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**greenwashing**

**the *trans-pacific partnership***

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The Sum of Us, TPP Hawaii Protests 2015

**DR MATTHEW RIMMER**

professor of intellectual property and innovation law

faculty of law

queensland university of technology

Queensland University of Technology

2 George Street GPO Box 2434

Brisbane Queensland 4001 Australia  
Work Telephone Number: (07) 31381599

**Executive Summary**

This submission provides a critical analysis of Chapter 20 of the *Trans-Pacific Partnership* dealing with the Environment.

The United States Trade Representative has made bold claims that the TPP will enhance the protection of the environment throughout the Pacific Rim.

In a rather brief and cursory National Interest Analysis, the Australian Government asserts that the TPP will be engaged in ‘promoting high levels of environmental protection, including by liberalising trade in environmental goods and services, and ensuring TPP Parties effectively enforce their domestic environmental laws.’ In its view, ‘TPP Parties must also take measures in relation to a number of important environmental challenges, such as protecting the ozone layer, protecting the marine environment from ship pollution, combatting illegal wildlife trade and combatting overfishing and illegal fishing. Subsidies for fishing that negatively affect overfished stocks and subsidies for vessels engaged in illegal fishing will be prohibited’.

In a somewhat more extensive National Interest analysis, the New Zealand Government has argued that the TPP fulfils its larger environmental objectives. The New Zealand Government maintains that ‘New Zealand’s policy in negotiating environment chapters in trade agreements is guided by four objectives: to promote sustainable development; to ensure trade and environment provisions are mutually supportive; to ensure the Government has the flexibility to regulate for the environment in accordance with national circumstances; and to ensure that environmental provisions are not used as a disguised form of protectionism.’ In its view, ‘The TPP Environment Chapter supports and promotes these objectives and represents the most comprehensive environmental outcome included in any of New Zealand’s FTAs.’

Canada’s Trudeau Government is still engaged in an open consultation about the merits of the TPP.

There has been much debate about the TPP and the environment in other nations, which have been participating in the TPP negotiations.

A close reading of the text of the TPP reveals that the Environment Chapter fails to provide for sufficient protection in respect of the environment across the Pacific Rim.

**Recommendation 1**

**The Environment Chapter of the *Trans-Pacific Partnership* provides weak overall protection of the environment, biodiversity, and the climate in the Pacific Rim.**

**Recommendation 2**

**There was a lack of open, transparent, and democratic consultations and discussions in respect of the Environment Chapter of the *Trans-Pacific Partnership*.**

**Recommendation 3**

**The *Trans-Pacific Partnership* fails to reinforce the international framework of multilateral environment agreements.**

**Recommendation 4**

**The Environment Chapter of the *Trans-Pacific Partnership* lacks meaningful enforcement of environmental rules and standards.**

**Recommendation 5**

**The Environment Chapter of the *Trans-Pacific Partnership* does little to protect biodiversity across the Pacific Rim.**

**Recommendation 6**

**The Environment Chapter of the *Trans-Pacific Partnership* has weak text on the oceans and marine capture fisheries.**

**Recommendation 7**

**The Environment Chapter of the *Trans-Pacific Partnership* fails to provide for strong protection of conservation.**

**Recommendation 8**

**The Environment Chapter of the *Trans-Pacific Partnership* has basic text on trade in environmental services. The overall agreement, though, equally promotes the trade in dirty technologies – as much as clean technologies.**

**Recommendation 9**

**The Environment Chapter of the *Trans-Pacific Partnership* fails to address the 21st century international environmental problem of climate change. This is problematic, given the interaction between trade and climate change.**

**Recommendation 10**

**Other Chapters of the *Trans-Pacific Partnership* – dealing with Investment, Intellectual Property, Development, Technical Barriers to Trade, and Public Procurement – undermine environmental policy, sustainable development, and climate action.**

**Biography**

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the *Trans-Pacific Partnership*, the *Trans-Atlantic Trade and Investment Partnership*, and the *Trade in Services Agreement*. His work is archived at [SSRN Abstracts](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=358042) and [Bepress Selected Works](http://works.bepress.com/matthew_rimmer/).

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on*The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer is the author of [*Digital Copyright and the Consumer Revolution: Hands off my iPod*](http://www.e-elgar.co.uk/bookentry_main.lasso?id=4263) (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors’ copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement*2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of [*Intellectual Property and Biotechnology: Biological Inventions*](http://www.e-elgar.co.uk/bookentry_main.lasso?id=4264) (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of Law in Context, entitled [*Patent Law and Biological Inventions*](http://www.federationpress.com.au/bookstore/book.asp?isbn=1862876371) (Federation Press, 2006).  Rimmer was also a chief investigator in an Australian Research Council Discovery Project, “Gene Patents In Australia: Options For Reform” (2003-2005), an Australian Research Council Linkage Grant, “The Protection of Botanical Inventions (2003), and an Australian Research Council Discovery Project, “Promoting Plant Innovation in Australia” (2009-2011). Rimmer has participated in inquiries into plant breeders’ rights, gene patents, and access to genetic resources.

Rimmer is a co-editor of a collection on access to medicines entitled [*Incentives for Global Public Health: Patent Law and Access to Essential Medicines*](http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=9780521116565)(Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of [*Intellectual Property and Emerging Technologies: The New Biology*](http://www.e-elgar.com/shop/intellectual-property-and-emerging-technologies?___website=uk_warehouse)(Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

Rimmer is the author of a monograph,[*Intellectual Property and Climate Change: Inventing Clean Technologies*](http://www.e-elgar.co.uk/bookentry_main.lasso?id=13601) (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. Rimmer is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers’ rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research*(Edward Elgar, 2015).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere*(2007); *Intellectual Property and Applied Philosophy*(2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines*(2012); and *Marine Bioprospecting: International Law, Indonesia and Sustainable Development*(2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.

**Greenwashing The *Trans-Pacific Partnership*:**

**Fossil Fuels, The Environment, and Climate change**

**Matthew Rimmer**

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]](#footnote-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 United States.[[2]](#footnote-2) There was an agreement reached between the parties in October 2015.[[3]](#footnote-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]](#footnote-4) The final texts of the agreement were published in November 2015.[[5]](#footnote-5)

There has been discussion as to whether other countries – such as Indonesia,[[6]](#footnote-6) the Philippines, and South Korea – will join the deal. There has been much debate about the impact of this proposed treaty upon the environment, biodiversity and climate change. 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]](#footnote-7)

In 2011, the United States Trade Representative developed a Green Paper on trade, conservation, and the environment in the context of the TPP.[[8]](#footnote-8) In its rhetoric, the United States Trade Representative has maintained that it has been pushing for strong, enforceable environmental standards in the TPP. In a key statement in 2014, the United States 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’.[[9]](#footnote-9) Moreover, the United States Trade Representative asserted: ‘Furthermore, our proposals would enhance international cooperation and create new opportunities for public participation in environmental governance and enforcement.’[[10]](#footnote-10)

The United States 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 *Trans-Pacific Partnership* 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.[[11]](#footnote-11)

[Mark Linscott, an assistant Trade Representative](http://www.finance.senate.gov/imo/media/doc/071410mltest.pdf) testified: ‘An environment chapter in the TPP should strengthen country commitments to enforce their environmental laws and regulations, including in areas related to ocean and fisheries governance, through the effective enforcement obligation subject to dispute settlement.’[[12]](#footnote-12) *Inside US Trade* has commented: ‘While not initially expected to be among the most difficult areas, the environment chapter has emerged as a formidable challenge, partly due to disagreement over the United States proposal to make environmental obligations binding under the TPP dispute settlement mechanism’.[[13]](#footnote-13)

Joshua Meltzer from the Brookings Institute contended that the trade agreement could be a boon for the protection of the environment in the Pacific Rim:

Whether it is depleting fisheries, declining biodiversity or reduced space in the atmosphere for Greenhouse Gas emissions, the underlying issue is resource scarcity. And in a world where an additional 3 billion people are expected to enter the middle class over the next 15 years, countries need to find new and creative ways to cooperate in order to satisfy the legitimate needs of their population for growth and opportunity while using resources in a manner that is sustainable for current and future generations. The TPP parties already represent a diverse range of developed and developing countries. Should the TPP become a free trade agreement of the Asia-Pacific region, it will include the main developed and developing countries and will be a strong basis for building a global consensus on these trade and environmental issues.[[14]](#footnote-14)

The TPP has been promoted by its proponents as a boon to the environment. The United States Trade Representative has maintained that the TPP will protect the environment: ‘The United States’ position on the environment in the TPP negotiations is this: environmental stewardship is a core American value, and we will insist on a robust, fully enforceable environment chapter in the TPP or we will not come to agreement.’[[15]](#footnote-15) The United States Trade Representative discussed ‘Trade for a Greener World’ on World Environment Day.[[16]](#footnote-16)

Andrew Robb, at the time Australian Trade and Investment Minister, vowed that the TPP will contain safeguards for the protection of the environment.[[17]](#footnote-17)

In November 2015, 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.[[18]](#footnote-18) He contended that the deal had been supported by the Nature Conservancy, the International Fund for Animal Welfare, the Joint Ocean Commission Initiative, the World Wildlife Fund, and World Animal Protection.

