

A DIRTY DEAL

How the Trans-Pacific Partnership Threatens our Climate



EXECUTIVE SUMMARY

After more than five years of closed-door negotiations, the governments of Trans-Pacific Partnership (TPP) countries have finally released the text of the controversial pact. The TPP is a broad trade, investment, and regulatory agreement between the United States and 11 Pacific Rim countries. In its more than 6,000 pages of binding rules, the deal fails to even mention the words “climate change”—a clear sign it is not “a 21st-century trade agreement,” as some have claimed.

Beyond making no effort to combat climate disruption, the TPP would actually fuel the climate crisis. If approved, the pact would increase greenhouse gas emissions and undermine efforts to transition to clean energy. The TPP’s biggest threats to our climate are as follows:

1. THE TPP WOULD EMPOWER FOSSIL FUEL CORPORATIONS TO ATTACK CLIMATE POLICIES IN PRIVATE TRIBUNALS.

- The TPP investment chapter would give foreign investors, including some of the world’s largest fossil fuel corporations, expansive new rights to challenge climate protections in unaccountable trade tribunals. This includes the power for investors to demand compensation for climate policies that do not conform to their “expectations” or that they claim reduce the value of their investment.
- These challenges would be brought before trade tribunals, comprised of three private lawyers who could order governments to pay fossil fuel firms for the profits they hypothetically would have earned if the climate protections being challenged had not been enacted.
- Fossil fuel corporations, including ExxonMobil and Chevron, have used similar rules in past agreements to challenge policies. Targeted policies have included a natural gas fracking moratorium in Canada, a court order to pay for oil pollution in Ecuador, and environmental standards for a coal-fired power plant in Germany.

- The TPP would newly extend such foreign investor privileges to more than 9,000 firms in the United States, roughly doubling the number of firms that could use this “investor-state dispute settlement” system to challenge U.S. policies. That includes, for example, the U.S. subsidiaries of BHP Billiton, one of the world’s largest mining companies, whose U.S. investments range from coal mines in New Mexico to offshore oil drilling in the Gulf of Mexico to fracking operations in Texas.
- While the Office of the U.S. Trade Representative claims to have inserted “safeguards” into the investment chapter, an analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals.

2. THE TPP WOULD LOCK IN DIRTY FOSSIL FUEL PRODUCTION BY EXPEDITING NATURAL GAS EXPORTS.

- The TPP would require the U.S. Department of Energy to automatically approve *all* exports of liquefied natural gas (LNG), a fossil fuel with high life-cycle greenhouse gas emissions, to *all* TPP countries including Japan, the world’s largest LNG importer.
- By expediting U.S. LNG exports, the TPP would increase the world’s dependence on a fossil fuel with significant climate impacts and would likely displace cleaner energy sources such as renewables.



- The TPP would encourage construction of new fossil fuel infrastructure in the United States and in importing countries to enable trade in LNG, locking in the production of climate-disrupting fossil fuels for years to come.
- Increased LNG exports, which would be facilitated by the TPP, would also spur more fracking, leading to greater air and water pollution, and increased health risks.

3. THE TPP WOULD INCREASE CLIMATE-DISRUPTING EMISSIONS BY SHIFTING U.S. MANUFACTURING OVERSEAS.

- The TPP would force U.S. manufacturers to compete directly with firms in low-wage countries, like Vietnam and Malaysia. The resulting offshoring of U.S. manufacturing would spur not only U.S. job loss, but also increased climate-disrupting emissions, as production in Vietnam is more than four times as carbon-intensive, and production in Malaysia is twice as carbon-intensive, as U.S. production.
- A TPP-spurred shift in manufacturing from the United States to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions, which are projected to increase by up to 250 percent by 2050 as demand for traded goods rises.

4. THE TPP WOULD IMPOSE NEW LIMITS ON GOVERNMENT EFFORTS TO COMBAT CLIMATE DISRUPTION.

- Renewable energy programs that encourage local job creation could run afoul of TPP rules. The deal includes terms that the World Trade Organization (WTO) used to rule against a successful clean energy program in Ontario that reduced emissions while creating thousands of local jobs.
- The TPP also replicates provisions that the WTO has used to rule against environmentally friendly consumer labels. These rules would prohibit labels seen as “more trade-restrictive than necessary,” restricting policy space for energy-saving or other labels that diminish climate-disrupting emissions.

