges. The TPP is also the first major plurilateral trade negotiation post the WTO Doha Round where both the impacts of climate change and the inability to make significant progress in the United Nations climate change negotiations are clear. This highlights the importance of using the TPP to develop new international trade rules that can enable countries to develop their economies in an environmentally sustainable manner.²⁵²

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Ilana Solomon, *Why the Climate Movement Cannot Ignore Trade*, HUFFINGTON POST BLOG (Sept. 25, 2014), http://www.huffingtonpost.com/ilana-solomon/why-the-climate-movement_b_5876964.html?ir=Australia.

250. Meltzer, *supra* note 230, at 207-30.

251. *Id.* at 230.

252. *Id.*

However, it is not clear that the TPP negotiations have been a useful forum to address climate change. Indeed, the trade deal may work against initiatives such as the *United Nations Framework Convention on Climate Change* 1992, the *Kyoto Protocol* 1997, and the *Paris Agreement* 2015.

In his book, *Oil and Honey*, Bill McKibben highlights the contradictions of the President Barack Obama on the issue of climate change.²⁵³ The U.S. President has waxed and waned on the question of climate change. He has been a strong advocate of the adoption of clean technologies. Yet, at times, he has also supported the use of fracking, and approved of drilling in the Arctic. McKibben, a climate activist, organized and led a high-profile campaign to encourage President Obama to block the Keystone XL Pipeline. After much deliberation, the President agreed to reject the pipeline. At the same time, the President Obama has promised action on climate change, urging his supporters to "Invest, Divest!" He has suggested that fossil fuel divestment could be a viable option.

During his two terms as President, Obama has promised effective national and international climate action. In his last term, he has sought to fulfil such promises. Obama has undertaken a number of significant national initiatives in respect of climate action.²⁵⁴ However, his efforts have often been stymied by a hostile Republican Congress and an antagonistic fossil fuel industry.²⁵⁵ President Obama has entered into bilateral agreements and co-operative arrangements on climate change with key trading partners—such as China,²⁵⁶ India,²⁵⁷ and Canada.²⁵⁸ Also, the President secured the *Paris Agreement* 2015 in December 2015.²⁵⁹ There has been divided opinion as to the merits of the international climate agreement (which

253. BILL MCKIBBEN, *OIL AND HONEY: THE EDUCATION OF AN UNLIKELY ACTIVIST* (2013).

254. See, e.g., *President Obama's Plan to Fight Climate Change*, THE WHITE HOUSE, <https://www.whitehouse.gov/climate-change> (last visited Apr. 19, 2016); PRESIDENT OBAMA'S CLIMATE ACTION PLAN: 2ND ANNIVERSARY PROGRESS REPORT, THE WHITE HOUSE (2015), available at https://www.whitehouse.gov/sites/default/files/docs/cap_progress_report_final_w_cover.pdf.

255. JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

256. Press Release, The White House, United States-China Joint Announcement on Climate Change (Nov. 12, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

257. Press Release, The White House, United States and India Climate and Clean Energy Cooperation (Jan. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/25/fact-sheet-us-and-india-climate-and-clean-energy-cooperation>.

258. Press Release, The White House, United States-Canada Joint Statement on Climate, Energy, and Arctic Leadership (Mar. 10, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership>.

259. Paris COP Decision & Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, <https://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>.

would be complex to summarize).²⁶⁰

In her book *This Changes Everything*, Naomi Klein writes about “Hot Money: How Free Market Fundamentalism Helped Overheat the Planet.”²⁶¹ She counterpoints the development of the *United Nations Framework Convention on Climate Change* 1992²⁶² and the *Kyoto Protocol* 1997,²⁶³ with the establishment of the WTO,²⁶⁴ and the *North American Free Trade Agreement* 1994.²⁶⁵ Klein observed: “What is most remarkable about these parallel processes—trade on the one hand, climate on the other—is the extent to which they functioned as two solitudes.”²⁶⁶ She stressed: “Indeed, each seemed to actively pretend that the other did not exist, ignoring the most glaring questions about how one would impact the other.”²⁶⁷ Klein is concerned that international trade laws and globalization have been undermining climate action: “To allow arcane trade law, which has been negotiated with scant public scrutiny, to have this kind of power over an issue so critical to humanity’s future is a special kind of madness.”²⁶⁸ She has been disturbed that “green energy programs—the strong ones that are needed to lower global emissions fast—were increasingly being challenged under international trade agreements, particularly the [WTO]’s rules.”²⁶⁹

Naomi Klein was alarmed by the proposals in respect of the TPP: “The habit of wilfully erasing the climate crisis from trade agreements continues to this day.”²⁷⁰ She noted “that U.S. negotiators had proposed an edit: take out all the stuff about

260. See Michael B. Gerrard & Edward McTiernan, *Effect of the Paris Climate Agreement on U.S. Businesses*, N.Y. L.J., Mar. 10, 2016, available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/070031620_arnold.pdf; Bill McKibben, *Falling Short on Climate in Paris*, N. Y. TIMES (Dec. 12, 2015), <http://www.nytimes.com/2015/12/14/opinion/falling-short-on-climate-in-paris.html>; George Monbiot, *Grand Promises of Paris Climate Deal Undermined by Squalid Retrenchments*, GUARDIAN (Dec. 12, 2015), <http://www.theguardian.com/environment/george-monbiot/2015/dec/12/paris-climate-deal-governments-fossil-fuels>; Mary Robinson, *An Agreement for Humanity – Statement from Mary Robinson on the Paris Agreement*, MARY ROBINSON FOUND. CLIMATE JUSTICE (Dec. 12, 2015), <http://www.mrfcj.org/resources/statement-from-mary-robinson-on-the-paris-agreement>; Press Release, UNFCCC, Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius (Dec. 12, 2015), <http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21>.

261. NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS THE CLIMATE* (2014).

262. *United Nations Framework Convention on Climate Change* 1992, Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

263. *Kyoto Protocol to the United Nations Framework Convention on Climate Change* 1997, Opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005).

264. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

265. NAFTA, *supra* note 2.

266. KLEIN, *supra* note 262.

267. *Id.* at 76.

268. *Id.* at 72.

269. *Id.* at 64.

270. *Id.* at 88.

climate change and UNFCCC commitments.”²⁷¹ Klein maintained: “In other words, while trade has repeatedly been allowed to trump trade, under no circumstances would climate be permitted to trump trade.”²⁷² Presciently, Klein warned that TransCanada could deploy investor clauses under the *North American Free Trade Agreement* 1994 or the TPP if the Keystone XL pipeline to Canada’s tar sands was blocked or delayed. Such fears were realised. In 2016, TransCanada has announced an investor action against the U.S. government’s decision to block the Keystone XL Pipeline under the *North American Free Trade Agreement* 1994.²⁷³ Environmental groups have argued that the TransCanada investor action highlights similar dangers with the TPP.²⁷⁴

A. The Draft Text on Climate Change

In January 2014, WikiLeaks revealed the draft text on climate change in the TPP.²⁷⁵ It is necessary to look at the draft text because it reveals the country positions in respect of the topic of trade and climate change, and it also highlights how progress on the issue was obstructed and blocked.