The United States Congress, though, has been conflicted about the United States Trade Representative’s arguments about the TPP and the environment.[[19]](#footnote-19) In 2012, members of the United States Congress - including Senator Ron Wyden (D-OR), Olympia 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 believe that 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.’[[20]](#footnote-20) 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’.[[21]](#footnote-21) The Congressional leaders maintained: ‘We believe the 2007 bipartisan congressional consensus on environmental provisions included in recent trade agreements should serve as the framework for the environment chapter of the TPP.’[[22]](#footnote-22)

Over several years, from 2013 to 2016, senior members of the Democratic leadership expressed their opposition to granting President Barack Obama a fast-track authority in respect of the TPP House of Representatives Minority Leader Nancy Pelosi said: ‘No on fast-track – Camp-Baucus – out of the question.’[[23]](#footnote-23) Senator Majority leader Harry Reid commented: ‘I’m against Fast-Track: Everyone would be well-advised not to push this right now.’[[24]](#footnote-24) Senator Elizabeth Warren has been particularly critical of the process and the substance of the negotiations in the TPP:

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. So the question is, Why are the trade talks secret? You’ll love this answer. Boy, the things you learn on Capitol Hill. I actually have had supporters of the deal say to me ‘They have to be secret, because if the American people knew what was actually in them, they would be opposed.

Think about that. Real people, people whose jobs are at stake, small-business owners who don’t want to compete with overseas companies that dump their waste in rivers and hire workers for a dollar a day—those people, people without an army of lobbyists—they would be opposed. I believe if people across this country would be opposed to a particular trade agreement, then maybe that trade agreement should not happen.[[25]](#footnote-25)

The Finance Committee in the United States Congress deliberated over the *Trans-Pacific Partnership* negotiations in 2014.[[26]](#footnote-26) The new committee chair Ron Wyden has argued that there needs to be greater transparency in trade. Nonetheless, he has mooted the possibility of a ‘smart-track’ to reconcile the competing demands of the Obama Administration, and United States Congress.[[27]](#footnote-27) Wyden insisted: ‘The new breed of trade challenges spawned over the last generation must be addressed in imaginative new policies and locked into enforceable, ambitious, job-generating trade agreements.’[[28]](#footnote-28) He emphasized that such agreements ‘must reflect the need for a free and open Internet, strong labor rights and environmental protections.’[[29]](#footnote-29)

Elder Democrat Sander Levin warned that the TPP failed to provide proper protection for the environment:

The TPP parties are considering a different structure to protect the environment than the one adopted in the May 10 Agreement, which directly incorporated seven multilateral environmental agreements into the text of past trade agreements. While the form is less important than the substance, the TPP must provide an overall level of environmental protection that upholds and builds upon the May 10 standard, including fully enforceable obligations. But many of our trading partners are actively seeking to weaken the text to the point of falling short of that standard, including on key issues like conservation.[[30]](#footnote-30)

Nonetheless, 2015, President Barack Obama was able to secure the overall support of the United States Congress for his ‘fast-track’ authority.[[31]](#footnote-31) This was made possible by the Republicans and dissident Democrats. Notably, Oregon Senator Ron Wyden switched sides, and was transformed from a critic of the TPP to an apologist for the TPP.

For their part, green political parties and civil society organisations have been concerned about the secretive nature of the negotiations; and the substantive implications of the treaty for the environment. Environmental groups and climate advocates have been sceptical of the environmental claims made by the White House for the TPP.[[32]](#footnote-32) 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’.[[33]](#footnote-33) In the United States, civil society groups such as the Sierra Club, [[34]](#footnote-34) Public Citizen,[[35]](#footnote-35) WWF,[[36]](#footnote-36) the Friends of the Earth,[[37]](#footnote-37) the Rainforest Action Network[[38]](#footnote-38) and 350.org[[39]](#footnote-39) 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: ‘This is a stealth affront to the principles of our democracy.’[[40]](#footnote-40) Maude Barlow’s [The Council of Canadians](http://www.canadians.org/trade/issues/TPP/index.html) has also been concerned about the TPP and environmental justice.[[41]](#footnote-41) New Zealand Sustainability Council executive director Simon Terry said the agreement showed ‘minimal real gains for nature’.[[42]](#footnote-42) A number of organisations have joined a grand coalition of civil society organisations, which are opposed to the grant of a fast-track.[[43]](#footnote-43)

On the 15th January 2013, WikiLeaks released the draft Environment Chapter of the TPP[[44]](#footnote-44) - 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.’[[45]](#footnote-45) He observed: ‘The fabled TPP environmental chapter turns out to be a toothless public relations exercise with no enforcement mechanism.’[[46]](#footnote-46) This article provides a critical examination of the Environment Chapter of the TPP – both the leaked drafts and the final text. The overall argument of the article is that the Environment Chapter of the TPP is an exercise in greenwashing – it is a public relations exercise by the United States 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 making 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.[[47]](#footnote-47) 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.[[48]](#footnote-48) Such a problem is apparent with the TPP – in which there was a gap between the assertions of the United States Government, and the reality of the agreement.

This article contends that the TPP fails to meet the expectations created by President Barack Obama, the White House, and the United States 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 also highlights that a number of other chapters of the TPP will 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.

**1. The Relationship of the TPP to Multilateral Environmental Treaties**



White House TPP Social Media Campaign

The United States Trade Representative, Michael Froman, has maintained: ‘Our values also tell us that the future global economy should be more sustainable than it is today.’[[49]](#footnote-49) 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’.[[50]](#footnote-50) Froman commented: ‘As we do with labor provisions, we have insisted that environmental commitments be on equal footing with commercial obligations.[[51]](#footnote-51) 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’.[[52]](#footnote-52) Froman contended: ‘Even as we push to raise the bar on environmental protections in new ways, we continue to insist that countries live up to commitments they’ve made in their own laws implementing their MEAs.’[[53]](#footnote-53) He observed: ‘These include but are not limited to the *Convention on International Trade of Endangered Species* (CITES), the Montreal protocol which covers ozone-depleting substances, and the MARPOL agreement which governs marine pollution from ships’.[[54]](#footnote-54) In his view, ‘the United States is standing firm on logging regulations, pollution control and other key issues where we’ve always led the way’. [[55]](#footnote-55)

Coral Davenport, the environmental correspondent for *The New York Times*, broke the story of the WikiLeaks’ publication of the TPP.[[56]](#footnote-56) 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.’[[57]](#footnote-57) Davenport noted: ‘The negotiations over the *Trans-Pacific Partnership*, 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.’[[58]](#footnote-58) She stressed: ‘As it stands now, the documents, viewed by The New York Times, show that the disputes could undo key global environmental protections.’[[59]](#footnote-59)

The joint analysis by the Sierra Club, WWF, and NRDC is highly critical of the language in the TPP on multilateral environmental treaties.[[60]](#footnote-60) 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 ofgovernments designed to protect the environment—represents a clear step back from the May2007 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 fulfill its obligations under each MEA.

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

The obligation to uphold commitments made under MEAs and subject those commitments to the same dispute settlement procedures as commercial obligations is critical. It helps give parity to environmental and commercial obligations in trade agreements. More fundamentally, it helps ensure that countries do not waive or weaken their obligations under MEAs in order to attracttrade or investment, and ensures that a country faces consequences if it does.[[61]](#footnote-61)

The environmental groups lamented that the leaked text takes a significant step back from the May 2007 agreement: ‘Instead of committing TPP countries to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfill its obligations under MEAs and subject those obligations to dispute settlement, each TPP country is merely committed to “affirm its commitment” to implement the MEAs to which it is a Party (Article SS.4.1).’[[62]](#footnote-62)

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.[[63]](#footnote-63) 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.’[[64]](#footnote-64)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.’ [[65]](#footnote-65) 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.’[[66]](#footnote-66) Article 20.3 addresses general commitments of the parties – including ‘the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development.’[[67]](#footnote-67) 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.[[68]](#footnote-68) Article 20.4.1 provides that ‘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’.[[69]](#footnote-69) Article 20.4.1 also acknowledges: ‘Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.’[[70]](#footnote-70) 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.’[[71]](#footnote-71) 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.[[72]](#footnote-72) Article 20.5.1 provides that ‘the 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.’[[73]](#footnote-73) Article 20.5.1 emphasizes that ‘each Party shall take measures to control the production and consumption of, and trade in, such substances.’[[74]](#footnote-74) Article 20.5.2 insists that ‘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 protection of the ozone layer’.[[75]](#footnote-75) 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 protection.’[[76]](#footnote-76) Article 20.5.3 discusses co-operation 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.’[[77]](#footnote-77)

Michael Brune of the Sierra Club maintained that the United States Congress should reject the polluter-friendly TPP.[[78]](#footnote-78) 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.’[[79]](#footnote-79) 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.’[[80]](#footnote-80) He commented: ‘Congress must stand up for American jobs, clean air and water, and a healthy climate and environment by rejecting the TPP.’[[81]](#footnote-81)

A grand alliance of Green Groups demanded that the United States Congress vote against the TPP unless it included rules in the environment chapter with binding obligations.[[82]](#footnote-82) 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.’[[83]](#footnote-83) The Green Groups demanded:

The binding obligation to uphold commitments made under all seven 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 To that end, since the May 10thagreement all U.S. free trade pacts have required countries to “adopt, maintain, and implement” the laws, regulations, and all other measures to fulfill its obligations under a set of seven multilateral environmental agreements (MEAs) and subject those commitments to the FTA dispute settlement process.[[84]](#footnote-84)

The Green Groups maintained that ‘The TPP must include all of the May 10th obligations, including that countries shall adopt, maintain, and implement its obligations under the following specified agreements: 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*.’[[85]](#footnote-85) Moreover, the Green Groups insisted that compliance with the *Minamata Convention on Mercury* be made mandatory under the TPP.[[86]](#footnote-86)

**2. Enforcement**



USTR TPP Social Media Campaign

The United States 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’. [[87]](#footnote-87)

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.’ [[88]](#footnote-88) He commented that the TPP ‘encourages [the trading partners of the United States] 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.’[[89]](#footnote-89)

In 2012, members of the United States 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:

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. These elements are critical to ensuring accountability between trading partners and higher standards for environmental protection that benefits the economies of both the United States and our trading partners.[[90]](#footnote-90)

There has also been concern about the enforcement of the environment chapter. There is a lack of consensus amongst the negotiating parties about dispute resolution over environmental matters.

