



## CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

### The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement

On October 5, 2015, the White House issued a statement by the President on the Trans-Pacific Partnership (TPP) agreement claiming that the TPP “includes the strongest commitments on labor and the environment of any trade agreement in history, and those commitments are enforceable, unlike in past agreements.”<sup>1</sup> This claim itself is unremarkable since proponents of almost every U.S. free trade agreement (FTA) formed in the past two decades have similarly promised meaningful and enforceable labor and environmental safeguards.<sup>2</sup> Yet the reality of past U.S. FTA enforcement and the provisions included in the TPP suggest that this agreement, like those before it, will not guarantee environmental protection.

While past agreements have contained similar enforcement provisions for the environment chapter, no Party has ever brought a formal case based on the environmental provisions of *any* U.S. FTA—despite documented violations. In fact, the only provision related to the environment used with regularity is Investor-State Dispute Settlement (ISDS), which allows companies to sue governments for enacting and upholding environmental and other laws. The regular use of ISDS starkly contrasts the underutilization and ineffectiveness of party dispute settlement or citizen suit provisions—mechanisms that have the potential to enforce environmental obligations in FTAs.

The history of U.S. trade agreement enforcement on the environment—or lack thereof—shows that any minimal gains from new commitments on the environment under the TPP pale in comparison to the negative human and environmental effects of the commercial and investment provisions.<sup>3</sup>

---

<sup>1</sup> Office of the Press Secretary, *Statement by the President on the Trans-Pacific Partnership*, THE WHITE HOUSE (Oct. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership>.

<sup>2</sup> Staff of Sen. Elizabeth Warren, *Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements*, <http://www.warren.senate.gov/files/documents/BrokenPromises.pdf> (last visited Oct. 23, 2015).

<sup>3</sup> Although this analysis focuses on environmental provisions and impacts, there are many other provisions within the TPP that provide cause for concern—including articles limiting access to medicine. See MÉDECINS SANS FRONTIÈRES, *TRADING AWAY HEALTH: THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP)*, Briefing Note (2015), [http://www.msfacecess.org/sites/default/files/IP\\_Brief\\_TPP\\_ENG\\_2015.pdf](http://www.msfacecess.org/sites/default/files/IP_Brief_TPP_ENG_2015.pdf) and PUBLIC CITIZEN, *INITIAL ANALYSES- SECRET TPP TEXT UNVEILED: IT’S WORSE THAN WE THOUGHT* (2015),

## I. EXISTING ENVIRONMENTAL COMMITMENTS

In part, the failure of the TPP to include sufficient environmental protections is evident from the text of the Environment Chapter itself.<sup>4</sup> The agreement includes almost no new substantive obligations, but instead reiterates the Parties' existing environmental responsibilities established previously in other multi-lateral and bi-lateral agreements. Moreover, some TPP commitments on the environment are actually *weaker* than those included in recent U.S. FTAs.

To wit, the TPP's Article on Multilateral Environmental Agreements (MEAs) only requires Parties to "adopt, maintain, and implement" the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>5</sup> rather than the seven MEAs listed for FTA inclusion in the May 2007 bipartisan agreement<sup>6</sup> and in accordance with "fast track" procedures.<sup>7</sup> In spite of these obligations, the MEA commitments are not reflected in the text of the TPP.

The environmental shortcomings of the TPP are not only reflected in what is not in the agreement, but also, by what is in the agreement—specifically, vague and likely unenforceable environmental commitments. For example, with respect to the conservation of wild flora and fauna and the illegal trade of protected species, Parties are only obliged to "combat," not "prohibit," "the illegal take of, and illegal trade in, wild fauna and flora."<sup>8</sup> And, while commitments under the CITES Convention itself are explicitly recognized, Parties are only required to "endeavor to implement, as appropriate, CITES resolutions."<sup>9</sup> Furthermore, while there is a commitment to "combat" illegal, unreported, and unregulated (IUU) fishing practices,<sup>10</sup> this obligation lacks efficacy given that Parties must merely "endeavor not to undermine" the

---

<http://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf> (expressing concerns about TPP, generally). See also PUBLIC CITIZEN, TPP'S INVESTMENT RULES HARM THE ENVIRONMENT (2015), <http://www.citizen.org/documents/fact-sheet-tpp-and-environment.pdf> (expressing concerns about the TPP's ISDS provisions).

<sup>4</sup> See TPP Article 20.15 (failing to impose any binding prohibitions on fossil fuel exports. Instead, the brief article merely requires Parties to "acknowledge" that transitioning to a low-emissions economy requires collective action and therefore calls for Parties to "cooperate and engage in capacity-building activities," accordingly.) *Id.* Meanwhile, in accordance with U.S. law, signing an FTA with the U.S., such as the TPP, qualifies nations for what amounts to automatic approval of LNG exports to these FTA parties. 15 U.S. C. §717(b). Thus, despite the TPP's call for a lower-emission economy, the TPP is likely to result in increased LNG exports to Japan, the world's largest LNG importer, and a party to the TPP. SIERRA CLUB, TPP TEXT ANALYSIS: ENVIRONMENT CHAPTER FAILS TO PROTECT THE ENVIRONMENT, 10, fn. 39 (Nov. 5, 2015) (hereinafter "Sierra Club TPP Text Analysis").