The TPP features weak, aspirational language on trade and climate change. Article SS.15 observes: “The Parties acknowledge climate change as a global concern that requires collective action and recognize the importance of implementation of their respective commitments under the *United Nations Framework Convention on Climate Change* (UNFCCC) and its related legal instruments.”²⁷⁶

The TPP also emphasizes that trade and climate change action should be mutually reinforcing: “The Parties recognize the desirability that trade and climate change policies be mutually supportive, and that policies and measures to deal with climate change should be cost effective.”²⁷⁷ Moreover, the Parties “further recognize the role that market and non-market approaches can play in achieving climate change objectives.”²⁷⁸ The TPP text observes:

271. *Id.*

272. KLEIN, *supra* note 262, at 88.

273. Press Release, TransCanada, TransCanada Commences Legal Actions Following Keystone XL Denial (Jan. 6, 2016), <http://www.transcanada.com/announcements-article.html?id=2014960>.

274. Letter from 350.org et al. to Members of Congress (Mar. 9, 2016), *available at* <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/transcanada-trade-letter.pdf>; Samantha Page, *Environmental Advocates Tell Congress: Reject the TPP*, THINK PROGRESS (Mar. 9 2016), <http://thinkprogress.org/climate/2016/03/09/3757348/tpp-opposition-letter-to-congress>.

275. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

276. *Id.*

277. *Id.*

278. *Id.*

The Parties agree that migration and adaptation actions should reflect domestic circumstances and capabilities, and note efforts underway in a range of international fora to: increase energy efficiency; develop low-carbon technologies and alternative and renewable energy sources; promote sustainable transport and sustainable urban infrastructure development; address deforestation and forest degradation; reduce emissions in international maritime shipping and air transport; improve monitoring, reporting and verification of greenhouse gas emissions; and develop adaptation actions for climate change.²⁷⁹

The text also emphasizes: “The Parties agree to encourage and facilitate cooperation on the complementary, trade-related, aspects of these efforts in areas of mutual interest.”²⁸⁰

The text stresses: “The Parties recognize that there are a suite of economic and environmental policy instruments that can play a role in achieving domestic climate change objectives and in helping achieve their international climate change commitments.”²⁸¹ There is also language about information sharing about climate change action—including in respect of “mechanisms to reduce carbon emissions, including market and non-market measures” and “the design, implementation and enforcement of regulatory instruments” as well as “best practices and lessons learned to enhance the transparency and accuracy of such instruments.”²⁸² The text also stresses: “The Parties recognize their respective commitments in APEC to rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption, while recognizing the importance of providing those in need with essential energy services.”²⁸³ Moreover, the draft TPP notes: “Accordingly, the Parties agree to undertake, as appropriate, cooperative and capacity building activities designed to facilitate effective implementation of these commitments, including in applying the APEC Voluntary Reporting Mechanism.”²⁸⁴

B. The Geopolitics of Climate Change

The draft texts reveal the geopolitics around trade and climate change (while the final texts of the TPP obscure and obfuscate this issue).

During the negotiations, New Zealand tabled a proposal on climate change in the

279. *Id.*

280. *Id.*

281. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20.

282. *Id.*

283. *Id.*

284. *Id.*

TPP.²⁸⁵ A New Zealand Trade Official observed: “Climate change is one of the preeminent environmental challenges of the 21st century and, as a 21st century agreement, the TPP is well placed to be able to bring economic and environmental issues together in a way that seeks to make trade policy and environmental policy mutually supportive.” The proposal reportedly has two elements. First, New Zealand wants to include language stating that countries should try to phase out subsidies for fossil fuels. Second, the country has supported a non-binding affirmation of the benefit of pricing carbon in the text of the agreement. New Zealand hopes that such text would be an important step towards the establishment of a regional carbon emissions trading system.

The New Zealand proposal has not necessarily found favour with environmental groups. There has been criticism that the text is a “shadow solution”—to the use the language of Stephen Gardiner—because it only addresses the problem of climate change in a limited way.²⁸⁶ There has been concern that text on climate change in the TPP may undermine or erode the *United Nations Framework Convention on Climate Change* 1992, the *Kyoto Protocol* 1997, and ongoing multilateral negotiations over climate change.

As revealed by the draft text, Peru has also proposed text on climate change in the TPP, reflecting its policy to reduce carbon emissions.

However, as highlighted by the WikiLeaks text, the U.S. and Australia opposed the inclusion of the drafted text on climate change. President Barack Obama is a paradox. While he supports domestic action on climate change, Obama has shown a great unwillingness to push for substantive obligations on climate change at an international level in the TPP.

Australia’s position against the text on climate change will no doubt harden. It is not clear where Australia stands in the debate over the TPP and climate change—especially in light of its package of reforms designed to promote a Clean Energy Future.²⁸⁷

As Prime Minister, then Coalition leader Tony Abbott repealed carbon pricing laws and sought to dismantle the clean energy future reforms passed previously by the Australian Labor Party and the Australian Greens. The new Coalition leader and

285. *TPPWatch Bulletin #14*, TPPWATCH BLOG (July 29, 2012), <https://tppwatch.files.wordpress.com/2012/07/tppwatch-bulletin-14.pdf>.

286. STEPHEN M. GARDINER, *A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE* 76 (2011).

287. See COMMONWEALTH OF AUSTRALIA, *CLEAN ENERGY AUSTRALIA: INVESTING IN THE CLEAN ENERGY SOURCES OF THE FUTURE* (2011), available at <https://web.archive.org/web/20130831054447/http://www.cleanenergyfuture.gov.au/wp-content/uploads/2011/07/clean-energy-australia.pdf> (showing an archive of the original source URL accessed via the Internet Archive: <https://archive.org/web>).

Prime Minister Malcolm Turnbull has yet to fully declare his position in respect of climate change.

Under Stephen Harper, the Conservative Government in Canada was supportive of fossil fuels—particularly the exploitation of tar-sands in Alberta. The Conservative Government was hostile to environmental regulation and climate action.²⁸⁸ Stephen Harper was willing to support the TPP, even though his government was in a caretaker election mode. The NDP's Thomas Mulcair insisted that he would not be bound by Harper's secret deal.²⁸⁹ Canadian Greens MP Elizabeth May was highly critical of the environmental impact of the TPP.²⁹⁰ Naomi Klein and Maude Barlow warned: "At international climate negotiations, our government's defiant commitment to carbon pollution will continue to be a barrier to progress, giving other governments an excuse to lower their ambitions and waste what is left of this critical decade."²⁹¹ Stephen Harper went to the Canadian election, promising to pass the TPP, before Canadian voters had an opportunity to see the texts of the agreement. Justin Trudeau and the Liberal Party of Canada soundly won the election in 2015 and vowed that there would be an open discussion of the TPP.²⁹² This new government promises to show a greater respect for environmental regulation and climate action.²⁹³ Trudeau has remained uncommitted on the question of implementing the TPP.

Moreover, Vietnam, Peru, and Malaysia did not want a reference to fossil fuel subsidies in an Article in the Environment Chapter of the TPP. The nations opposed this text: "The Parties recognize their respective commitments in APEC to rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption, while recognizing the importance of providing those in need with essential energy services."²⁹⁴

288. See DAVID BOYD, *THE OPTIMISTIC ENVIRONMENTALIST: PROGRESSING TOWARDS A GREENER FUTURE* (2015); DAVID BOYD, *CLEANER, GREENER, HEALTHIER: A PRESCRIPTION FOR STRONGER CANADIAN ENVIRONMENTAL LAWS AND POLICIES* (2015).

289. *NDP Won't Be "Bound" by Trans-Pacific Trade Deal, Tom Mulcair Says*, CBC NEWS (Oct. 2 2015), <http://www.cbc.ca/news/politics/canada-election-2015-tpp-trade-ndp-1.3255051>.