In March 2015, Brian Deese, Senior Advisor to President Barack 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 trading partners take on.’[[91]](#footnote-91)

In its analysis, WikiLeaks observed: ‘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’.[[92]](#footnote-92) 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’.[[93]](#footnote-93) 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’.[[94]](#footnote-94) 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’, commented.[[95]](#footnote-95) 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’. [[96]](#footnote-96)

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.’[[97]](#footnote-97) 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.’[[98]](#footnote-98) He maintained: ‘Considering the dire state of many fisheries and forests in the Asia-Pacific region and the myriad threats to endangered wildlife, we need a modern trade agreement with real teeth, not just empty rhetoric.’[[99]](#footnote-99)

The joint analysis by the Sierra Club, WWF, and NRDC is highly critical of the language in the TPP laments the lack of enforcement in respect of environmental obligations.[[100]](#footnote-100) 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’.[[101]](#footnote-101) The environmental leaders cited the May 2007 Congressional agreement, which stipulated that ‘all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements— same remedies, procedures, and sanctions’.[[102]](#footnote-102) 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.’[[103]](#footnote-103) The civil society groups lamented that the TPP failed to honour this May 2007 agreement:

The consolidated text of the TPP environment chapter, however, sends countries back to a pre-2007 world. If one county suspects a potential violation of the TPP environment chapter, a Party can request consultations with another Party (Article SS.12.1); set up a Committee to review the issue (Article SS.12.2); and refer the issue to relevant Ministers of consulting Parties (Article SS.12.3). If the issue remains unresolved, a Party can request an arbitral tribunal which would consider the matter (Article SS.12.4) and present the disputing Parties a report (ArticleSS.12.11). If the arbitral panel finds that one of the Parties has failed to comply with its obligations in the environment chapter, the Parties “shall endeavor” to agree on a “mutually satisfactory action plan” (Article SS.12.12).[[104]](#footnote-104)

The leading environmental groups lament: ‘Unfortunately, the process in the consolidated text ends here, with a final report and an action plan.’[[105]](#footnote-105) The civil society groups comment: ‘If the action plan is ignored or not implemented adequately, there is no recourse’.[[106]](#footnote-106) The environmental groups conclude: ‘This vastly insufficient process is an unacceptable rollback of previous commitments and renders the obligations in this chapter virtually meaningless.’[[107]](#footnote-107)

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. Article 20.2 of the TPP speaks of the need to ‘promote high levels of environmental protection and effective enforcement of environmental laws’.[[108]](#footnote-108)

Article 20.19 establishes an Environment Committee and Contact Points.[[109]](#footnote-109) Article 20.20 deals with consultations on the environment.[[110]](#footnote-110) Article 20.21 deals with senior representative consultations.[[111]](#footnote-111) Article 20.22 concerns ministerial consultations.[[112]](#footnote-112) Article 20.23 deals with dispute settlement.[[113]](#footnote-113) 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) and Article 20.22 (Ministerial Consultations) within 60 days after the date of receipt of a request under Article 20.20 (Environmental Consultations), 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).’[[114]](#footnote-114)

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.’ [[115]](#footnote-115)

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.’[[116]](#footnote-116) 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.’[[117]](#footnote-117) 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.’[[118]](#footnote-118) 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.’[[119]](#footnote-119)

A Coalition of Green Groups called upon the United States Congress to reject the TPP – unless there was meaningful enforcement of environmental rules and standards. [[120]](#footnote-120) It noted: ‘Strong obligations with weak or no enforcement would render the chapter meaningless’.[[121]](#footnote-121) The group observed: ‘Our organizations are also extremely concerned that the provisions agreed to in the environment chapter will not be enforced.’[[122]](#footnote-122) The green groups commented: ‘The United States has never once brought a trade dispute against another country for failing to live up to its environmental obligations in trade deals even when there has been documented evidence of non-compliance with environmental obligations.’[[123]](#footnote-123) In particular, there was concern about the failure by the United States 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’.[[124]](#footnote-124) 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.’[[125]](#footnote-125)

**3. Trade and Biodiversity**



USTR TPP Social Media Campaign

There has been concern about the efficacy of the multilateral framework for the protection of biodiversity.[[126]](#footnote-126)

The Pacific Rim features a rich and diverse environment, with ecosystems such as the Great Barrier Reef,[[127]](#footnote-127) The Amazon and a third of all the threatened species on earth.

The United States Trade Representative, Michael Froman, has argued that the TPP will protect biodiversity hot-spots:

Through our negotiations, we are seeking to address conservation challenges that are 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 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. [[128]](#footnote-128)

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.’[[129]](#footnote-129)

In 2012, members of the United States 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.[[130]](#footnote-130)

Draft Article SS.13 of the Environment Chapter of the TPP addresses the topic of trade and biodiversity.[[131]](#footnote-131) The language echoes some of the key principles in the *Convention on Biological Diversity* 1992,[[132]](#footnote-132) the *Bonn Guidelines* 2002,[[133]](#footnote-133) and the *Nagoya Protocol* 2010.[[134]](#footnote-134)

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’.[[135]](#footnote-135) 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 in a fair and equitable way the benefits arising from the utilization of genetic resources.’[[136]](#footnote-136)

Draft article SS13 (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.’[[137]](#footnote-137)

Draft article 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.’[[138]](#footnote-138)

Draft article 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’.[[139]](#footnote-139) 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.’[[140]](#footnote-140)

Draft article 13.6 maintains 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’.[[141]](#footnote-141) 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.’[[142]](#footnote-142)

Draft article 13.7 promotes co-operative activity: ‘The Parties are committed to enhance their cooperative efforts in areas of mutual interest related to biological diversity, including through Article SS.10 (Cooperation). Cooperation may include, but is not limited to, exchanging information and experiences in areas related to: (a) the conservation and sustainable use of biological diversity; (b) the protection and maintenance of ecosystem and ecosystem services; and (c) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources.’[[143]](#footnote-143)

The United States has provided opposition to this text on the basis that it is 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.

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.[[144]](#footnote-144) 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.’[[145]](#footnote-145) 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.’[[146]](#footnote-146) The problem is further compounded by the final version of the Intellectual Property Chapter of the TPP.[[147]](#footnote-147) The final text has only soft language about co-operation 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.[[148]](#footnote-148)

In a letter to the United States Trade Representative in July 2015, a group of 19 House Democrats led by Earl Blumenauer expressed concerns about the environment chapter of the TPP.[[149]](#footnote-149) The group highlighted that the ‘TPP countries represent some of the most resource-rich regions in the world.’[[150]](#footnote-150) The House Democrats warned: ‘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.’[[151]](#footnote-151)

The final text of the TPP does contain language on trade and biodiversity in Article 20.13.[[152]](#footnote-152) Article 20.13.1 provides: ‘The Parties recognise the importance of conservation and sustainable use of biological diversity and their keyrole in achieving sustainable development.’ [[153]](#footnote-153) 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.’ [[154]](#footnote-154) 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.’ [[155]](#footnote-155) 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: ‘Parties recognise the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party’s international obligations.’ [[156]](#footnote-156) Moreover, ‘The Parties further recognise 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.’ [[157]](#footnote-157) 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’. [[158]](#footnote-158) 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 of biological diversity.’ [[159]](#footnote-159) Article 20.13.6 observes that ‘the Parties shall cooperate to address matters of mutual interest’ – including ‘(a) the conservation and sustainable use of biological diversity; (b) the protection and maintenance of ecosystems and ecosystem services; and (c) access to genetic resources and the sharing of benefits arising from their utilization.’ [[160]](#footnote-160)

There would appear to be significant regrets about the failure of the TPP to do much to promote the conservation of biodiversity in the Pacific Rim.

**4. Marine Capture Fisheries**



White House TPP Social Media Campaign

In 2011, the United States Trade Representative emphasized that it would address fisheries in the TPP.[[161]](#footnote-161) The 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. With respect to IUU fishing, the United States has proposed obligations to support measures being developed or implemented through relevant regional fisheries management organizations and other arrangements in the region, such as catch documentation schemes and port State measures. 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.[[162]](#footnote-162)

There has been much debate about whether the TPP has realised such ambitions.