<sup>5</sup> Sierra Club TPP Text Analysis at 3; TPP Article 20.17.2. There are also limited obligations on the Montreal Protocol and MARPOL. TPP Articles 20.5, 20.6.

<sup>6</sup> Office of the United States Trade Representative, *Trade Facts: Bipartisan Agreement on Trade Policy 2* (May 2007), [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf). Additionally, the exclusion of the six MEAs is noteworthy, given that all Parties to the TPP are also party to at least two of these MEAs left out of the agreement. Sierra Club TPP Text Analysis at 3.

<sup>7</sup> 19 U.S.C. § 4201(b) (10) (A).

<sup>8</sup> TPP Article 20.17.1.

<sup>9</sup> TPP Article 20.17.2.

<sup>10</sup> TPP Article 20.16.14.

efforts of Regional Fisheries Management Organizations (RFMOs).<sup>11</sup> While the Article on Marine Capture Fisheries does offer one new substantive commitment in the form of reduced fisheries subsidies,<sup>12</sup> the lack of binding enforcement measures significantly undermines efforts to promote long-term marine conservation.<sup>13</sup>

Also significant is the TPP's failure to even mention climate change. The agreement includes provisions on transitioning to a low emission and resilient economy,<sup>14</sup> but never actually addresses the underlying issue that is driving this transition. The omission of any reference to the most severe environmental threat currently facing the TPP Parties or to the relevant objectives of the UNFCCC is a significant cause for concern given the potential for trade to exacerbate climate change.

## II. INEFFECTIVE ENVIRONMENTAL ENFORCEMENT OF PAST FTAs

As demonstrated by past FTAs, enforcement provisions do not lead to enforcement in-fact, so the agreements must include effective enforcement mechanisms to ensure environmental protection. The TPP, however, lacks such mechanisms. Similar to past FTAs, the TPP includes two potential enforcement mechanisms in its Environment Chapter: a dispute settlement process available for Parties to the agreement and a framework for what may become a citizen suit provision.<sup>15</sup> Even though these mechanisms may theoretically offer recourse, their ineffectiveness and underutilization in other U.S. FTAs, makes it unlikely that the TPP will offer meaningful recourse in response to environmental harm.

### A. DISPUTE SETTLEMENT

Recent U.S. FTAs have included party dispute settlement provisions similar to those in the TPP,<sup>16</sup> which offer parties a mechanism through which they may enforce the agreement, including the environment chapter.<sup>17</sup>

---

<sup>11</sup> TPP Article 20.16.14(e).

<sup>12</sup> TPP Article 20.16.5.

<sup>13</sup> TPP Article 20.16.

<sup>14</sup> TPP Article 20.15.

<sup>15</sup> See TPP Article 20.9 (describing the "Public Submission" process); see also TPP Articles 20.20-20.23 (describing "Environmental Consultations," "Senior Representative Consultations," "Ministerial Consultations," and "Dispute Resolution," respectively).

<sup>16</sup> TPP Article 20.20-20.23; see, e.g., Article 18.12 of the United States-Peru Trade Promotion Agreement (PTPA), Article 17.10 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), and Article 20.9 of the U.S.-Korea Fair Trade Agreement (KORUS FTA) (referencing dispute settlement provisions to which the environmental chapter of the agreement applies).

<sup>17</sup> See HOUSE WAYS & MEANS COMMITTEE, PERU & PANAMA FTA CHANGES (May 10, 2007), [http://waysandmeans.house.gov/Media/pdf/110/05\\_14\\_07/05\\_14\\_07.pdf](http://waysandmeans.house.gov/Media/pdf/110/05_14_07/05_14_07.pdf) (discussing the extension of dispute settlement to labor and environmental chapters). Not all U.S. FTAs with enforcement provisions in environment chapters allow for dispute settlement for all the provisions in the chapter; for example, the dispute settlement process is only available under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) for a violation of terms in the environment chapter when a Party is failing "to effectively enforce its

Most U.S. FTAs follow the same steps for parties in a dispute, starting with an initial consultation. If consultation—or under the TPP, three stages of consultations,<sup>18</sup> rather than the standard two—fails to resolve the dispute, parties may bring their claims before a dispute panel, which will determine whether a party violated an agreement period.<sup>19</sup> If this violation is confirmed, an implementation period begins, and remedies for non-compliance are available.<sup>20</sup> However, no party has ever brought a formal case based on the environmental provisions of *any* U.S. FTA<sup>21</sup>—despite documented violations.

For example, the PTPA<sup>22</sup> is considered one of the most environmentally protective FTAs, largely due to its comprehensive commitments against illegal timber and wildlife trade, and its inclusion of a Forest Annex, which imposes criminal and civil liability for those who “impede or undermine the sustainable management of Peru’s forest resources.”<sup>23</sup> Although these environmental obligations in this area are greater than those in the TPP, illegal logging in Peru remains rampant, and the USTR has declined to request verifications of exports to the U.S. using provisions in the PTPA Environment Chapter Forest Annex.<sup>24</sup> The ineffective enforcement of environmental commitments under PTPA is largely attributable to the USTR’s broad discretion to decide whether to enforce.<sup>25</sup>

In April 2012, EIA and CIEL identified 29 concessions and 77 shipments of timber exported from Peru to the U.S. in violation of the Forest Annex,<sup>26</sup> and called for the USTR to take appropriate enforcement action. Among its requests, EIA and CIEL urged the USTR to audit concessions and verify exports from two companies that have historically harvested illegal timber. Rather than request an audit or pursue other enforcement mechanisms embedded in the

---

environmental laws through a sustained or recurring course of action or inaction, in a manner affecting trade between Parties.” CAFTA-DR Article 17.2.1(a).