290. *Submission: Environmental Assessment of Trans-Pacific Partnership Free Trade Agreement Negotiations*, <http://elizabethmaymp.ca/submission-environmental-assessment-tpp> (last visited Apr. 19, 2016).

291. Naomi Klein & Maude Barlow, *Stephen Harper's Politics Put Canada to Shame: Don't Be Distracted by Them*, GUARDIAN (Oct. 17, 2015), <http://www.theguardian.com/commentisfree/2015/oct/16/stephen-harper-canada-carbon-climate-change>.

292. Press Release, Liberal Party of Can., Statement by Liberal Party of Canada Leader Justin Trudeau on the Trans-Pacific Partnership (Oct. 5, 2015), <https://www.liberal.ca/statement-by-liberal-party-of-canada-leader-justin-trudeau-on-the-trans-pacific-partnership>.

293. *Budget in Brief: An Innovative and Clean Economy*, GOV'T OF CAN., <http://www.budget.gc.ca/2016/docs/bb/brief-bref-en.html#section02> (last visited Apr. 21, 2016).

294. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS, *supra* note 20, art. SS.15.

Heather Smith observed that, in the new Pacific trade talks leak, “climate” became an unmentioned topic.²⁹⁵ She commented that the U.S. was not playing a constructive role in the debate over climate change:

The previous draft had a vague agreement to “acknowledge climate change as a global concern that requires collective action, and recognize the importance of implementation of their respective commitments under the *United Nations Framework Convention on Climate Change* (UNFCC).” Under the proposed U.S. revision, the parties instead “affirm the importance of moving towards low-emissions economies.” That’s it. No mention of what a low-emissions economy might be. No mention of the UNFCC, whose agreements are non-binding and largely ineffectual but still represent the closest thing the world has to a global climate change policy. The U.S.’s proposed revisions scrub the words “climate change” from the text of the chapter.²⁹⁶

Heather Smith suggested that the leak revealed the priorities of U.S. trade representatives: “The American trade delegation is reverting to old-school denial—as if, as long as we don’t mention it, maybe the problem will just go away.”²⁹⁷

C. The Final Text

In October 2015, the final text of the TPP was agreed to by the member states in Atlanta, and it was published in November 2015.²⁹⁸ There was much controversy over the failure to mention “climate change” at all in final iteration of the TPP—despite global warming being a pressing environmental issue affecting the Pacific Rim.²⁹⁹ A comparison between the draft text and the final text reveals an erasure of climate change from the language of the TPP.

Article 20.15 speaks of a “Transition to a Low Emissions and Resilient Economy.”³⁰⁰ Article 20.15.1 provides that “the Parties acknowledge that transition to a low emissions economy requires collective action.”³⁰¹ Article 20.15.2 insists that “the Parties recognise that each Party’s actions to transition to a low emissions

295. Heather Smith, *In New Pacific Trade Talks Leak, “Climate” Becomes the Unmentionable*, Grist (Feb. 21, 2014), <http://grist.org/politics/in-new-pacific-trade-talks-leak-climate-becomes-the-unmentionable/#.Uwq0VwAcQis.twitter>.

296. *Id.*

297. *Id.*

298. *See* TPP, *supra* note 5.

299. Gareth Hutchens, *Climate Change Missing from Full Trans-Pacific Partnership Text*, SYDNEY MORNING HERALD (Nov. 5, 2015), <http://www.smh.com.au/federal-politics/political-news/details-of-transpacific-partnership-finally-released-20151105-gkrivo.html>.

300. TPP, *supra* note 5, art. 20.15.

301. *Id.* at art. 20.15.1.

economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperative Frameworks), Parties shall cooperate to address matters of joint or common interest.”³⁰² The text provides some examples of areas of co-operation:

Areas of cooperation may include, but are not limited to: energy efficiency; development of cost-effective, low-emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and non-market mechanisms; low-emissions, resilient development and sharing of information and experiences in addressing this issue.³⁰³

Moreover, the final text provides that “the Parties shall, as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy.”³⁰⁴

The Australian Trade Minister Andrew Robb at the time was indignant at the criticism that the TPP failed to address the pressing global problem of climate change.³⁰⁵ He maintained: “Well, this is not a climate change policy. It's not an agreement to do with climate change, it's a trade agreement.”³⁰⁶

Robb seems caught between two positions. On the one hand, he tries to maintain that the TPP provides strong environmental standards, and, on the other, he insists that the TPP has nothing to do with the pressing environmental issue of our time: climate change. Ultimately, this seems an awkward vacillation. Trade and climate change are not “two solitudes.” Trade and climate change are inter-related. Even the World Trade Organization recognises that there is a significant interaction between trade rules and climate change.³⁰⁷

D. Civil Society

302. *Id.* at art. 20.15.2.

303. *Id.*

304. *Id.*

305. Anna Henderson & Francis Keany, *Trade Minister Andrew Robb Frustrated by TPP Critics; Warns Them Not to “Jump at Shadows,”* ABC NEWS (Australia) (Nov. 6, 2015), <http://www.abc.net.au/news/2015-11-06/trade-minister-warns-tpp-critics-against-jumping-at-shadows/6918400>; Shalailah Medhora, *Andrew Robb Defends TPP After Full Release of Trade Deal Document*, GUARDIAN (Nov. 6, 2015), <http://www.theguardian.com/business/2015/nov/06/andrew-robb-defends-tpp-after-full-release-of-trade-deal-document>.

306. Michael Brissenden, *Andrew Robb: TPP Is a Trade Agreement, Not a Climate Change Agreement*, ABC NEWS (Australia) (Nov 6, 2015), <http://www.abc.net.au/news/2015-11-06/andrew-robb:-tpp-is-a-trade-agreement,-not-a/6918182>.

307. *Activities of the WTO and the Challenge of Climate Change*, WTO, https://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm (last visited Apr. 19, 2016).

Climate activists were deeply alarmed by the final deal in respect of the environment in the TPP because of the failure to address climate change.³⁰⁸

350.org executive director May Boeve commented that the TPP makes “climate change worse.”³⁰⁹ She commented: “By handing even more power to Big Oil, letting massive corporations throw tantrum lawsuits at governments who dare to scale back emissions, and spreading fracking further around the world, there's no question that TPP is an absolute disaster for our climate.”³¹⁰ Karthik Ganapathy, a spokesperson for environmental activist group 350.org at the time said of the TPP: “Let’s not suddenly forget why so many of us in the climate movement bitterly fought against fast-tracking this trade deal.”³¹¹ He noted: “TPP tilts the playing field in favor of multinational fossil fuel companies even more, and makes it easier for them to dig carbon out of the ground.”³¹²

Disgusted by the final text of the TPP, 350.org complained that the agreement would “rollback multilateral environmental agreements, weaken conservation rules, give new rights to the fossil fuel industry to challenge climate protections, and lock in natural gas exports and fracking.”³¹³ 350.org Policy Director Jason Kowalski argued that “the TPP is an act of climate denial.”³¹⁴ He was concerned: “While the text is full of handouts to the fossil fuel industry, it doesn’t mention the words