On the topic of marine protection, the United States Trade Representative, Michael Froman, has maintained:

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 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.[[163]](#footnote-163)

Froman 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](http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership)” online – go beyond the multilateral agreements on fisheries management to which the United States and some of the other countries are already parties’.[[164]](#footnote-164) 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.’[[165]](#footnote-165)

In 2012, members of the United States 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. The Food and Agriculture Organization now estimates that more than 85 percent of the world’s commercial fish populations are over- or fully-exploited. Government sponsored fishing subsidies are a primary contributor to overfishing. These subsidies are 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. [[166]](#footnote-166)

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. [[167]](#footnote-167)

The environmental groups make 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.[[168]](#footnote-168) 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 — 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.[[169]](#footnote-169)

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. Samantha Page reported that ‘Whaling - which is currently under dispute between Japan and Australia - might not be dealt with in the environmental chapter of the TPP.’[[170]](#footnote-170) She noted that ‘Japan has been pushing back against potential whale-hunting prohibitions.’[[171]](#footnote-171) 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.[[172]](#footnote-172) The letter noted: ‘Following the graphic news reports on January 17th that five pods of Bottlenose dolphins were driven into Taiji’s infamous killing cove, leaving 40 slaughtered and 51 captured, people watching from around the world were left heartbroken.’[[173]](#footnote-173) The group observed:

Corporations have spent the past two years marking-up the language of the TPP to serve their interests, should human compassion not be afforded the same privilege as business interests? Although we understand that the negotiations have been quite lengthy, at this point, 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.[[174]](#footnote-174)

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.

A number of environmental organisations 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 *Trans-Pacific Partnership* (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. The emphasis of these agreements must balance both economic and environmental priorities. Humanity’s lust for commercialisation and unbridled growth, at the expense of our life support system, may cause us to fall off the precipice as a species.[[175]](#footnote-175)

Accordingly, the Sea Shepherd has joined the coalition of civil society organisations, which have opposed the fast-tracking of 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.[[176]](#footnote-176) 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.’[[177]](#footnote-177) Solomon worried:

In fact, many of the 12 Pacific Rim countries negotiating the secretive trade pact - [Malaysia](http://www.thestar.com.my/News/Nation/2013/08/16/Wildlife-Shark-Fin/), [Vietnam](http://www.ecorazzi.com/2014/04/09/vietnam-surpasses-hong-kong-in-global-shark-fin-trade/), and [Singapore](http://oceana.org/sites/default/files/reports/OCEANA_international_trade_shark_fins_english.pdf), to name a few - have a long and bloody history in the shark fin trade. That's why it is particularly worrying that a previously [leaked chapter of the TPP](http://sierraclub.typepad.com/compass/2014/01/leaked-secret-trade-document-reveals-weak-environmental-standards.html) includes only very vague references to shark finning - not the full ban on shark finning and associated trade that we need. Other parts of the TPP would allow corporations to sue governments over environmental safeguards--like protections for sharks - that might decrease their profits. This could mean a huge step backward in the fight to protect sharks.[[178]](#footnote-178)

Solomon urged the community to tell ‘Members of Congress to oppose fast track in order to prevent a harmful TPP that threatens communities, our environment, and sharks.’ She observed: ‘So while you're watching prime time shark action this week, [take action](https://secure.sierraclub.org/site/Advocacy?cmd=display&page=UserAction&id=12351&s_src=714HSNFB03) to tell your Member of Congress that the U.S. can't be a part of any trade deal that puts our sharks at risk.’[[179]](#footnote-179) Solomon concluded: ‘We know we need to protect our oceans' top predator. It's time the U.S. led the way.’[[180]](#footnote-180)

The final text of the TPP does contain language on marine capture fisheries in Article 20.16.[[181]](#footnote-181) 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. [[182]](#footnote-182)

Moreover, the agreement emphasizes: ‘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’.[[183]](#footnote-183)

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.’[[184]](#footnote-184) Cray said ‘There are better ways to protect the world's oceans than what's in the TPP.’[[185]](#footnote-185)

A Coalition of Green Groups made a number of recommendations in respect of fisheries, oceans, and marine protection. [[186]](#footnote-186) The alliance maintained that there should be ‘legally binding commitments to address illegal, unreported, and unregulated (IUU) fishing.’[[187]](#footnote-187) Moreover, there should be ‘legally binding rules to prohibit subsidies that contribute to overcapacity and overfishing’.[[188]](#footnote-188) Furthermore, the Green Groups pressed for ‘legally binding prohibitions on shark finning and associated trade and commercial whaling.’[[189]](#footnote-189) 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*.’[[190]](#footnote-190) 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.’[[191]](#footnote-191)

**5. Conservation**



White House TPP Social Media Campaign

In 2011, the United States Trade Representative developed a Green Paper on trade, conservation, and the environment in the context of the TPP.[[192]](#footnote-192) The Green Paper stressed: ‘The significance of existing problems with illegal wildlife and wild plant trade warrant bold measures in the TPP.’[[193]](#footnote-193) The Green Paper promised: ‘Our proposal for a conservation framework in the TPP environment chapter reflects our determination to negotiate a truly 21st-century result for trade and the environment.’[[194]](#footnote-194)

Apparently, Australia has voiced reservations about the United States conservation proposal, because of a belief that it is overly prescriptive and fails to take into account individual variation in national laws. Australia is perhaps also concerned about preserving the precautionary principle under the TPP.

Mike Baker, the chief executive of World Animal Protection was a supporter of the TPP.[[195]](#footnote-195) He argued that the ‘TPP can potentially enhance and embed international standards for wildlife.’[[196]](#footnote-196) He contended that ‘the deal's environment chapter can potentially help curb one of the severest transnational crimes: wildlife trafficking.’[[197]](#footnote-197) 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.’[[198]](#footnote-198) He maintained: ‘The TPP's environment chapter can potentially enhance and embed standards for wildlife and marine animals’.[[199]](#footnote-199) Mike Baker offered his endorsement of the agreement: ‘As an advocate for animals, when World Animal Protection sees potential to help them, we are compelled to press for the best possible outcome.’[[200]](#footnote-200) 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 United States Government to take a strong line on conservation in the TPP talks. He observed that ‘there remain unrealized opportunities to incorporate environmental provisions into the framework of the TPP.’[[201]](#footnote-201) Roberts noted: ‘As part of the Executive Order on Wildlife Crime, the President declared that “the United States shall seek to reduce the demand for illegally traded wildlife, both at home and abroad, while allowing legal and legitimate commerce involving wildlife.”’[[202]](#footnote-202) He commented: ‘As implied in this statement, there is an important legal trade in wildlife products – including commodity products such as timber and fish – and this legal trade, which is of great economic value to many countries, including the US, is undermined by illegality throughout the supply chain’.[[203]](#footnote-203)

Carter 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.’[[204]](#footnote-204) Carter Roberts commented:

Renewable resources and wildlife are highly traded among the twelve TPP partner countries, which represent major producers, exporters and importers of seafood, wood and other goods derived from natural resources. The TPP countries represent eight of the world’s top 20 fishing nations, contributing over 28% of the global marine catch, with almost 33% of global fish product imports and 24% of exports. They account for 17% of global shark imports and 28% of global exports by value. They account for 34% of global timber and pulp production and 24% of total trade value worldwide. They also represent significant importing, exporting and transit countries for legal and illegal wildlife products, and some countries, such as Vietnam, are the major global markets for CITES-listed species. Where natural resources are poorly managed, the demand generated by TPP markets can drive illegal activities and unsustainable practices.[[205]](#footnote-205)

Carter Roberts submitted: ‘This is why the TPP presents the participating countries, including the US, with a unique and important opportunity to promote economic growth in the context of a far-reaching and ambitious 21st Century trade agreement, while also recognizing the fundamental need to sustainably manage natural resources and protect wildlife from illegal trade’. [[206]](#footnote-206) He maintained: ‘If executed along these lines, it can also serve as a strong model for future such agreements’.[[207]](#footnote-207)

Conservation groups, though, were disappointed by the text of the TPP in respect of conservation. Nav Dayanand has considered whether free trade agreements work for wildlife conservation.[[208]](#footnote-208) Dayanand has noted the volatile nature of the discussions: ‘Certain key tenets of the TPP chapter as released by USTR's earlier [green paper](http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership) leads [observers](http://www.sierraclub.org/trade/downloads/NGO-Letter-Ambassador-Kirk-TPP.pdf) 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.’[[209]](#footnote-209) Dayanand observed:

But Japan's joining of the TPP talks in July 2013, following its [opposition](http://www.cites4sharks.org/historic-shark-decisions-survive-final-threat-at-cites-plenary/) a few months prior at the CITES COP16 to the listing of the oceanic whitetip shark under CITES Appendix II - which prompts permits to ensure exports are sustainable and legal - drew concern among some in the conservation community about the reduced potential for the trade agreement to help regulate shark fisheries. And when in the new year anti-government secrecy organisation WikiLeaks revealed a November 2013 draft of the TPP environment text, many [international conservation organisations](http://www.nrdc.org/media/2014/140115.asp) in the US suggested it offered sobering news in relation to all 11 of the US negotiating partners' positions with regards to a strong, enforceable environment chapter.[[210]](#footnote-210)