<sup>18</sup> Under the TPP, if Parties fail to uphold the general environmental commitments, they may initiate an “Environmental Consultation” under Article 20.20, through which requesting, responding, and consulting Parties attempt to resolve the matter. At this point in the dispute settlement process, the TPP includes a new step: a consultation with a “Senior Representative” under Article 20.21. If the matter remains unresolved, Parties may invoke the typical “Ministerial Consultation” under Article 20.22 before resorting to formal dispute resolution under Article 20.23.

<sup>19</sup> TPP Article 20.23.

<sup>20</sup> Jeanne J. Grimmer, CONG. RESEARCH SERV., R41779, DISPUTE SETTLEMENT IN THE U.S.-SOUTH KOREA FREE TRADE AGREEMENT (KORUS FTA) 5 (2012), <https://www.fas.org/sgp/crs/row/R41779.pdf>.

<sup>21</sup> *Id.* at 3, fn. 10; Congressman Lloyd Doggett, *Labor and Environmental Standards in the TPP*, <http://doggett.house.gov/index.php/media-center/news/679-labor-and-environmental-standards-in-the-tp> (last visited Nov. 4, 2015).

<sup>22</sup> Office of the United States Trade Representative, United States-Peru Trade Promotion Agreement: Strengthening Forest Sector Governance in Peru, <https://ustr.gov/sites/default/files/UNITED-STATES-PERU-TRADE-PROMOTION-AGREEMENT-strengthening-forest-sector-governance.pdf> (last visited Oct. 10, 2015).

<sup>23</sup> PTPA, Annex 18.3.4.3(b).

<sup>24</sup> *Id.*

<sup>25</sup> Environmental Investigation Agency, *The Laundering Machine: How Fraud and Corruption in Peru’s Concession System are Destroying the Future of its Forests*, EIA-GLOBAL.ORG (Apr. 2012), <https://eia-international.org/wp-content/uploads/The-Laundering-Machine.pdf>.

<sup>26</sup> *Id.*

PTPA, the USTR agreed to a five-point action plan with Peru,<sup>27</sup> in which the latter nation expressed its commitment to sustainable forest management,<sup>28</sup> but did not assume responsibility for the illegal timber trade documented in the 2012 Petition. In spite of this action plan, in 2015 the Peruvian government reported legal violations in 93.75% of authorized forest management operations for timber harvest,<sup>29</sup> many of which related to falsified permits and verifications.<sup>30</sup>

Even though the USTR's monitoring and reporting on environmental cooperation have improved in recent years, according to the GAO, it nevertheless lacks key monitoring elements, including indicators and time frames, and the political will to enforce the environmental obligations of the U.S. and partner countries made under FTAs.<sup>31</sup> As such, it is doubtful that the Parties to the TPP will ever use dispute settlement provisions in the TPP to protect the environment—even in the unlikely event that the U.S. and other Parties are able to fully monitor and detect any violations of the Environment Chapter by the twelve TPP countries.

## B. CITIZEN SUIT PROVISIONS

In addition to party dispute settlement, the TPP outlines a framework for a public submission process, another mechanism intended to enable the enforcement of environmental commitments.<sup>32</sup> Unfortunately, the general outline of the process in the TPP does not include a factual record, i.e. the only recourse available to citizens who file a submission. In other U.S. FTAs offering a public submission process, including the North American Agreement on Environmental Cooperation (NAAEC),<sup>33</sup> CAFTA-DR, the PTPA, the U.S.-Colombia Trade Promotion Agreement, and the U.S.-Panama Trade Promotion Agreement,<sup>34</sup> the final factual record is what drives the public to utilize this enforcement mechanism.

---

<sup>27</sup> *Id.* See also *Forest Management, Timber Trade Focus of U.S.-Peru Plan*, IIP DIGITAL (Jan. 16, 2013), <http://iipdigital.usembassy.gov/st/english/article/2013/01/20130115140986.html#axzz3qXPso6jU>. In 2013, the U.S. and Peruvian Governments agreed to a five-point action plan to further promote the goals of the PTPA Annex on Forest Sector Governments. *Id.*

<sup>28</sup> Office of the United States Trade Representative, *The United States and Peru Reach Agreement on Action Plan to Strengthen Forest Sector Governance*, EXECUTIVE OFFICE OF THE PRESIDENT (Jan. 11, 2013), [http://www.sice.oas.org/TPD/AND\\_USA/Implementation/Forest\\_SubCommittee/Jan%202013%20Forestry%20Meetings\\_e.pdf](http://www.sice.oas.org/TPD/AND_USA/Implementation/Forest_SubCommittee/Jan%202013%20Forestry%20Meetings_e.pdf).

<sup>29</sup> Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre, *Resultados de las supervisiones y fiscalizaciones efectuadas por el OSINFOR en el marco del Operativo Internacional "Operación Amazonas 2014"* (Oct. 2015), <http://www.osinfor.gob.pe/osinfor/wp-content/uploads/2015/10/Operaci%C3%B3n-Amazonas-19-octubre.pdf>.