308. See Karen Barlow, *Robb on the TPP: “Read the Fine Print,”* HUFFINGTON POST (Nov 6, 2015), http://www.huffingtonpost.com.au/2015/11/06/robb-stands-by-asia-pacific-trade-pact_n_8483178.html; Binoy Kampmark, *A Trade Deal of Denial: Omissions and Sins in the Trans-Pacific Partnership*, COUNTERPUNCH (Nov. 6, 2015), <http://www.counter-punch.org/2015/11/06/a-trade-deal-of-denial-omissions-and-sins-in-the-tpp>; Justin Mikulka, *Breaking: Trans-Pacific Partnership Ignores Climate, Asks Countries to Volunteer to Protect the Environment*, DESMOGBLOG (Nov. 5, 2015), <http://www.desmogblog.com/2015/11/05/breaking-trans-pacific-partnership-ignores-climate-asks-countries-volunteer-protect-environment>; Clark Mindock, *Trans-Pacific Partnership Text: Climate Change Not Addressed, Trade Deal Confirms “Worst Nightmares” for Environment*, INT’L BUS. TIMES (Nov. 6, 2015), <http://www.ibtimes.com/trans-pacific-partnership-text-climate-change-not-addressed-trade-deal-confirms-worst-2170853>; Thom Mitchell, *TPP Environment Fears Confirmed by Final Text*, NEW MATILDA (Nov. 8, 2015), <https://newmatilda.com/2015/11/06/tpp-environment-fears-confirmed-by-final-text>; Samantha Page, *Environmental Groups Aren’t Buying the TPP’s Wildlife Provisions*, THINK PROGRESS (Nov. 10, 2015), <http://thinkprogress.org/climate/2015/11/10/3720911/tpp-losing-support>; Niki Widdowson, *TPP – Light on Environment & Labour, Sweet on Multinationals*, QUEENSLAND UNIV. OF TECH. (Nov. 6, 2015), <https://www.qut.edu.au/law/about/news-events/news?news-id=99257>; Hutchens, *supra* note 300.

309. Solomon, *supra* note 212.

310. *Id.*

311. Page, *supra* note 154.

312. *Id.*

313. Press Release, 350.org, TPP Text Confirms a Handout to the Fossil Fuel Industry (Nov. 5, 2015), <http://350.org/press-release/350-org-tpp-text-confirms-a-handout-to-fossil-fuels>.

314. *Id.*

climate change once.”³¹⁵ Kowalski was also worried about the impact of investor-state dispute settlement: “The agreement would give fossil fuel companies the extraordinary ability to sue local governments that try and keep fossil fuels in the ground.”³¹⁶ He stressed: “In short, these rules undermine countries’ ability to do what scientists say is the single most important thing we can do to combat the climate crisis: keep fossil fuels in the ground.”³¹⁷ Kowalski highlighted the potential for conflict between the TPP and the *Paris Agreement* 2015. He commented: “As the world accelerates towards a clean energy future, the TPP is a dangerous detour that must be avoided.”³¹⁸

“The TPP ignores climate change completely and this is a major setback,” said IATP’s Climate Director Ben Lilliston.³¹⁹ He lamented: “Past trade deals have driven an extractive mode of globalization that has led to mass deforestation, fossil fuel withdrawal and an energy-intensive industrial model of agriculture.”³²⁰ In his view, “TPP is more of the same--an outdated, climate-damaging trade deal.”³²¹ U.S. Climate Plan Executive Director Evan Weber said: “The TPP is likely to provide fossil fuel companies and other polluters new tools to avoid regulations and fight policies designed to protect our climate and our communities.”³²² Weber despaired: “Negotiated in secret by corporations and governments, with public oversight and input expressly prohibited, it’s hard to imagine a scenario in which this corporate giveaway gets us any closer to preserving a liveable planet for future generations.”³²³

Michael Brune of the Sierra Club commented: “The TPP would empower big polluters to challenge climate and environmental safeguards in private trade courts and would expand trade in dangerous fossil fuels that would increase fracking and imperil our climate.”³²⁴ With the release of the final text, he elaborated upon his deep misgivings about the deal:

We now have concrete evidence that the TPP threatens our families, our communities, and our environment. It’s no surprise that the deal is rife with polluter giveaways that would undermine decades of environmental progress, threaten our climate, and fail to adequately protect wildlife because big polluters helped write the deal. The words ‘climate change’ don’t even appear in the text, a dead giveaway that this isn’t a 21st-century trade deal. It sets us back further, empowering fossil fuel

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. Solomon, *supra* note 212.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Sierra Club, *supra* note 94.

corporations to challenge our public health and climate safeguards in unaccountable trade tribunals while increasing dirty fossil fuel exports and fracking.³²⁵

Brune lamented: “Many provisions in the deal’s environment chapter are toothless and fail to offer any of the protections proponents of this deal have touted.”³²⁶ He maintained that the U.S. Congress should block the deal altogether: “Congress must stand up for American jobs, clean air and water, and a healthy climate by rejecting the toxic TPP.”³²⁷

The Defenders of Wildlife were disturbed by the lack of attention paid to climate change and biodiversity.³²⁸ The group commented: “It is ridiculous that in 2015, twelve of the world’s nations would construct a trade deal of this magnitude and not even consider the effects of climate change on industries like agriculture or fishing, or ways to prevent worsening global warming through our own economic activities.”³²⁹

Australian Green groups said that the TPP would undermine environmental action and limit the ability of governments to take action on climate change.³³⁰ Senator Peter Whish-Wilson of the Australian Greens warned: “This is a watershed moment for the Liberals and the mining industry in their continuing assault against environmental protections in Australia.”³³¹ He feared: “ISDS will provide a massive chilling effect against improvements in environmental law at a local, state and federal level.”³³²

Kelly O'Shanassy, chair of the Australian Conservation Foundation, observed it would be “a very silly idea to lock in restrictions to future policy in this country.”³³³ She was concerned that the TPP would limit nations’ ability to take the necessary additional steps to take action on climate change: “It means governments won't be bold and ambitious as they should be.”³³⁴ Thom Mitchell of New Matilda also highlighted concerns about the TPP amongst Australian environmentalists and

325. Press Release, Sierra Club, TPP Text Is “Concrete Evidence” of Toxic Deal, (Nov. 5, 2015), <http://content.sierraclub.org/press-releases/2015/11/sierra-club-tpp-text-concrete-evidence-toxic-deal>.

326. *Id.*

327. *Id.*

328. Press Release, Defenders of Wildlife, Trans-Pacific Partnership Falls Short for Wildlife (Nov. 5 2015), <http://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife>.

329. *Id.*

330. Peter Hannam, *Trans-Pacific Partnership Bad for the Environment, Green Groups Say*, SYDNEY MORNING HERALD (Oct. 7, 2015), <http://www.smh.com.au/environment/transpacific-partnership-bad-for-the-environment-green-groups-say-20151006-gk2bga.html>.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

climate activists.³³⁵

Emma Gibson, Head of Program for Greenpeace Australia Pacific commented: “Although the text mentions emissions and the ozone layer, it does not confront the challenge of climate change, even though the international community recognises that it is the most pressing global problem we face.”³³⁶

Maude Barlow, the chair of the Council of Canadians, was worried that the TPP would undermine the international climate action at the *Paris Agreement* 2015 and beyond.³³⁷ She was concerned about the impact of trade agreements and investor clauses upon international climate law: “The central problem is that many of the same countries pledging to take serious action on climate change are also party to, or are aggressively negotiating, trade and investment deals that contain a mechanism that gives large corporations the right to challenge any changes to the current rules under which they operate.”³³⁸ Barlow maintained that there was a need for international climate law to address the threat of investor-state dispute settlement. Unfortunately, there were no meaningful discussions of the issue in the final *Paris Agreement* 2015.