Dayand was circumspect as to whether the TPP would promote conservation: ‘While negotiations continue, the reality appears to be that the US faces an uphill battle in pushing for a binding environment chapter with wildlife safeguards subject to dispute resolution similar to other business chapters of the agreement’.[[211]](#footnote-211) Dayand observed: ‘Besides underlining international MEAs, which among other topics include mechanisms for prohibiting the trade in endangered fauna and flora, FTA environment chapters - if negotiated properly - can also offer specific protections for trafficked or threatened wildlife, such as unlawfully taken flora or vulnerable fisheries’.[[212]](#footnote-212) Dayand concluded: ‘But like all battles, achieving the desired outcome will require a hawkish eye for detail and persistence.’[[213]](#footnote-213)

As it stands, the TPP will endanger the protection of the environment, the rich biodiversity of the Pacific Rim, and the climate. Michael Brune, executive director of the Sierra Club, worried: ‘If the environment chapter is finalized as written in this leaked document, President Obama’s environmental trade record would be worse than George W. Bush’s.’[[214]](#footnote-214) He lamented: ‘This draft chapter falls flat on every single one of our issues - oceans, fish, wildlife, and forest protections - and in fact, rolls back on the progress made in past free trade pacts.’[[215]](#footnote-215)

Ben Beachy from the Sierra Club noted: ‘One of the latest TPP sales pitches from the Office of the U.S. Trade Representative (USTR) and other TPP proponents is that the deal would help protect endangered wildlife like rhinos and elephants.’[[216]](#footnote-216) 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’.[[217]](#footnote-217) 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.’[[218]](#footnote-218) Finally, he noted that other more effective tools exist to reduce illegal illegal wildlife trade. Beachy recommended that other policy tools can and should be used immediately to help save endangered species from extinction.

With the agreement on the TPP in October 2015, the White House sought to promote the trade agreement as being good for the environment. The White House used an array of social media advertisements on the TPP, featuring endangered animals, such as tigers, rhinoceros, and elephants. Following the White House’s talking points, *The New York Times* published a story entitled, ‘Environmentalists Praise Wildlife Measures in Trans-Pacific Trade Pact.’[[219]](#footnote-219) The story provided this gloss on the text:

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. The agreement complements the [*Convention on International Trade in Endangered Species of Wild Fauna and Flora*](https://www.cites.org/), also known as Cites. The Cites agreement provides a list of animals and plants for which international trade is banned or restricted, and it is the world’s primary treaty to protect wildlife, with roughly 175 member countries. Under provisions in the Trans-Pacific Partnership, countries would be required to enforce laws and regulations to protect wildlife covered under the Cites agreement from illegal smuggling, or risk economic sanctions. The agreement goes further by requiring countries to take action to protect any wildlife, even if it is not covered under Cites, if the wildlife has been illegally taken from any country.[[220]](#footnote-220)

The piece quoted David McCauley from the World Wildlife Fund as saying ‘The provisions in the *Trans-Pacific Partnership* go beyond what we have seen in other trade agreements.’ [[221]](#footnote-221) There was heavy criticism of the article for creating the misleading impression that the majority of environmental groups were supportive of the TPP.[[222]](#footnote-222)

However, many environmental groups repudiated the claims of the White House, saying that they did not support this trade pact.[[223]](#footnote-223) Erich Pica, President of Friends of the Earth, was scathing about the final version of the TPP:

Ambassador Froman struck an ugly deal in Atlanta and is going to have a hard time selling this to Congress and the American people. 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. Friends of the Earth urges our members and members of Congress to oppose this bad deal.[[224]](#footnote-224)

Ilana Solomon of the Sierra Club documented the criticism of the Environment Chapter of the TPP from over a dozen environmental and climate organisations.[[225]](#footnote-225) She commented that ‘there is no evidence to support claims that the pact will help save endangered species like the elephant or rhino.’[[226]](#footnote-226)

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.’ [[227]](#footnote-227) She warned: ‘The trade pact strengthens the ability of corporations to sue countries when they pass rules to protect rapidly disappearing wildlife and the places they live.’[[228]](#footnote-228)

Green groups demanded a ‘legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources.’[[229]](#footnote-229) The organisations 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.’[[230]](#footnote-230)

**Article 20.17 of the final text of the TPP addresses the topic of ‘Conservation and Trade’**.[[231]](#footnote-231)Article 20.17.1 has a simple recognition: ‘The Parties 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.[[232]](#footnote-232) Article 20.17.2 acknowledges that **‘**each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).’[[233]](#footnote-233)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’.[[234]](#footnote-234) 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 co-operation.[[235]](#footnote-235) Article 20.17.5 discusses deterrence of the illegal trade of wild fauna and flora.[[236]](#footnote-236) Article 20.17.6 highlights the discretion of individual parties.[[237]](#footnote-237) Article 20.17.7 discusses law enforcement co-operation and sharing.[[238]](#footnote-238)

The Defenders of Wildlife were disappointed by the final text of the TPP.[[239]](#footnote-239) Jamie Rappaport Clark, President and CEO of Defenders of Wildlife, said: ‘Now that the text of the Trans-Pacific-Partnership is available to the public, it is disappointingly clear that this is not the tougher language we had hoped for’.[[240]](#footnote-240) The President observed: ‘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.’[[241]](#footnote-241) Clark said: ‘Although presented as a ground-breaking trade agreement in regards to wildlife, the Trans-Pacific Partnership includes no commitments not already present in existing international and regional agreements for regulating wildlife trade or preventing wildlife trafficking.’[[242]](#footnote-242) The President of Defenders of Wildlife commented: ‘We urge Congress to reject the Trans-Pacific Partnership and call for a plan that would actually make a difference for wildlife and our natural heritage.’[[243]](#footnote-243)

**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.

In September 2012, there [was agreement at APEC](http://www.apec.org/Press/News-Releases/2012/0909_declaration.aspx) to reduce tariffs upon environmental goods.[[244]](#footnote-244) Australian Trade Minister at the time [Craig Emerson](http://www.abc.net.au/news/2012-09-09/apec-cuts-tariffs-on-green-products/4251602) commented: ‘Australia exports $1.2 billion worth of these environmental goods in the region and $430 billion worth of trade is done in these environmental goods.’[[245]](#footnote-245)

The United States 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’. [[246]](#footnote-246)

The leaked draft text provided an indication of the content in this area. Article SS.18 considers ‘environmental goods and services’.[[247]](#footnote-247) Article SS. 18 (1) provides that ‘the Parties recognize 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.’[[248]](#footnote-248) Article SS. 18 (2) observes: ‘Accordingly, each Party has, consistent with its national circumstances, eliminated all customs duties upon entry into force of this Agreement on a wide range of environmental goods and as soon as possible on all other environmental goods.’[[249]](#footnote-249) Article SS. 18 (3) comments: ‘Furthermore, in recognition of the importance of environmental services in supporting environmental goods trade and delivering benefits in their own right, each Party has, consistent with national circumstances, limited its restrictions on trade in environmental services, including environmental service suppliers.’[[250]](#footnote-250) Article SS.18 (4) observes: ‘The Committee shall consider issues identified by Parties related to the trade in environmental goods and services, including issues identified as potential non-tariff barriers to such trade’.[[251]](#footnote-251) The provision also emphasizes that: ‘The Parties shall endeavor to address any potential barriers to trade that may be identified by a Party, including by working through the Committee and in conjunction with other relevant TPP Committees, as appropriate.’[[252]](#footnote-252) Article SS. 18 (5) stressed: ‘The Parties may develop bilateral and plurilateral cooperative projects on environmental goods and services to address current and future global trade-related environmental challenges.’[[253]](#footnote-253)

The final text of the TPP provides a brief, abridged discussion of ‘environmental goods and services.’[[254]](#footnote-254) 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.’ [[255]](#footnote-255) 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.’[[256]](#footnote-256) 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’. [[257]](#footnote-257) 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’. [[258]](#footnote-258) 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.’ [[259]](#footnote-259) Overall, this TPP text on the environment is rather hollow and empty, and does little to promote trade in environmental goods and services.