<sup>30</sup> Environmental Investigation Agency, *Implementation and Enforcement Failures in the U.S.-Peru Free Trade Agreement Allows Illegal Logging Crisis to Continue: June 2015 Briefing Paper*, EIA (June 2015), [http://eia-global.org/images/uploads/Implementation\\_and\\_enforcement\\_FINAL.pdf](http://eia-global.org/images/uploads/Implementation_and_enforcement_FINAL.pdf).

<sup>31</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-161, *FREE TRADE AGREEMENTS: OFFICE OF THE U.S. TRADE REPRESENTATIVE SHOULD CONTINUE TO IMPROVE ITS MONITORING OF ENVIRONMENTAL COMMITMENTS 30* (2014), <http://www.gao.gov/assets/670/666782.pdf>.

<sup>32</sup> TPP Article 20.9.

<sup>33</sup> The NAAEC is the environmental side agreement to the North American Free Trade Agreement (NAFTA).

<sup>34</sup> See e.g. CAFTA-DR, Ch. 17 (Aug. 5, 2004), <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; PTPA, Ch. 18 (Apr. 12, 2006), <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; US-Colombia Trade Promotion

Through what is essentially a citizen suit provision, the public submission process generally enables any non-governmental organization or person residing in a FTA Party nation to file a submission<sup>35</sup> asserting that a party is failing to implement or substantially enforce its own environmental laws.<sup>36</sup> Under the NAAEC, if the Secretariat determines that there is an assertion of an environmental harm to the non-governmental organization or person making the submission,<sup>37</sup> the accused Party has an opportunity to respond to the allegation before the Council of the Commission for Environmental Cooperation (CEC) determines whether the violation warrants a final factual record.<sup>38</sup>

Rarely, however, does this citizen suit process reach this end point. Of the 87 submissions filed with the CEC alleging failures of environmental enforcement by the Canadian, US, and Mexican governments<sup>39</sup> only 22 claims resulted in factual records, and few have actually had a discernible impact on the enforcement practices at issue in the initial submissions.<sup>40</sup> Moreover, factual records take an average of nearly 5 years to complete, and several records have not encompassed the full scope of the enforcement issues raised in the submission.<sup>41</sup> In exceptional cases publication of a factual record has had an effect on enforcement,<sup>42</sup> but more often than not, there

---

Agreement, Ch. 18 (Nov. 22, 2006), <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; US-Panama Trade Promotion Agreement, Ch. 17 (June 28, 2007), <http://www.us tr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>.

<sup>35</sup> Under the NAAEC, this submission is known as a “Submission on Enforcement Matters” and the process is referred to as the “SEM process.” NAAEC Art. 14.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> NAAEC Art. 15.

<sup>39</sup> See Commission for Environmental Cooperation, *Submission on Enforcement Matters*, [http://www.cec.org/Page.asp?PageID=1212&SiteNodeID=210&BL\\_ExpandID=880](http://www.cec.org/Page.asp?PageID=1212&SiteNodeID=210&BL_ExpandID=880) (last visited Nov. 6, 2015) (as of Nov. 6, 2015, the CEC archive featured a total of 87 citizen submissions); John H. Knox and David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of NAFTA Environmental Commission*, 47 TEXAS INT’L 505, 519 (2011-2012), (<http://www.tilj.org/content/journal/47/num3/Knox-Markell505.pdf>).

<sup>40</sup> See Geoffrey Garver, *Forgotten Promises, Neglected Environmental Provisions of the NAFTA and the North American Agreement on Environmental Cooperation* 19, [www.cec.org/Storage/150/17599\\_NAFTA\\_book\\_chapter.docx](http://www.cec.org/Storage/150/17599_NAFTA_book_chapter.docx) (referring to CEC, SEM-99-02 Council Resolutions 01-10(2001)(Migratory Birds), and 03-16(2003)(Pulp and Paper)).

<sup>41</sup> The BC Logging, BC Mining, Migratory Birds, and Oldman River II submissions, for example. See Geoffrey Garver, *A North American Toolbox for Public Involvement in International Watershed Issues*, in PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES 237, 248 (Carl E. Bruch et al. ed., 2005).

<sup>42</sup> *Id.* at 249. One of the rare examples demonstrating the potential for a factual record to effect change is the 1996 submission by Mexican citizens alleging the failure of appropriate authorities to effectively enforce environmental laws before implementing the construction of a public harbor for tourist cruises in Cozumel. Submitters agreed that the factual record helped promote “additional protection of coral reefs in the area, improvements to Mexican law on environmental impact assessment, and establishment of a trust fund for reef protection.”*Id.*

is no improvement in environmental enforcement following a CEC submission and factual record.<sup>43</sup>

Under CAFTA-DR, the submission process has been similarly underutilized and ineffective; since 2007, citizens have filed only 32 submissions, including several that were suspended and resubmitted.<sup>44</sup> Of these submissions, the CAFTA-DR Council has only ordered the production of three factual records,<sup>45</sup> and only one, *Marine Turtles Dominican Republic* (CAALA/07/001),<sup>46</sup> has actually effected change<sup>47</sup> by providing data that the Dominican Republic needed to improve sea turtle protection, and giving the nation the political capital that it needed to develop a Conservation Action Plan.<sup>48</sup>

With the exception of this case, however, even reaching the factual record phase of the submission process has not resulted in meaningful environmental enforcement under FTAs, and the TPP does not even allow for a factual record. Although the TPP provides general instruction for the Committee on Environment to review submissions and Parties' written responses, it is unlikely that these provisions will have any significant effect on environmental enforcement. Until the Committee prepares a report on the implementation of the public submission article, which shall occur no later than three years after the TPP has entered into force,<sup>49</sup> any claim of success will remain unconfirmed. What is evident from the public submission process of the NAAEC and CAFTA-DR, however, is that even if citizens are able to navigate through the TPP's public submission process and the submission receives a timely and unbiased review, the outcome will have no legally binding effect on the Parties<sup>50</sup>—and there will be no factual record.