Osgoode Hall and York University Professor Gus van Harten has argued that there needs to be a carve-out from investor-state dispute settlement to support action on climate change.³³⁹

Nobel Laureate Professor Joseph Stiglitz of Columbia University has warned that, under the TPP, polluters could sue governments for setting limits for carbon emissions.³⁴⁰ He noted: “We know we’re going to need regulations to restrict the emissions of carbon.”³⁴¹ He worried: “But under these provisions, corporations can sue the government, including the American government, by the way, so it’s all the

335. Thom Mitchell, *Warnings Trans-Pacific Partnership Will Undermine Environmental Protections*, NEW MATILDA (Oct. 6, 2015), <https://newmatilda.com/2015/10/06/warnings-trans-pacific-partnership-will-undermine-environmental-protections>.

336. Press Release, Greenpeace Australia, *TPP Environmental Provisions a Major Disappointment* (Nov. 6, 2015), <http://www.greenpeace.org/australia/en/mediacentre/media-releases/climate/TPP-environmental-provisions-a-major-disappointment>.

337. Maude Barlow, *UN Climate Change Agreement Must Address Corporate Right to Sue Countries*, HUFFINGTON POST (Sep. 22, 2015), http://www.huffingtonpost.ca/maude-barlow/corporations-un-climate-change_b_8179118.html.

338. *Id.*

339. Gus Van Harten, *An ISDS Carve-Out to Support Action on Climate Change* (Osgoode Hall Law School, York Univ., Research Paper No. 38/2015, 2015), available at <http://ssrn.com/abstract=2663504> or <http://dx.doi.org/10.2139/ssrn.2663504>.

340. Amy Goodman, *Joseph Stiglitz: Under TPP, Polluters Could Sue U.S. For Setting Carbon Emissions Limits*, DEMOCRACY NOW! (Oct. 27, 2015), http://www.democracynow.org/2015/10/27/joseph_stiglitz_under_tpp_polluters_could. See also Clayton Aldern, *Trans-Pacific Partnership Could Undermine Climate Regulations, Top Economist Warns*, GRIST (Oct. 28, 2015), <http://grist.org/news/trans-pacific-partnership-could-undermine-climate-regulations-top-economist-warns>.

341. *Id.*

governments in the TPP can be sued for the loss of profits as a result of the regulations that restrict their ability to emit carbon emissions that lead to global warming.”³⁴²

Green groups have demanded that the United States Congress reject the TPP—unless there are significant and major reforms to the agreement in respect of climate action.³⁴³ The groups called for “Protections for countries to implement rules and safeguards that address climate change, including commitments under the *United Nations Framework Convention on Climate Change* (UNFCCC).”³⁴⁴ The coalition highlighted that “there is a direct connection between increased trade and increased climate-disrupting emissions and an increasing number of trade and investment cases that directly challenge climate and clean energy policies.”³⁴⁵ The green groups asserted the following:

[T]he TPP should require countries to live up to their commitments in the UNFCCC and explicitly protect the ability of countries to adopt, maintain, and implement rules and policies to address climate change including greenhouse gas emission standards, feed-in tariffs, a carbon cap and/or tax and any related border tax adjustments, renewable energy programs, government programs that cultivate local production of clean energy and green goods, and energy efficiency standards or labels.³⁴⁶

In their view, such measures would help ensure the TPP did not undermine effective international climate action.

There was much concern at the Paris 2015 Climate Talks that the TPP has undermined effective international climate action.³⁴⁷

E. United States Domestic Politics

The Fast-Track Debate in 2015 and the Presidential Debates in 2016 are significant to the future fate of the TPP. President Barack Obama has faced

342. *Id.*

343. See Timothy Cama & Vicki Needham, *Several Green Groups Outline Demands for Pacific Trade Pact*, THE HILL (Oct. 29, 2015), <http://thehill.com/policy/finance/258539-greens-outline-demands-for-pacific-trade-pact>. See also Letter from 350.org et al., *supra* note 64.

344. Letter from 350.org et al., *supra* note 64.

345. *Id.*

346. *Id.*

347. See Devlin Kuyek, *The Secretive Trade Agreements That Could Scupper Climate Change Action*, GUARDIAN (Nov. 30, 2015), <http://www.theguardian.com/sustainable-business/2015/nov/30/paris-climate-change-talks-secretive-trade-agreements-ttp-ttip>; Alexandra Macmillan & Rhys Jones, *TPP Must Not Block the Path to Healthy Climate Action*, NZ HERALD (Nov. 27, 2015), http://www.nzherald.co.nz/climate-change/news/article.cfm?c_id=26&objectid=11552338.

significant opposition from Democrats in the U.S. Congress over the TPP—particularly because of its treatment of the environment and climate change. The President has sought to win the support of Republican members of the U.S. Congress (which could explain the reticence of the Obama administration over climate change in the TPP). The future of the TPP has been thrown into doubt by the 2016 Presidential Races—with all the leading Presidential candidates voicing opposition to the conclusion of the TPP.

In 2015, U.S. House of Representatives Minority Leader Nancy Pelosi (D-CA) was highly critical of President Barack Obama's demands for a fast track authority.³⁴⁸ She maintained: "In order to succeed in the global economy, it is necessary to move beyond stale arguments of protectionism vs. free trade."³⁴⁹ Pelosi argued that trade deals must have strong and effective protection for the environment: "To do so, we must recognize that workers' rights, consumer and intellectual protections, and environmental safeguards must be just as enforceable as the protection of the economic interests of investors."³⁵⁰ She observed that "we must prepare our people, our economies and our environment for the future."³⁵¹ Pelosi was particularly animated about the relationship between trade and climate change:

The climate crisis presents a challenge to the survival of our planet, but it also presents an opportunity to create a clean energy economy. Investing in a green economy will result in clean energy jobs for the many workers who have been left behind by globalization... Our pre-eminence in clean energy is essential to maintaining America as No. 1 in the global economy, and we must protect the intellectual property rights of entrepreneurs.³⁵²

In her view, "We must ensure that trading partners play by the rules and uphold their responsibility to their international obligations."³⁵³ Pelosi's position represents a significant rebuff to President Barack Obama's model of trade and the environment.

In a letter to the U.S. Trade Representative in July 2015, a group of 19 House Democrats led by Earl Blumenauer expressed concerns about the Environment Chapter of the TPP and its treatment of climate change.³⁵⁴ The Congressmen and women said: "We are also deeply concerned about mitigating climate change."³⁵⁵ The group commented: "While the TPP was never going to be the forum to

348. Pelosi, *supra* note 15.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Letter from Earl Blumenauer, *supra* note 130.