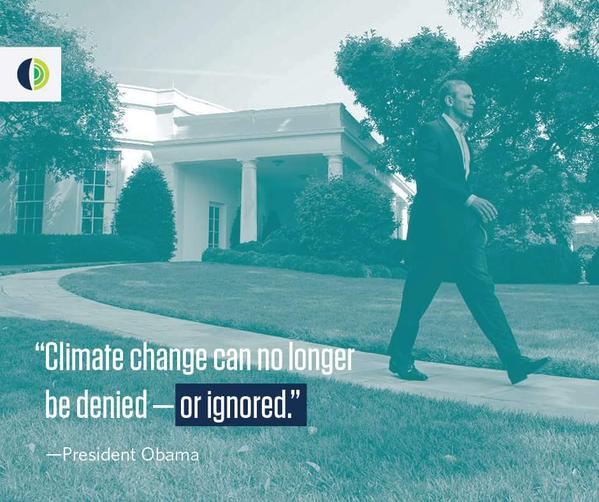
Joshua Meltzer has argued that the TPPcan help achieve a range of environmental goals: ‘Similar to the way the TPP can help countries improve a broad range of environmental challenges by shifting their economies into cleaner, less polluting industries, the TPP can assist countries’ transition on to low-carbon pathways by providing access to pertinent goods, services and investment.’[[260]](#footnote-260) He contended that ‘reduced tariffs on environmental goods can support domestic efforts towards environmental conservation and reducing GHG emissions.’[[261]](#footnote-261)

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 there is a need to develop a better model of trade, which supports a green economy.[[262]](#footnote-262) He maintained ‘that trade deals should boost worker and environmental standards, not lower them’.[[263]](#footnote-263) Levine insisted: ‘We should preserve the right and ability of our federal, state and local governments to set standards and guidelines’.[[264]](#footnote-264) He commented: ‘We should seek the highest common ground, not the lowest.’[[265]](#footnote-265) 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.’[[266]](#footnote-266) 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.’[[267]](#footnote-267) 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.’[[268]](#footnote-268)

Rose Marcario of Patagonia said that her firm would oppose the TPP.[[269]](#footnote-269) 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’.[[270]](#footnote-270) 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.’[[271]](#footnote-271) She commented: ‘We oppose TPP because the costs for the environment, workers, consumers, communities and small businesses would outweigh any potential gains.’[[272]](#footnote-272)

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.’[[273]](#footnote-273) She worries about the trade discourse in this area.[[274]](#footnote-274) Solomon agreed that ‘as we transition to a clean energy economy, we should increase the use of and trade in environmentally friendly technologies.’[[275]](#footnote-275) 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."’[[276]](#footnote-276) 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.’[[277]](#footnote-277) 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’.[[278]](#footnote-278) She observed that ‘Developed countries like the U.S. must step up and share resources that actually help the environment and communities’. [[279]](#footnote-279)

**7. Trade and Climate Change**



White House #ActonClimate Social Media

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.’[[280]](#footnote-280) There has been outrage amongst environmental and climate activists that the United States Trade Representative been conflicted on climate action during the course of his Presidential career.

There has been much debate as to whether the TPP will facilitate action on climate change.

Some commentators like Joshua Meltzer were confident that the trade agreement could play a useful role in addressing climate change.[[281]](#footnote-281) 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.’[[282]](#footnote-282) 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…. Should the TPP become a free trade agreement of the Asia-Pacific region, it will… be a strong basis for building a global consensus on these trade and environmental issues.[[283]](#footnote-283)

However, it is not clear that the TPP negotiations will be a useful forum to address climate change. Indeed, the trade deal may merely mirror the deadlocks and the stalemates which have existed in respect of the *United Nations Framework Convention on Climate Change* 1992.

In his book, *Oil and Honey*, Bill McKibben highlights the contradictions of the President Barack Obama on the issue of climate change.[[284]](#footnote-284) The United States President has waxed and waned on the question of climate change. He has also supported the use of fracking, and approved of drilling in the Arctic. The climate activist Bill McKibben has organised and led a high-profile campaign, encouraging President Barack Obama to block the Keystone XL Pipeline. After much deliberation, the President agreed to reject the Keystone XL Pipeline. At the same time, the United States President has promised action on climate change, urging his supporters to "Invest, Divest!" In his term, Obama has promised effective national and international climate action. President Barack Obama secured the *Paris Agreement* 2015 in December 2015.[[285]](#footnote-285) There has been divided opinion as to the merits of the international climate agreement.

In her book *This Changes Everything*, Naomi Klein writes about ‘Hot Money: How Free Market Fundamentalism Helped Overheat the Planet’.[[286]](#footnote-286) Klein recounts: ‘Throughout this period of rapid change [in the 1990s], the climate and trade negotiations closely paralleled one another, each winning landmark agreements within a couple of years of each other.’[[287]](#footnote-287) She counterpoints the development of the *United Nations Framework Convention on Climate Change*1992[[288]](#footnote-288) and the *Kyoto Protocol* 1997,[[289]](#footnote-289) with the establishment of the WTO,[[290]](#footnote-290) and the *North American Free Trade Agreement*1994.[[291]](#footnote-291) Klein observes: ‘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.’[[292]](#footnote-292) She stresses: ‘Indeed, each seemed to actively pretend that the other did not exist, ignoring the most glaring questions about how one would impact the other.’[[293]](#footnote-293) 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’.[[294]](#footnote-294) 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.’[[295]](#footnote-295)

Naomi Klein was alarmed by the proposals in respect of the TPP:

The habit of willfully erasing the climate crisis from trade agreements continues to this day: for instance, in early 2014, several negotiating commitments for the proposed Trans-Pacific Partnership, a controversial new NAFTA-style trade deal spanning twelve countries were released to the public via WikiLeaks… A draft of the environment chapter had contained language stating that countries ‘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).’ The language was vague and nonbinding but at least it was a tool that governments could use to defend themselves should their climate policies be challenged in a trade tribunal, as Ontario’s plan was. But a later document showed that U.S. negotiators had proposed an edit: take out all the stuff about climate change and UNFCCC commitments. In other words, while trade has repeatedly been allowed to trump trade, under no circumstances would climate be permitted to trump trade.[[296]](#footnote-296)

Naomi Klein remains concerned that TransCanada could deploy investor clauses under the North American Free Trade Agreement 1994 or the Trans-Pacific Partnership if the Keystone XL pipeline to Canada’s tar sands is blocked or delayed. Such fears were realised. In 2016, TransCanada has announced an investor action against the United States Government’s decision to block the Keystone XL Pipeline under the North American Free Trade Agreement 1994.[[297]](#footnote-297) Environmental groups have argued that the TransCanada investor action highlights similar dangers with the TPP.[[298]](#footnote-298)

**A. The Draft Text on Climate Change**

In January 2014, WikiLeaks revealed the draft text on climate change in the TPP.[[299]](#footnote-299)

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.’ [[300]](#footnote-300)

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.’[[301]](#footnote-301) Moreover, ‘The Parties further recognize the role that market and non-market approaches can play in achieving climate change objectives.’[[302]](#footnote-302) The TPP text observed:

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.[[303]](#footnote-303)

The text also emphasized: ‘The Parties agree to encourage and facilitate cooperation on the complementary, trade-related, aspects of these efforts in areas of mutual interest.’[[304]](#footnote-304)

The text stressed: ‘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.’[[305]](#footnote-305) There was also language about information sharing about climate change action:

The Parties acknowledge the value of sharing information and experiences in developing and implementing such instruments. Accordingly, where relevant and appropriate, the Parties agree to discuss matters such as: best practices and lessons learned in designing, implementing, and operating mechanisms to reduce carbon emissions, including market and non-market measures; best practices in the design, implementation and enforcement of regulatory instruments; and best practices and lessons learned to enhance the transparency and accuracy of such instruments. Activities pursuant to paragraphs 3 and 4 may, at the discretion of the participating Parties and as appropriate, involve other governments in the Asia-Pacific region with an interest in such mechanisms, as well as the private sector and non-governmental organizations.[[306]](#footnote-306)

The text also stressed: ‘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.’[[307]](#footnote-307) Moreover, the TPP noted: ‘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.’[[308]](#footnote-308)

**B. The Geopolitics of Climate Change**

During the negotiations, New Zealand tabled a proposal on climate change in the TPP.[[309]](#footnote-309) 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.[[310]](#footnote-310) There has been concern that text on climate change in the *Trans-Pacific Partnership* may undermine or erode the *United Nations Framework Convention on Climate Change* 1992, the *Kyoto Protocol* 1997, and ongoing multilateral negotiations over climate change.

Peru has also proposed text on climate change in the *Trans-Pacific Partnership*, reflecting its policy to reduce carbon emissions.

However, the United States and Australia have 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 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](http://www.cleanenergyfuture.gov.au/clean-energy-future/our-plan/clean-energy-australia/).[[311]](#footnote-311)  
As Prime Minister, 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 Prime Minister Malcolm Turnbull has yet to 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.[[312]](#footnote-312) Stephen Harper was willing to support the TPP, even though his government in a caretaker election mode. The NDP’s Thomas Mulcair insisted that he would not be bound by Harper’s secret deal.[[313]](#footnote-313) Canadian Greens MP Elizabeth May was highly critical of the environmental impact of the TPP.[[314]](#footnote-314) 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.’[[315]](#footnote-315) 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.[[316]](#footnote-316) This new government promises to show a greater respect for environmental regulation and climate action. 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.’[[317]](#footnote-317)

Heather Smith observed that, in the new Pacific trade talks leak, ‘climate’ became an unmentioned topic.[[318]](#footnote-318) She commented that the United States 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](http://grist.org/news/u-n-climate-talks-will-be-all-about-the-benjamins/), whose agreements are [non-binding and largely ineffectual](http://grist.org/climate-energy/at-u-n-climate-talks-in-warsaw-hunger-games-get-serious/) 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.[[319]](#footnote-319)

Heather Smith suggested that the leak revealed the priorities of U.S. trade representatives: ‘In a world where most international bodies have figured out that it’s OK to pay the climate issue lip service as long as you don’t do anything concrete about it, 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.’[[320]](#footnote-320)