### III. INSTITUTIONAL AUTONOMY ON THE DECLINE

Recognizing that enforcement mechanisms have previously proven ineffective or gone unused by parties to resolve claims other than those in commercial chapters, U.S. environmental groups urged Congress to consider a new dispute settlement approach for environmental commitments in the TPP. One recommendation involved the creation of an “independent body to continuously monitor countries' compliance with environmental chapter obligations, report on best-practices

---

<sup>43</sup> See Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements* 28 ST. LOUIS U. PUB. L REV. 201, 227-232 (2008), [http://www.slu.edu/Documents/law/PLR/Archives/PLR28-1\\_Wold\\_Article.pdf](http://www.slu.edu/Documents/law/PLR/Archives/PLR28-1_Wold_Article.pdf).

<sup>44</sup> Giselle Davidian, *Should Citizens Expect Procedural Justice in Nonadversarial Processes? Spotlighting the Regression of the Citizen Submissions Process from NAAEC to CAFTA-DR*, in *NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE, AND PROSPECTS FOR REFORM* 37, 65 (Betsey Baker, et al. eds., Cambridge Univ. Press) (2015).

<sup>45</sup> *Id.*

<sup>46</sup> CAFTA-DR Secretariat for Environment Matters, *Factual Record Sea Turtles DR*, CAALA 07-001 (Jan. 2011) [www.saa-sem.org/expedientes/factual\\_record\\_caala\\_07\\_001.pdf](http://www.saa-sem.org/expedientes/factual_record_caala_07_001.pdf).

<sup>47</sup> Andrew Lurié and Maria Kalinina, *Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements*, 30 AM. U. INT'L REV. 457-465 (2015).

<sup>48</sup> *Id.* at 463.

<sup>49</sup> TPP Art. 20.9.4, 20.9.6.

<sup>50</sup> Knox and Markell, *supra* note 39 at 527.

and compliance, and bring cases directly to a dispute settlement body if and when it finds non-compliance with environmental obligations.”<sup>51</sup> This recommendation is a reaction to the apparent decrease in independent oversight and loss of institutional autonomy that has undermined environmental enforcement in past FTAs.

This trend is most evident with respect to diminishing authority and ultimate elimination of the Secretariat position.<sup>52</sup> Under the NAAEC, the CEC Secretariat is given “explicit and implicit authority”<sup>53</sup> to act as an independent body and an “international forum” and to exercise principles of international treaty interpretation.<sup>54</sup> Under the newer CAFTA-DR agreement, the Secretariat for Environmental Matters oversees the citizen submission process, but does not have broad enforcement authority.<sup>55</sup> Meanwhile, in more recent FTAs, like the PTPA, and now the TPP, the Secretariat position is eliminated altogether, and parties must instead rely exclusively on the USTR and other domestic enforcement bodies to oversee environmental compliance.

The apparent loss of institutional autonomy raises questions about whether parties seriously intend to comply with environmental commitments in FTAs. An autonomous body has the power to use “knowledge brokering, capacity building, negotiation facilitation, and litigation facilitation”<sup>56</sup> to uphold environmental obligations in an FTA. The authority of such institutions to review citizen submissions, oversee dispute settlement, and facilitate environmental cooperation, supports unbiased decision-making under the FTA, although, limited independence has hampered some of these efforts in the past.<sup>57</sup> Furthermore, “without an independent Secretariat, no institution is charged with developing information about the environmental effects of trade,”<sup>58</sup> which are likely to be substantial and wide-ranging considering the TPP’s twelve countries represent around 40% of the global GDP.

Since these autonomous bodies ensure that the environmental commitments established in the FTA are not undermined by commercial interests of the parties, the elimination of institutional autonomy compromises the integrity of the FTA and undermines environmental commitments

---

<sup>51</sup> Letter from 13 U.S. environmental organizations to Congress (October 29, 2013), [https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp%20letter%20final\\_0.pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp%20letter%20final_0.pdf).

<sup>52</sup> Costa Rica was the last party to implement CAFTA-DR, and did so in January 2009.

<sup>53</sup> Memorandum from Geoffrey Garver, Director, Submissions on Enforcement Matters Unit to Liette Vasseur, Chair, JPAC, “NACEC Secretariat’s Note to the JPAC on Lessons Learned in the Article 14 and 15 Submissions Process (Jan. 30, 2001), [http://cec.org/Storage/32/9425\\_NACEC.PDF](http://cec.org/Storage/32/9425_NACEC.PDF).

<sup>54</sup> Sikina Jinnah and Abby Lindsay, *Secretariat Influence on Overlap Management Politics in North America: NAFTA and the Commission for Environmental Cooperation*, REVIEW OF POLICY RESEARCH 124-145 (2015) <http://onlinelibrary.wiley.com/doi/10.1111/ropr.12106/pdf>.