355. *Id.*

comprehensively address climate issues, it should set the stage for TPP countries to move towards low-emissions economies.”³⁵⁶ The House Democrats also stressed: “We also emphasize the importance of ensuring the TPP investment chapter protects the right of each of the TPP countries to make and fairly enforce strong environmental protections, including those relating to climate change.”³⁵⁷

President Barack Obama was able to obtain support for a fast-track authority from the U.S. Congress, with the help of Republicans and dissident Democrats. A number of environmental groups and climate activists were concerned about the Republicans’ caveats in the “Customs Bill.”³⁵⁸ The provision in the House version of the Customs Bill, introduced by Chairman Paul Ryan (R-WI), would amend the Trade Priorities and Accountability Act of 2015 “to ensure that trade agreements do not require changes to U.S. law or obligate the United States with respect to global warming or climate change.”³⁵⁹

A grand coalition of environmental groups—including 350.org and others sent a letter to the U.S. Congress asking them to reject the anti-climate provisions in the House version of the bill.³⁶⁰ The Center for International Environmental Law expanded upon these issues in a policy brief.³⁶¹ The environmental groups and climate activists warned: “If accepted, it would limit the United States’ latitude to safeguard climate policies from trade attacks under existing and future trade agreements.”³⁶² Considering the Republicans’ rider, Carroll Muffett, President of the Center for International Environmental Law, complained: “The Customs Bill climate provision raises new and significant barriers to effective action on climate change even as the window for taking that action is closing rapidly.”³⁶³ William J. Snape, III, Senior Counsel at the Center for Biological Diversity was concerned that the Republicans were promoting climate denial in the Customs Bill.³⁶⁴ The Customs

356. *Id.*

357. *Id.*

358. Press Release, Ctr. for Int’l Env’tl. Law, Groups Demand Rejection of Anti-Climate Provision in Customs Bill (July 28, 2015), <http://www.ciel.org/news/groups-demand-rejection-of-anti-climate-provision-in-customs-bill>.

359. *Paul Ryan’s Climate Change Language Contains More Than Just Climate Change*, DAILY KOS (June 10, 2015), <http://www.dailykos.com/story/2015/6/10/1392327/-Paul-Ryan-s-Climate-Change-language-contains-more-than-just-climate-change>.

360. Letter from 350.org et al. to U.S. Senate Conferees (July 28, 2015), *available at* <http://www.ciel.org/wp-content/uploads/2015/07/Environmental-groups-urge-Conferees-to-reject-anti-climate-provision-in-House-Customs-Bill.pdf>. *See also* Ctr. for Int’l Env’tl. Law, *supra* note 359.

361. CTR. FOR INT’L ENVTL. LAW, THE CUSTOMS BILL: AN UNACCEPTABLE BARRIER TO CLIMATE ACTION (2015), *available at* <http://www.ciel.org/wp-content/uploads/2015/07/CIEL-Policy-Brief-The-Customs-Bill-and-Climate-Change-July-2015.pdf>.

362. Ctr. for Int’l Env’tl. Law, *supra* note 359.

363. *Id.*

364. *Id.*

Bill is still subject to further consideration by the U.S. Congress as at March 2016.

A number of Presidential contenders have raised concerns about the TPP. Vermont Independent and Democrat Presidential aspirant Bernie Sanders has been a steadfast critic of the TPP, and other trade deals promoted by the U.S. Trade Representative.³⁶⁵ He has also been an advocate of substantive climate action, and an opponent of the Keystone XL Pipeline. Hillary Clinton has equivocated on the TPP. In her book, *Hard Choices*, Clinton expressed deep concerns about investor clauses, and called for proper safeguards for labor rights, the environment, and public health.³⁶⁶ Under pressure from Sanders, Clinton has come out in opposition to the TPP.³⁶⁷ Leading Republican candidate Donald Trump has been opposing the TPP, as has his main rival Ted Cruz.³⁶⁸

Such a discussion about domestic U.S. politics is critical to the future fate of the TPP. It would be unwise to ignore the impact of such developments. The U.S. Congress—or a future U.S. President—could halt the TPP. Without the inclusion of the U.S. in the TPP, the trade agreement would crumble. Other participating countries would refuse to commit to the terms of the TPP—without gaining market access to the U.S.

Conclusion

The TPP is an ambitious broad and deep free trade agreement, with a far-reaching scope in respect of the environment, biodiversity, and climate change. There has been much disquiet about the secretive and anti-democratic nature of the negotiations thus far. In addition, there has been much concern about the substantive content of the Environment Chapter of the TPP. The contention of this paper has been the Environment Chapter of the TPP has been an exercise in government greenwashing. Naomi Klein noted that President Barack Obama had used a similar strategy for the TPP to that deployed by President Bill Clinton and Vice President Al Gore in the NAFTA debate.³⁶⁹

365. See JONATHAN TASINI, *THE ESSENTIAL BERNIE SANDERS AND HIS VISION FOR AMERICA* (2015).

366. HILLARY RODHAM CLINTON, *HARD CHOICES* 428 (2014).

367. See Ben Jacobs, Lauren Gambino & Sabrina Siddiqui, *Hillary Clinton Breaks with Obama to Oppose Trans-Pacific Partnership*, *GUARDIAN* (Oct. 5, 2015), <http://www.theguardian.com/us-news/2015/oct/07/hillary-clinton-opposes-trans-pacific-partnership-tpp>; Amanda Terkel & Zach Carter, *Hillary Clinton Comes Out Against TPP*, *HUFFINGTON POST* (Oct. 7, 2015), http://www.huffingtonpost.com.au/entry/hillary-clinton-tpp_56157832e4b0fad1591a9289.

368. David Dayen, *Trump Was Right About TPP Benefitting China*, *THE INTERCEPT* (Nov. 12, 2015), <https://theintercept.com/2015/11/11/trump-was-right-about-tpp-benefitting-china>.

369. See Naomi Klein (@NaomiAKlein), Twitter (Oct. 5, 2015, 8:21 AM), <https://twitter.com/NaoimiAKlein/status/651054609407045632> (“This is pathetic. A betrayal. For real, folks. Memories of how Big Green helped push through NAFTA.”).

An examination of the draft and final texts of the Environment Chapter of the TPP reveals a host of problems. There are concerns about whether the TPP does much to reinforce the network of international environmental and climate law (especially as the U.S. has not necessarily been a party to some key multilateral agreements). The TPP Environment Chapter lacks a strong regime for enforcement. The TPP does little to provide protection for the biodiversity of the Pacific Rim—even though this biodiversity is under threat from various developments, including urbanization, deforestation, and climate change. The TPP is weak on the question of the protection of the oceans. The provisions of conservation have been oversold. The trade in environmental services and goods under the TPP will be counteracted by the trade in fossil fuels. There are deep abiding tensions between the TPP and the efforts to achieve a substantive international agreement on climate change.

Overall, the Environment Chapter of the TPP is dispiriting. For the boasts and bluster, the agreement does not achieve its ambition of providing for a strong network of environmental regulation across the Pacific Rim. Michael Brune, executive director of the Sierra Club, has warned that it is doubtful that the Environment Chapter of the TPP would be ever be enforced effectively.³⁷⁰ Likewise, Greenpeace research specialist Charlie Cray said: “This is a cynical, last-minute sop intended to divide the environmental community, and doesn't change the fact that the TPP will likely do more harm than good.”³⁷¹ Cray added: “There is no way green-looking window-dressing can make up for a secretly negotiated trade agreement that, by design, empowers multinationals to undermine environmental standards.”³⁷² The TPP is a misleading and deceptive agreement. While it adopts the rhetoric of environmentalism, the partnership delivers little in the way of enforceable protection of the environment in the Pacific Rim.