**C. Fast-Track Debate 2015 and Presidential Debates 2016**

In 2015, Democrat Leader Nancy Pelosi was highly critical of President Barack Obama’s demands for a fast track authority.[[321]](#footnote-321) She maintained: ‘In order to succeed in the global economy, it is necessary to move beyond stale arguments of protectionism vs. free trade.’[[322]](#footnote-322) 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.’[[323]](#footnote-323) She observed that ‘we must prepare our people, our economies and our environment for the future.’[[324]](#footnote-324) 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](http://www.un.org/apps/news/story.asp?NewsID=37577#.VX9JR_lViko) for the many workers who have been left behind by globalization. Recognizing this trend, the Democratic Congress passed and President George W. Bush signed the [Energy Independence and Security Act of 2007](https://www.congress.gov/bill/110th-congress/house-bill/6). It [created](http://www.gpo.gov/fdsys/pkg/BILLS-110hr6eah/pdf/BILLS-110hr6eah.pdf) an Energy Efficiency and Renewable Energy Worker Training Program to prepare a quality workforce for clean energy jobs. It was a solution as local as neighborhoods from rural areas to inner cities, and as global as the planet. 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.[[325]](#footnote-325)

In her view, ‘We must ensure that trading partners play by the rules and uphold their responsibility to their international obligations.’[[326]](#footnote-326)

President Barack Obama was able to obtain support for a fast-track authority from the United States 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’.[[327]](#footnote-327) The provision in the House version of the Customs Bill, introduced by Chairman Paul Ryan (R-Wis.), 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.’ A grand coalition of environmental groups – including 350.org, Center for Biological Diversity, Center for International Environmental Law, Food & Water Watch, Friends of the Earth, Green America, Greenpeace USA, Institute for Agriculture and Trade Policy, League of Conservation Voters, Natural Resources Defense Council and the Sierra Club – sent a letter [a letter](http://www.ciel.org/wp-content/uploads/2015/07/Environmental-groups-urge-Conferees-to-reject-anti-climate-provision-in-House-Customs-Bill.pdf) to the United States Congress asking them to reject the anti-climate provisions in the House version of the bill.[[328]](#footnote-328) The Center for International Environmental Law expanded upon these issues in a policy brief.[[329]](#footnote-329) 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; it would inject even greater uncertainty into ongoing negotiations in the *UNFCCC* and other arenas by raising news questions about the scope of US negotiating authority; and it would raise serious challenges to the fulfillment of formal agreements like the US-China commitment to facilitate trade in clean-energy technologies, and global commitments to phase out fossil fuel subsidies.’ [[330]](#footnote-330)

Considering the Republicans’ rider, Carroll Muffett, President, 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.’[[331]](#footnote-331) William J. Snape, III, Senior Counsel, Center for Biological Diversity was concerned that the Republicans were promoting climate denial in the Customs Bill:

This is another head in the sand approach to global warming. Putting aside the undisputed fact that this provision flies in the face of what is already happening in almost every other legal forum on climate and trade, including at the World Trade Organization itself, this Customs Bill directly harms Americans by taking away legal rights for citizens and businesses alike, all in the name of a far right ideological crusade. There is no rational justification for the trade/climate provision in this current legislation.[[332]](#footnote-332)

Luísa Abbott Galvão, climate and energy campaigner, Friends of the Earth, commented: ‘“It is particularly disingenuous to say that climate change considerations shouldn’t fall under the purview of trade agreements when these trade deals are likely to explicitly set in place rules to liberalize the trade of fossil fuels.’ [[333]](#footnote-333) Ilana Solomon, director of the Sierra Club’s Responsible Trade Program said there was a need to stop this attempt to subvert climate action: ‘The same Republicans that are endangering our future by denying the reality of climate disruption are now sneaking anti-climate language into trade bills.’[[334]](#footnote-334) She warned: ‘Trade deals like the TPP already put our climate in peril, and this language would make already bad trade pacts even worse for our planet.’[[335]](#footnote-335) Solomon insisted: ‘Members of Congress who care about our air, water, and climate action must remove this damaging provision from the bill.’[[336]](#footnote-336) Scott Slesinger, Legislative Director, Natural Resources Defense Council, commented: ‘These provisions give new meaning to ‘climate denial,’ and they should be stripped.’[[337]](#footnote-337)

In a letter to the United States 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.[[338]](#footnote-338) The Congressmen and women said: ‘We are also deeply concerned about mitigating climate change.’[[339]](#footnote-339) The group commented: ‘While the TPP was never going to be the forum to comprehensively address climate issues, it should set the stage for TPP countries to move towards low-emissions economies.’[[340]](#footnote-340) 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.’[[341]](#footnote-341)

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 United States Trade Representative.[[342]](#footnote-342) 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.[[343]](#footnote-343) Under pressure from Sanders, Clinton has come out in opposition to the TPP.[[344]](#footnote-344)

**D. 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.[[345]](#footnote-345) 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.[[346]](#footnote-346)

Article 20.15 speaks of a ‘Transition to a Low Emissions and Resilient Economy.’[[347]](#footnote-347) Article 20.15.1 provides that ‘The Parties acknowledge that transition to a low emissions economy requires collective action.’[[348]](#footnote-348) Article 20.15.2 insists that ‘the Parties recognise that each Party’s actions to transition to a low emissions 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’.[[349]](#footnote-349) 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’.[[350]](#footnote-350) Moreover, it provides that ‘the Parties shall, as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy.’[[351]](#footnote-351)

The then Australian Trade Minister Andrew Robb was indignant at the criticism that the TPP failed to address the pressing global problem of climate change.[[352]](#footnote-352) 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.[[353]](#footnote-353)

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.[[354]](#footnote-354)

Environmental and climate groups have been deeply concerned by the failure of the TPP to address climate change.

**E. Civil Society**

Climate activists have been deeply alarmed by the final deal in respect of the environment in the TPP.[[355]](#footnote-355)

350.org executive director May Boeve commented that the TPP would be a disaster for action on climate change:

TPP makes climate change worse. 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. That's why so many people and organizations who care about climate change have repeatedly bashed this corporate giveaway; suggesting otherwise is nothing short of misleading cynicism. Decision-makers should know better than to try and distort our movement's position.[[356]](#footnote-356)

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.’[[357]](#footnote-357) 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.’[[358]](#footnote-358) Karthik Ganapathy commented: ‘Loaded with provisions that would spread fracking across the world, and enable Exxon and Shell to throw multi-million dollar tantrum lawsuits at any government that dares to regulate carbon emissions, TPP was and is an absolute disaster for our climate.’[[359]](#footnote-359)

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.’[[360]](#footnote-360) 350.org Policy Director Jason Kowalskilamented that the agreement was a case of climate denial:

The TPP is an act of climate denial. While the text is full of handouts to the fossil fuel industry, it doesn’t mention the words climate change once. The agreement would give fossil fuel companies the extraordinary ability to sue local governments that try and keep fossil fuels in the ground. If a province puts a moratorium on fracking, corporations can sue; if a community tries to stop a coal mine, corporations can overrule them. 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.[[361]](#footnote-361)

Jason Kowalski maintained that ‘The United States should be in the business of supporting the just transition to 100% renewable energy, not propping up the fossil fuel based economy of the past’.[[362]](#footnote-362) He stressed: ‘While institutions across the planet are divesting from fossil fuels, the TPP would double down on the industry’s destructive business model’.[[363]](#footnote-363) Jason Kowalski highlighted the conflict between the TPP and the Paris Climate Talks: ‘The agreement works at absolute cross purposes to governments’ attempts to reach a strong climate deal in Paris’.[[364]](#footnote-364) He commented: ‘As the world accelerates towards a clean energy future, the TPP is a dangerous detour that must be avoided.’[[365]](#footnote-365)

‘The TPP ignores climate change completely and this is a major setback,’ said IATP's Climate Director Ben Lilliston. [[366]](#footnote-366) 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.’[[367]](#footnote-367) In his view, ‘TPP is more of the same--an outdated, climate-damaging trade deal.’[[368]](#footnote-368) 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.’[[369]](#footnote-369) 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.’[[370]](#footnote-370)

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.’[[371]](#footnote-371) With the release of the final text, he elaborated upon his deep misgivings about the deal:

We now have concrete evidence that the Trans-Pacific Partnership 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 corporations to challenge our public health and climate safeguards in unaccountable trade tribunals while increasing dirty fossil fuel exports and fracking.[[372]](#footnote-372)

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.’[[373]](#footnote-373) He maintained that the United States Congress should block the deal: ‘Congress must stand up for American jobs, clean air and water, and a healthy climate by rejecting the toxic Trans-Pacific Partnership.’[[374]](#footnote-374)

The Defenders of Wildlife were disturbed by the lack of attention paid to climate change.[[375]](#footnote-375) The civil society group said: ‘Most alarmingly, climate change isn’t mentioned a single time in the environment chapter’.[[376]](#footnote-376) The Defenders of Wildlife said: ‘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’.[[377]](#footnote-377) The Defenders of Wildlife were alarmed by the climate denial in the trade agreement: ‘Climate change is happening right now: Species are disappearing and extreme weather events like hurricanes, crippling drought and wildfires are become more prevalent across the world’.[[378]](#footnote-378)