<sup>55</sup> CAFTA-DR, Final Text, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

<sup>56</sup> Jinnah and Lindsay, 134.

<sup>57</sup> Wold, *supra* note 43 at 238-40.

<sup>58</sup> *Id.* at 243. Assessment and evaluation is left to the Parties and to the Committee, as described in the Environment Chapter. These responsibilities are limited to the acquisition of information, and do not rise to the level of autonomy granted to a Secretariat. TPP Ch. 20.

made in the agreement.<sup>59</sup> Without an independent oversight body with sufficient autonomy to enforce environmental commitments and evaluate the environmental effects of the TPP, there is no guarantee that the commitments made in the TPP will translate into environmental protection.

#### IV. ISDS PROVISIONS

The TPP also includes Investor-State Dispute Settlement (ISDS) provisions, allowing investors to challenge alleged violations of customary international law, investment contracts, and domestic laws of a party nation and seek compensation for interference with its commercial interests. Consequently, ISDS presents a major threat to environmental protection and other policies in the public interest.

Over the past two decades, ISDS has become one of the most frequently invoked provisions of international trade and investment agreements. By the end of 2014, a total of 608 ISDS claims had been filed under BITS and FTAs globally, with an average 50 new ISDS claims annually in recent years.<sup>60</sup> The popularity of ISDS among investors, however, is not shared among the general public, and national governments have become increasingly wary of the provision.<sup>61</sup> Specifically, there is increasing concern regarding the economic costs and lack of accountability<sup>62</sup> involved in the process, as ISDS cases often result in millions of dollars in damages and litigation fees.<sup>63</sup> Meanwhile, studies have found that over 50% of ISDS arbitrators have also acted as counsel for investors in other ISDS cases<sup>64</sup> and most agreements lack substantive conflict of interest disclosure requirements.<sup>65</sup> Furthermore, the TPP refers to a “code of conduct” for panelists, but the Rules of Procedure, which purportedly contain this code of

---

<sup>59</sup> *Id.* at 140.

<sup>60</sup> CEO and Friends of the Earth, *Lawyers Subverting the Public Interest: Lobby Group EFILA’s Stake in Investment Arbitration* (Apr. 2015), [http://corporateeurope.org/sites/default/files/efila\\_report-web.pdf](http://corporateeurope.org/sites/default/files/efila_report-web.pdf); UNCTAD, IIA ISSUES NOTE: RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) (May 2013), [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf) (revealing that approximately 42% of ISDS cases have been decided in favor of the state, 31% have been decided in favor of the investor, and 27% have been settled).

<sup>61</sup> Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, THE WASHINGTON POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

<sup>62</sup> *Id.* Senator Elizabeth Warren has critiqued ISDS as shifting power from American courts to “unaccountable international tribunals” that enable large multinational corporations to diminish environmental obligations.

<sup>63</sup> Paola Casale, *The Dangers of Investor State Dispute Settlement (ISDS)*, ECONOMY IN CRISIS (Sept. 28, 2015), <http://economyincrisis.org/content/the-eu-sees-dangers-of-investor-state-dispute-settlements-america-needs-to-see-it-too>; CEO and Friends of the Earth, *supra* note 60 (in addition to these economic damages, ISDS has cost nations significant legal fees; a handful of law firms handle these cases, and rack up average legal fees of over \$8 million per case). *Id.* at 2.

<sup>64</sup> D. GAUKRODGER AND K. GORDON, INVESTOR-STATE DISPUTE SETTLEMENT: A SCOPING PAPER FOR THE INVESTMENT POLICY COMMUNITY, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 46 (OECD pub. 2012), <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

<sup>65</sup> *Id.* at 50. (“At present, there are no clear rules addressing issue conflicts in ISDS...issue conflicts refer to situations where an arbitrator has either a pre-existing view or conflicting interest in an issue in a case they are deciding”).

conduct, are silent on these issues, and on any others related to ethical guidelines generally contained within a code of conduct.<sup>66</sup>

ISDS allows for little public oversight on these issues;<sup>67</sup> although there are public disclosure and transparency provisions in the TPP, the agreement falls far short of what's needed to protect the public and environment, as it fails to endorse the transparency rules established by the United Nations Commission on International Law (UNCITRAL).<sup>68</sup> The UNCITRAL rules require that sufficient information regarding the ISDS proceedings be disclosed to the public in a timely matter,<sup>69</sup> or include a method by which the public can obtain information.<sup>70</sup> In addition, the ISDS provision in the TPP agreement also affords investors additional privileges beyond those available in previous FTAs, including permitting investors to claim that a Party breached its minimum standard of treatment obligation by taking "an action that may be inconsistent with an investor's expectations," provided that this is not the sole basis for the claim.<sup>71</sup> This provision rolls-back on the efforts of NAFTA tribunals to narrow the minimum standard of treatment, and codifies the controversial position that if a host state issues certain assurances or promises towards an investor and does not follow through, the state may be liable for breach of the minimum standard of treatment.<sup>72</sup>

Furthermore, ISDS actions, or even the threat thereof, can roll-back laws protecting the environment, or even prevent their creation.<sup>73</sup> As seen in the 1997 NAFTA case *Ethyl*

---

<sup>66</sup> TPP, Arts. 28.10, 28.12.