This impression about the anti-environmental nature of the TPP is reinforced by a consideration of other related Chapters of the TPP.³⁷³ In addition to the Environment Chapter, a number of other Chapters of the TPP will impact upon the environment, biodiversity, and climate change. In October 2015, WikiLeaks published the final text of the Intellectual Property chapter of the TPP.³⁷⁴ In November 2015, the full text of the TPP was published. The Intellectual Property chapter is Chapter 18 of the TPP.³⁷⁵ The Intellectual Property chapter includes text on patent law, trade mark law, copyright law, data protection, and intellectual

370. Solomon, *supra* note 212.

371. *Id.*

372. *Id.*

373. See KELSEY, *supra* note 78.

374. WIKILEAKS, *supra* note 127.

375. See TPP, *supra* note 5 (providing the final text of Chapter 18 on Intellectual Property).

property enforcement.³⁷⁶ A number of the U.S. proposals are designed to boost the intellectual property rights of agricultural companies, the biotechnology industry, and the food industry. There has been much discussion about the impact of the Intellectual Property Chapter upon information technology, access to essential medicines, and the plain packaging of tobacco products.³⁷⁷ There has been an insufficient attention, thus far, to the question of intellectual property, clean technologies, and climate change. In international summits on the environment and climate change, there have been fierce debates over text on intellectual property and clean technologies.³⁷⁸ While blocking text on intellectual property on the environment in multilateral forums, the U.S. has aggressively pushed for high standards for intellectual property at the TPP talks. There has been a concern that an intellectual property maximalist regime would undermine sustainable environment, the protection of biodiversity, and the transfer of clean technologies, particularly to developing countries, least developed countries, and island states. The Green Party of Aotearoa New Zealand, the Australian Greens, and the Green Party of Canada have questioned a model promoting intellectual property rights for big, multinational companies.³⁷⁹ Their counterparts—the European Greens—have more generally called for a balanced approach to intellectual property, technology transfer, and climate change.³⁸⁰

There has also been much concern about the proposals in respect of the Investment Chapter.³⁸¹ The investor-state dispute settlement regime would enable foreign investors to bring tribunal action against nation states in respect of government decisions, which adversely affect their foreign investments. In 2015,

376. See Matthew Rimmer, *Our Future Is at Risk: Disclose the Trans-Pacific Partnership Now*, NEW MATILDA (Nov. 15, 2013), <https://newmatilda.com/2013/11/15/our-future-risk-disclose-tpp-now>; Matthew Rimmer, *The TPP Protects Old Companies at the Expense of the New*, ABC NEWS (Australia) (Oct. 6, 2015), <http://www.abc.net.au/news/2015-10-06/rimmer-tpp-favours-old-ip-industries/6830884>.

377. See Matthew Rimmer, *A Mercurial Treaty: The Trans-Pacific Partnership and the United States*, THE CONVERSATION (June 15, 2012), <https://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471>.

378. See MATTHEW RIMMER, INTELLECTUAL PROPERTY AND CLIMATE CHANGE: INVENTING CLEAN TECHNOLOGIES (2011); Matthew Rimmer, *Intellectual Property and Global Warming: Fossil Fuels and Climate Justice*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 727 (Matthew David & Debora Halbert eds., 2014).

379. See Green Party of Aotearoa New Zealand, *supra* note 24.

380. See THE EUROPEAN GREENS, GREEN POSITION PAPER ON CLIMATE CHANGE, TECHNOLOGY TRANSFER AND INTELLECTUAL PROPERTY: 13 KEY MEASURES TO PROMOTE INNOVATION AND FIGHT CLIMATE CHANGE (2012), available at http://www.greens-efa.eu/fileadmin/dam/Documents/Policy_papers/GreenPositionPaper-IP-CC-TT.pdf.

381. See Matthew Rimmer, *A Dangerous Investment: Australia, New Zealand, and the Trans-Pacific Partnership*, THE CONVERSATION (July 2, 2012), <http://theconversation.edu.au/a-dangerous-investment-australia-new-zealand-and-the-trans-pacific-partnership-7440>.

WikiLeaks published a draft version of the Investment Chapter of the TPP.³⁸² The final text was published in November 2015.³⁸³ The regime proposes the establishment of an investor-state dispute resolution mechanism. The draft text has only weak protections and safeguards in respect of the environment. U.S. Trade Representative spokesperson Nkenge Harom has maintained that the Investment Chapter of the TPP includes measures to protect the environment.³⁸⁴ As the Australian Trade and Investment Minister, Andrew Robb vowed that the TPP would contain safeguards for the protection of the environment.³⁸⁵ Nonetheless, Senior Democrat and U.S. Congressman Henry Waxman (D-CA) has been concerned that the TPP lacks appropriate and meaningful safeguards in respect of the environment, labor rights, and public health.³⁸⁶ Christine Milne, a former Australian Senator and Leader of the Australian Greens, now a Global Greens Ambassador, has been particularly concerned about the Investment Chapter of the TPP.³⁸⁷ She observed: “These Investor State Dispute Settlement provisions are central to the negotiations from the U.S. point of view as big tobacco, big oil, big agribusiness and big pharmaceuticals come back for what they didn’t get under the US Australia free trade agreement.”³⁸⁸ Margrete Strand Rangnes, Labor and Trade Director for the Sierra Club, said: “This investment chapter would severely undermine attempts to strengthen environmental law and policy.”³⁸⁹ Erich Pica, President of Friends of the Earth US, commented: “The TPP would allow transnational corporations to challenge environmental laws that protect our air, land and water.”³⁹⁰ Dr Kyla Tienhaara has warned that the TPP could result in an expropriation of environmental governance.³⁹¹ Sierra Club executive director Michael Brune

382. *Secret Trans-Pacific Partnership Agreement (TPP) – Investment Chapter*, WIKILEAKS, <https://wikileaks.org/tpp-investment> (last visited Apr. 20, 2016).

383. See TPP, *supra* note 5 (providing the final text of Chapter 9 on Investment).

384. See Zach Carter, *Obama Trade Document Leaked, Revealing New Corporate Powers and Broken Campaign Promises*, HUFFINGTON POST (June 13, 2012), http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html.

385. See Philip Dorling, *WikiLeaks Reveals Local Health and Environment Rules Under Threat*, SYDNEY MORNING HERALD (Mar. 26, 2015), <http://www.smh.com.au/federal-politics/political-news/wikileaks-reveals-local-health-and-environment-rules-under-threat-20150325-1m7y8d.html>.

386. See Henry Waxman, *Remarks of Rep. Waxman on the Fifth Anniversary of the “May 10 Agreement,”* INFOJUSTICE.ORG (May 15, 2012), <http://infojustice.org/archives/23270>.

387. See Press Release, Christine Milne, Australian Senator and Leader of the Australian Greens, *Is the Trans-Pacific Partnership Dead in the Water?* (Mar. 13, 2012), http://christine-milne.greensmps.org.au/content/media-releases/trans-pacific-partnership-negotiation-dead-water_

388. *Id.*

389. Carter, *supra* note 385.

390. *Trans-Pacific Partnership*, FRIENDS OF THE EARTH, <http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership> (last visited Apr. 19, 2016).