Australian Green groups said that the TPP would undermine environmental action and limit the ability of governments to take action on climate change.[[379]](#footnote-379) 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.’[[380]](#footnote-380) He feared: ‘ISDS will provide a massive chilling effect against improvements in environmental law at a local, state and federal level.’[[381]](#footnote-381) 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.’[[382]](#footnote-382) 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.’[[383]](#footnote-383) Thom Mitchell of *New Matilda* also highlighted concerns about the agreement amongst Australian environmentalists and climate activists.[[384]](#footnote-384)

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.’[[385]](#footnote-385)

Maude Barlow, the chair of the Council of Canadians, was worried that the TPP would undermine the international climate talks in Paris in 2015.[[386]](#footnote-386) Barlow noted that there were high expectations for the Paris Climate Summit: ‘This is a historic gathering, and the last chance for perhaps another decade for the nations of the world to truly and meaningfully come to an agreement to seriously reduce greenhouse gas emissions.’[[387]](#footnote-387) She was concerned about the impact of trade agreements and investor clauses upon the climate deal: ‘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.’[[388]](#footnote-388) Barlow maintained: ‘We also hope that the climate and trade justice communities will adopt the demand that the threat of ISDS must be part of any meaningful discussions in Paris.’[[389]](#footnote-389)

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.[[390]](#footnote-390)

Nobel Laureate Professor Joseph Stiglitz of Columbia University has warned that, under the TPP, polluters could sue governments for setting limits for carbon emissions.[[391]](#footnote-391) He noted: ‘We know we’re going to need regulations to restrict the emissions of carbon.’[[392]](#footnote-392) He worried: ‘But under these provisions, corporations can sue the government, including the American government, by the way, so it’s all the 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.’[[393]](#footnote-393)

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.[[394]](#footnote-394) 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).’[[395]](#footnote-395) 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’.[[396]](#footnote-396) The green groups asked that ‘the 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.’[[397]](#footnote-397) In their view, such measures would help ensure the TPP did not undermine effective international climate action.

There was concern at the Paris 2015 Climate Talks that the TPP has undermined climate action.[[398]](#footnote-398)

**Conclusion**



Courtenay Lewis, Sierra Club, <https://twitter.com/courtsretorts/status/651602763214811136/photo/1>

The TPP is an ambitious 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. The Green Party of Aotearoa New Zealand, the Australian Greens and the Green Party of Canada observe: ‘Yet while representatives of AT&T, Verizon, Cisco, major pharmaceutical companies and the Motion Picture Association of America have access to the text, democratically elected members of parliament, advocacy organisations for healthcare and the environment and ordinary citizens are being left out in the cold’. [[399]](#footnote-399) The texts of the TPP should have been made public at first instance, so that there could have been a full and frank discussion of the impact of the proposed treaty upon conservation, biodiversity, and climate change. As it stands, the agreement will be presented as a *fait accompli* to the participating nations in the Pacific Rim.

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:

This is pathetic. A betrayal. For real, folks. Memories of how Big Green helped push through NAFTA.[[400]](#footnote-400)

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 United States 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 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. As Michael Brune warned: ‘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.’[[401]](#footnote-401) 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’. [[402]](#footnote-402) 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." [[403]](#footnote-403)

This impression is reinforced by a consideration of other related Chapters of the TPP.[[404]](#footnote-404) 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.[[405]](#footnote-405) In November 2015, the full text of the TPP was published. The Intellectual Property chapter is chapter 18 of the TPP.[[406]](#footnote-406) The Intellectual Property chapter includes text on patent law; trade mark law; copyright law; data protection; and intellectual property enforcement.[[407]](#footnote-407) A number of the United States 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](https://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471).[[408]](#footnote-408) 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](http://www.e-elgar.co.uk/bookentry_main.lasso?id=13601).[[409]](#footnote-409) The United States has taken an uncompromising position of promoting strong intellectual property rights protection in respect of environmentally sustainable technologies. Members of the BASIC Group – Brazil, India, China, and South Africa – and developing countries have argued for recognition of flexibilities in respect of intellectual property rights – such as patent pools, public sector licensing, technology transfer, and compulsory licensing. Least-developed countries, small island states, and Progressive Latin American countries have argued that certain clean technologies should be in the public domain. At the urging of [industry groups](http://www.ipo.org/AM/Template.cfm?Section=Board_Resolutions_and_Position_Statements&ContentID=33586&template=/CM/ContentDisplay.cfm), the United States, though, has sought to block any such text on flexibilities on intellectual property, green technologies and technology transfer.[[410]](#footnote-410) There has been a *United Nations Framework Convention on Climate Change Climate Technology Centre and Network* established to promote the research, development and deployment of clean technologies. [[411]](#footnote-411) While blocking text on intellectual property on the environment in multilateral forums, the United States has aggressively pushed for high standards for intellectual property at theTPPtalks. 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](http://wa.greens.org.au/content/joint-statement-trans-pacific-partnership-agreement) have questioned a model promoting intellectual property rights for big, multinational companies. [[412]](#footnote-412) Their counterparts - the [European Greens](http://www.greens-efa.eu/climate-change-technology-transfer-and-intellectual-property-5484.html) – have more generally called for a balanced approach to intellectual property, technology transfer, and climate change.[[413]](#footnote-413)

There has also been much concern about the proposals in respect of the Investment Chapter.[[414]](#footnote-414) 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, WikiLeaks published a draft version of the Investment Chapter of the TPP.[[415]](#footnote-415) The final text of the Investment Chapter was published in November 2015.[[416]](#footnote-416) 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. [United States Trade Representative spokesperson, Nkenge Harom](http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html), has maintained:

This [Obama] administration is committed to ensuring strong environmental, public health and safety laws. Nothing in our *Trans-Pacific Partnership* investment proposal could impair our government's ability to pursue legitimate, non-discriminatory public interest regulation, including measures to protect public health, public safety and the environment.’[[417]](#footnote-417)

Nonetheless, [Senior Democrat and United States Congressman Henry Waxman](http://infojustice.org/archives/23270) has been concerned that the TPP lacks appropriate and meaningful safeguards in respect of the environment, labor rights, and public health.[[418]](#footnote-418) [Senator Christine Milne from the Australian Greens](http://christine-milne.greensmps.org.au/content/media-releases/trans-pacific-partnership-negotiation-dead-water) has been particularly concerned about the Investment Chapter of the TPP.[[419]](#footnote-419) She observed: ‘US negotiators have been working hard to get a deal that would allow a foreign company to sue an Australian government because an Australian law reduces their profits or adversely affects their business.’[[420]](#footnote-420) Milne commented: ‘These Investor State Dispute Settlement provisions are central to the negotiations from the US 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.’[[421]](#footnote-421) 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.’[[422]](#footnote-422) [Erich Pica, President of Friends of the Earth US](http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership), commented: ‘The TPP would allow transnational corporations to challenge environmental laws that protect our air, land and water’. [[423]](#footnote-423) Pica worried: ‘The TPP could lead to an explosion in natural gas and other energy exports — something that would expand dangerous fracking and accelerate global warming.’[[424]](#footnote-424) Dr Kyla Tienhaara has warned that the TPP could result in an expropriation of environmental governance.[[425]](#footnote-425) Sierra Club executive director Michael Brune 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.’[[426]](#footnote-426)

There has also been debate about the Chapter on Technical Barriers to Trade and its impact upon environmental regulation.[[427]](#footnote-427) In 2012, the [World Trade Organization found in favour of Mexico against United States regulations on a Dolphin-Safe Eco-Label](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm) under the *Agreement on Technical Barriers to Trade*.[[428]](#footnote-428) Referring to the 2012 ruling, [Lori Wallach of Public Citizen](http://citizen.typepad.com/eyesontrade/2012/05/public-citizen-condemns-wto-attack-on-us-dolphin-protection-efforts.html) 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.’[[429]](#footnote-429) This decision was reaffirmed in a decision in 2015, and a further appellate decision.[[430]](#footnote-430) 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.[[431]](#footnote-431)

There has been a discussion as to whether the TPP will affect environmental labelling schemes – such as eco-labels, carbon reduction labels, and GM labels.[[432]](#footnote-432) 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 labeling initiatives to challenge, including those designed to protect animal safety, encourage energy efficiency and inform consumers about products with genetically modified ingredients.’ [[433]](#footnote-433)

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.[[434]](#footnote-434)

There has also been discussion as to whether the Procurement Chapter will any way limit sustainable government procurement. [Public Citizen](http://www.citizen.org/tpp) has been concerned that such text may limit a Nation State’s ability to pass procurement laws aimed at achieving certain public policy objectives.[[435]](#footnote-435)

Overall, the agreement will do little to promote the protection of the environment, sustainable development, and climate. In a piece for the *Boston Globe*, Professor Jeffrey Sachs of Columbia University has said of the package in the TPP:

Perhaps most disappointing is the lack of creativity in the development, labor, and environmental chapters. Yes, they rhetorically defend global economic development, labor standards, and environmental sustainability, but they do so without specific enforcement powers. Why is it that companies can force arbitration tribunals to defend their investor rights, but workers have no such power? 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?[[436]](#footnote-436)

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. There is a need to develop a new model of trade, which respects workers and the environment.[[437]](#footnote-437)

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