<sup>67</sup> Laura Henry, *Responding to Public Concerns Over Investor State Dispute Settlement*, 12 J. OF KOREAN L. 197, 206 (2013).

<sup>68</sup> TPP Article 9.22; see also UNCITRAL, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE Arbitration (2014), <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>. For an assessment of TPP's investment provision to those in previous FTA's, along with minor changes to address recent problematic decisions by arbitral panels, but falling short of addressing the overall problems with ISDS, see Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short: Commentary*, IISD (Nov. 6, 2015), <http://www.iisd.org/commentary/how-investment-chapter-trans-pacific-partnership-falls-short>.

<sup>69</sup> TPP Article 9.1.

<sup>70</sup> TPP Article 9.23.

<sup>71</sup> TPP Article 9.6.4.

<sup>72</sup> Stefan Dudas, *Bilcon of Delaware et al. v. Canada: A Story About Legitimate Expectations and Broken Promises*, WOLTERS KLUWER-Arbitration Blog (Sept. 11, 2015), <http://kluwerarbitrationblog.com/2015/09/11/broken-promises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/>. See Bernasconi-Osterwalder, *supra* note 68, for a description of changes to the minimum standard of treatment clause in the TPP.

<sup>73</sup> Public Citizen, CASE STUDIES: INVESTOR-STATE ATTACKS ON PUBLIC INTEREST POLICIES, <http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf>. Several other ISDS cases that threaten to undermine environmental protection are currently pending, including *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Request for Arbitration, May 31, 2012; *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2, Initial Procedural Hearing, January 9, 2015; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Request for Arbitration, March 4, 2014; *The Renco Group Inc., v. Republic of Peru*, ICSID Case No. UNCT/13/1, Constitution of UNCITRAL Tribunal, April 8, 2013. *Id.* See also International Centre for Settlement of Disputes, *Cases*, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27> (last visited Nov. 12, 2015). As of November 12, 2015, there were 213 pending ISDS cases registered on the ICSID database. Of these registered cases, 7 cases are related to water, sanitation and flood protection; 9 cases are related to agriculture,

*Corporation v. Canada*,<sup>74</sup> Ethyl Corporation, a U.S. chemical company, invoked ISDS, claiming that the Canadian government's ban on the import and interprovincial transport of MMT, a toxic gasoline additive containing manganese, a known human neurotoxin and environmental hazard,<sup>75</sup> had expropriated the company's commercial interests.<sup>76</sup> After reaching arbitration, the Canadian government agreed to settle and pay Ethyl Corporation \$13 million. Canada was also required to advertise MMT as safe to human and environmental health, and to reverse the nation-wide chemical ban.<sup>77</sup>

Other ISDS cases have similarly resulted in the roll-back of environmental protections and demonstrated the potential for ISDS to restrict a state's authority to regulate on behalf of citizen welfare.<sup>78</sup> In the first of two ISDS claims that Vattenfall, a Swedish energy firm, brought against Germany, the company sought \$1.9 billion in damages for permit delays related to the construction of a coal-fired power plant in Hamburg.<sup>79</sup> In a settlement, Germany agreed to waive the environmental obligations embedded in Vattenfall's permits, and waived the company's obligations to mitigate the coal-plant's environmental impacts on the Elbe River.<sup>80</sup>

The potential for ISDS to undercut state sovereignty and to influence decision-making within a nation's public policy-making process<sup>81</sup> is not merely hypothetical, this chilling effect has occurred as a result of previous ISDS decisions. Perhaps the most illustrative of these decisions is the *Metalclad Arbitral* case,<sup>82</sup> a well-known dispute that arose from the Mexican government's refusal to intervene in a dispute between Metalclad and a municipal government over the construction and operation of a landfill. Fearing the environmental and health impacts of the site, a municipal government refused to issue the permit that Metalclad needed to construct the landfill. In addition to awarding the company US\$16,685,000 in damages, the Tribunal created a chilling effect on future conservation by interpreting "expropriation" to include land-use regulations "which have the effect of depriving the owner in whole or in significant part, of the

---

fishing & forestry; 49 cases are related to electric power and other energy; and 54 cases are related to oil, gas & mining.

<sup>74</sup> *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, Ad hoc – UNCITRAL Arbitration Rules (1998), [http://italaw.com/sites/default/files/case-documents/ita0300\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0300_0.pdf).

<sup>75</sup> The US EPA has banned MMT in reformulated gasoline.

<sup>76</sup> J. Anthony VanDuzer, *Investor-State Dispute Settlement Under NAFTA Chapter 11: The Shape of Things to Come?* 35 CAN. Y. B. INT'L L. 263, 274 (1997).

<sup>77</sup> *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, *supra* note 74.

<sup>78</sup> Henry, *supra* note 67, at 202.

<sup>79</sup> Investment Arbitration Reporter, *Germany Is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising out of Nuclear Phase-outs* (June 1, 2012), [http://www.iareporter.com/articles/20120601\\_1](http://www.iareporter.com/articles/20120601_1).

<sup>80</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, March 30, 2009, <http://italaw.com/documents/VattenfallRequestforArbitration.pdf>.

<sup>81</sup> David R. Haigh, *Chapter 11-Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN-US L. J 115, 125 (2000).