391. See KYLA TIENHAARA, *THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY* (2009); Kyla Tienhaara, *Varieties of Green*

commented: “The TPP would empower big polluters to challenge climate and environmental safeguards in private trade courts and would expand trade in dangerous fossil fuels that would increase fracking and imperil our climate.”³⁹² The investor-state dispute settlement action under NAFTA by TransCanada against President Obama’s decision to block the Keystone XL pipeline has raised concerns amongst environmental advocates and climate activists.³⁹³ There is a fear that fossil fuel companies will deploy the investor-state dispute settlement regime in the TPP against efforts at climate action.³⁹⁴

There has also been debate about the Chapter on Technical Barriers to Trade and its impact upon environmental regulation.³⁹⁵ In 2012, the World Trade Organization found in favor of Mexico against U.S. regulations on a Dolphin-Safe Eco-Label under the *Agreement on Technical Barriers to Trade*.³⁹⁶ Referring to the 2012 ruling, Lori Wallach of Public Citizen commented: “The Obama administration must stand with the thousands of Americans who have signed a Consumer Rights Pledge calling on the U.S. to not comply with these illegitimate trade pact rulings and to stop the TPP trade negotiations that would greatly intensify this problem.”³⁹⁷ This decision was reaffirmed in a 2015 ruling, and a further appellate decision.³⁹⁸ There has been much disquiet as to the impact of the decision, and what it means for the treatment of environmental issues in the WTO.³⁹⁹

There has been a discussion as to whether the TPP will affect environmental

Capitalism: Economy and Environment in the Wake of the Global Financial Crisis, 23 ENVIRONMENTAL POLITICS 187 (2014).

392. Solomon, *supra* note 212.

393. See TransCanada, *supra* note 274.

394. See Jim Schultz, The Pipeline Strikes Back: *The Audacity of TransCanada’s \$15B Suit Against the U.S.*, YES! MAG. (Feb. 3, 2016), <http://www.yesmagazine.org/planet/the-pipeline-strikes-back-the-audacity-of-transcanadas-fifteenb-suit-against-the-us-20160203>; Letter from 350.org et al., *supra* note 275; Page, *supra* note 275.

395. See TPP, *supra* note 5 (providing the final text of Chapter 8 on Technical Barriers to Trade).

396. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) (adopted June 13, 2012).

397. *Public Citizen Condemns WTO Attack on U.S. Dolphin Protection Efforts*, PUBLIC CITIZEN BLOG (May 16, 2012), <http://citizen.typepad.com/eyesontrade/2012/05/public-citizen-condemns-wto-attack-on-us-dolphin-protection-efforts.html>.

398. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW (Nov. 20, 2015).

399. See Ben Beachy, *The WTO Just Dealt a Blow to U.S. Consumers and Dolphins*, SIERRA CLUB BLOG (Nov. 20, 2015), <http://www.sierraclub.org/compass/2015/11/wto-just-dealt-blow-us-consumers-and-dolphins>; David Dayen, *WTO Ruling on Dolphin-Safe Tuna Labeling Illustrates Supremacy of Trade Agreements*, THE INTERCEPT (Nov. 24, 2015), <https://theintercept.com/2015/11/24/wto-ruling-on-dolphin-safe-tuna-labeling-illustrates-supremacy-of-trade-agreements/>; Press Release, Public Citizen, Flipper vs. Fast Track: World Trade Organization Again Rules Against “Dolphin-Safe” Label, Says U.S. Policy Still Violates WTO Rules, Must Go (Apr. 14, 2015), <http://www.citizen.org/documents/press-release-wto-dolphin-safe-tuna-april-2015.pdf>.

labelling schemes—such as eco-labels, carbon reduction labels, and GM labels.⁴⁰⁰ A Coalition of Green Groups commented: “Were the TPP to replicate or expand on the WTO’s TBT rules, it would expose an array of U.S. environmental labels and labelling initiatives to challenge, including those designed to protect animal safety, encourage energy efficiency and inform consumers about products with genetically modified ingredients.”⁴⁰¹

The Final Text of the Development Chapter of the TPP is also disappointing, because it fails to require binding commitments in respect of government action on sustainable development.⁴⁰²

There has also been discussion as to whether the Procurement Chapter will any way limit sustainable government procurement. *Public Citizen* has been concerned that such text may limit a Nation State’s ability to pass procurement laws aimed at achieving certain public policy objectives.⁴⁰³

Overall, the agreement will do little to promote the protection of the environment, sustainable development, and climate. Professor Jeffrey Sachs of Columbia University expressed disappointment at “the lack of creativity in the development, labor, and environmental chapters.”⁴⁰⁴ He suggested that such Chapters were merely rhetorical devices: “Yes, they rhetorically defend global economic development, labor standards, and environmental sustainability, but they do so without specific enforcement powers.”⁴⁰⁵ Sachs questioned the absence of climate change in the text of the agreement: “Why is climate change not even considered in the draft, despite the fact that it represents the most important environmental threat of the 21st century, and may have strong implications for future trade rules?”⁴⁰⁶

400. See Matthew Rimmer, *Just Label It: Consumer Rights, GM Food Labelling, and International Trade*, in *INTELLECTUAL PROPERTY AND GENETICALLY MODIFIED ORGANISMS: A CONVERGENCE IN LAWS* 143 (Charles Lawson & Berris Charnley eds., 2015).

401. Sierra Club et al., *supra* note 169.

402. See TPP, *supra* note 5 (providing the final text of Chapter 23 on Development); Matthew Rimmer, *The Trans-Pacific Partnership Poses a Grave Threat to Sustainable Development*, *THE CONVERSATION* (Nov. 11, 2015), <https://theconversation.com/the-trans-pacific-partnership-poses-a-grave-threat-to-sustainable-development-50398>.

403. See *PUBLIC CITIZEN*, *supra* note 26.

404. Jeffrey Sachs, *TPP Is Too Flawed for a Simple “Yes” Vote*, *BOSTON GLOBE* (Nov. 8, 2015), <https://www.bostonglobe.com/opinion/2015/11/08/jeffrey-sachs-tpp-too-flawed-for-simple-yes-vote/sZd0nlnCr18RurX1n549GI/story.html>. See also *Trans-Pacific Partnership Trade Pact Text Published, Environment Chapter Scrutinised*, *INT’L CTR. FOR TRADE & SUSTAINABLE DEV.* (Nov. 12, 2015), <http://www.ictsd.org/bridges-news/biores/news/trans-pacific-partnership-trade-pact-text-released-environment-chapter>.

405. *Id.*

406. *Id.*

Given the combination of measures, the TPP promises to have a significant negative impact upon the environment, biodiversity, and climate change across the Pacific Rim. Instead, there is a need to develop a new model of trade, which respects workers and the environment.⁴⁰⁷ Michael Brune of the Sierra Club maintained that the U.S. Congress should reject the polluter-friendly TPP.⁴⁰⁸ He lamented: “Despite widespread, international opposition, the United States government is moving toward signing a trade deal that threatens our families, our communities, and our environment.”⁴⁰⁹ Brune observed that “we know enough about the pact to understand that, if passed, it would undermine decades of environmental progress and threaten our climate.”⁴¹⁰ He commented: “Congress must stand up for American jobs, clean air and water, and a healthy climate and environment by rejecting the TPP.”⁴¹¹

As Nobel Laureate Joseph E. Stiglitz has commented, it would be a tragic outcome for President Obama to undermine his own climate initiatives with the passage of TPP.⁴¹² There is a need to end the greenwashing of trade agreements—such as the TPP. The next U.S. President should work towards devising a model of trade agreement, which promotes a healthy climate in the Pacific Rim.

407. Michael Brune & Randi Weingarten, *Desperately Seeking a New Model for Trade*, AL-JAZEERA (May 21, 2015), <http://america.aljazeera.com/opinions/2015/5/desperately-seeking-a-new-model-for-trade.html>.

408. Sierra Club, *supra* note 94.

409. *Id.*

410. *Id.*

411. *Id.*

412. Joseph E. Stiglitz, *TPP's Hidden Climate Costs*, ROOSEVELT INST. (Mar. 28, 2016), <http://rooseveltinstitute.org/tpps-hidden-climate-costs>.