<sup>82</sup> *Metalclad Corporation and The United Mexican States* (2000), Case No. ARB(AF)/97/1, (International Centre for the Settlement of Investment Disputes(Additional Facility)).

use or reasonably-to-be-expected economic benefit of property.”<sup>83</sup> ISDS outcomes and subsequent chill on environmental regulation distorts the hierarchical relationship that has traditionally existed between foreign investors and host states. Thus, fearing “legal retaliation for lost profits,”<sup>84</sup> states may simply freeze efforts to advance environmental protection.

As the result of concerns with ISDS, in April 2011, Australia’s Gillard government announced that it would no longer include ISDS provisions in its trade agreements (the Abbot government has reverted to including ISDS on a case-by-case basis)<sup>85</sup> and roughly six months later, the President of Korea announced his intent to renegotiate the ISDS provision in the KORUS-FTA in response to overwhelming domestic opposition.<sup>86</sup> This opposition confirms that while there is a need for greater understanding and awareness of ISDS, there is also a growing recognition that ISDS does more harm than good for people and the environment.

Contained within the TPP text itself is the implicit recognition that ISDS is capable of promoting dangerous results. The TPP’s tobacco “carve-out”—the exclusion of the tobacco industry from the ISDS provision—provides that a “Party may elect to deny the benefits of [ISDS] with respect to claims challenging a tobacco control measure of the Party.”<sup>87</sup> For public health advocates, this carve-out represents a major victory, yet it should also raise a red flag. With more than \$34 billion in ISDS claims under BITs and FTAs currently pending, the economic costs of ISDS are well known. However, the tobacco carve-out reveals that States are wary not only of these financial costs, but of the potential costs to citizen health and welfare, despite the so-called “safeguards” related to laws protecting people and the environment.<sup>88</sup>

## V. CONCLUSION

---

<sup>83</sup> Marc Andrew Munro, *Expropriating Expropriation Law: The Implications of the Metalclad Decision on Canadian Expropriation Law and Environmental Land-Use Regulation*, 5 ASPER REV. INT’L BUS. & TRADE L. 75, 112-114 (2005) (quoting *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, para. 99).

<sup>84</sup> Henry, *supra* note 67, at 203.

<sup>85</sup> Australian Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity*, <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#promotion>.

<sup>86</sup> KORUS FTA, Apr.2007, renegotiated. Dec. 3, 2010, <http://www.ustr.gov/tradeagreements/free-trade-agreements/korus-fta/final-text>.

<sup>87</sup> TPP Article 29.5.

<sup>88</sup> See TPP Annex 9-B.3(b) (exempting from most claims of expropriations all “[n]on-discriminatory regulatory actions by a Party [are those] that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment”). NAFTA’s investment chapter actually features more environmental health and social welfare “safeguards” than that of the TPP yet has not prevented ISDS from challenging environmental laws. See e.g., NAFTA Arts. 1101.4, 1106.6, 1114.2. Furthermore, the Most Favored Nation provision in the TPP does not appear to limit the practice of applying substantive provisions more favorable to investors from other trade agreements, although it does state that MFN does not apply to procedural provisions. TPP Article 9.5.3. See Bernasconi-Osterwalder, *supra* note 68; Todd Tucker, *The TPP has a provision many will love to hate: ISDS. What is it, and why does it matter?*, THE WASHINGTON POST (Oct. 6, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter/>.

Whether the TPP will achieve its intended trade-based goals is an open question, but it is apparent that the agreement will detrimentally affect the environment. Not only does the TPP fail to include substantial new or ground-breaking commitments, but the enforcement mechanisms included in the agreement, specifically, party dispute settlement and citizen suit provisions, have proven either ineffective, or gone unused in previous FTAs with respect to the environmental obligations of the parties. Furthermore, the TPP creates no obligation to even assess the overall environmental impacts of the commercial and investment provisions.

Recognizing these trends and the reluctance of the USTR to enforce environmental obligations, environmental organizations aptly called for Congress to include a provision establishing independent oversight of environmental commitments. Unfortunately, no such autonomous body appears in the agreement, so Parties have once again committed to environmental obligations that will likely go unenforced.

Further threatening to undermine environmental protection is the ISDS provision of the agreement. Despite its controversial reputation, the U.S. has included ISDS in every FTA it has signed during the past two decades. The controversy surrounding ISDS is not limited to those same environmental organizations who called for greater enforcement; rather, governments from other nations have responded with threats to forego all FTAs featuring ISDS,<sup>89</sup> while in the U.S. the opposition to ISDS has even transcended political lines.<sup>90</sup> This concern is warranted, and should be more widespread given the environmental and economic damage that can result from ISDS. The TPP should not include a provision that diminishes state sovereignty, rolls-back environmental legislation, and chills future policy-making.

Instead, the TPP should be opposed in its current form, until it includes more stringent environmental protections, greater enforcement provisions, and more meaningful recourse for environmental harm. Only then can the Obama administration truthfully state that the TPP offers stronger enforceable environmental commitments than any U.S. FTA to come before it.

---

<sup>89</sup> Australian Department of Foreign Affairs and Trade, *supra* note 85.

<sup>90</sup> Simon Lester, Ingrid Persson, Jason Yackee, John K. Veroneau, *Investor-State Dispute Settlement: Getting the Rules Right*, CATO UNBOUND, (May 19, 2015) <http://www.cato-unbound.org/2015/05/19/jason-yackee/new-trade-agreements-dont-need-isds>; Elizabeth Warren, *supra* note 61.