- The TPP’s procurement rules would restrict governments’ autonomy to mandate “green purchasing,” such as requiring energy to come from renewable sources in government contracts. Such policies could be challenged for having the unintended “effect of creating an unnecessary obstacle to trade.”

Government officials charged with promoting the TPP typically ignore these threats to our climate, claiming instead that the pact’s environment chapter would “preserve the environment.” However, the chapter includes no provision that would protect climate and environmental policies from the myriad threats posed by other parts of the TPP.

Moreover, while all U.S. trade agreements since 2007 have required trade partners to “adopt, maintain, and implement” policies to fulfill their obligations under seven core multilateral environmental agreements (MEAs), the TPP environment chapter only includes this requirement for *one* of the seven MEAs. This step backward from environmental protections negotiated under the George W. Bush administration contradicts the requirements of U.S. law for fast-tracked trade agreements, and would allow TPP countries to violate critical environmental commitments to boost trade or investment.

While the TPP environment chapter mentions a range of conservation issues, the TPP countries’ obligations are generally weak. Rather than *prohibiting* trade in illegally taken timber and wildlife, for example, the text only asks countries “to combat” such trade with insufficient measures, while allowing governments to avoid this weak commitment at their “discretion.”

Even if the TPP’s conservation terms included stronger obligations, there is little evidence to suggest that they would be enforced. The United States has never once brought a trade case against another country for violating its environmental commitments in a trade agreement, even amid documented evidence of violations.

The TPP poses a panoply of threats to our climate and environment. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

INTRODUCTION

The Trans-Pacific Partnership (TPP) is a broad trade, investment, and regulatory agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Eventually, other Pacific Rim nations from Indonesia to China could be included, as the TPP is a “docking” agreement that other countries could join.¹ The deal, which is more than 6,000 pages long, would require each TPP government to conform its domestic policies to a broad array of binding TPP rules.

While government officials charged with promoting the pact have claimed the TPP would “preserve the environment,”² the Sierra Club’s analysis of the final text reveals that the TPP would actually undermine efforts to combat climate disruption, and could threaten decades of progress on environmental protection.³

The health of our planet depends upon our ability to make big changes in our economy. These changes include moving beyond fossil fuels and transitioning to 100 percent clean energy. However, the TPP would create new barriers to this much-needed transition. The agreement would 1) empower fossil fuel corporations to attack climate and other public interest policies in private trade tribunals, 2) expedite natural gas exports, spurring additional hydraulic fracturing (“fracking”), 3) increase climate-disrupting emissions, and 4) impose new limits on climate and environmental regulations.

The pact, meanwhile, fails to even mention the words “climate change”⁴—a dead giveaway that it is not a “21st century trade agreement,” as some have claimed.⁵ It is hard to imagine significant environmental benefits resulting from the environment chapter’s generally weak language, and any *potential* benefits would likely be overwhelmed by the negative effects of the deal’s polluter-friendly terms.

After years of extraordinary secrecy, it’s finally clear what TPP negotiators were trying to hide: The TPP is a raw deal for communities and our climate.

NEW RIGHTS FOR FOSSIL FUEL CORPORATIONS TO CHALLENGE CLIMATE POLICIES

To solve the climate crisis, we need bold policy changes to fully transition to clean energy. This requires reining in the power of (and pollution from) the fossil fuel industry. Yet, the TPP investment chapter gives foreign investors, including some of the world’s largest fossil fuel corporations, expansive new rights to challenge climate protections. This includes a guaranteed “minimum standard of treatment,”⁶ which has been interpreted as barring policy changes that do not conform to foreign investors’ “expectations.”⁷

If a foreign corporation believed a policy change (e.g., a new restriction on fossil fuel extraction) violated its special TPP rights, it could use the TPP’s investor-state dispute settlement (ISDS) system to “sue” the government in an unaccountable trade tribunal for the profits it hypothetically would have earned without the new policy.

Using similar rules in past agreements, foreign investors, including corporations such as ExxonMobil, Dow Chemical, Chevron, and Occidental Petroleum,⁸ have launched more than 600 ISDS cases against more than 100 governments.⁹ Their targets have included a fracking moratorium in Quebec, a nuclear energy phase-out and new coal-fired power plant standards in Germany, a court order to pay for Amazon pollution in Ecuador, a requirement to remediate toxic metal smelter emissions in Peru, and an environmental panel’s decision to reject a mining project in Canada.¹⁰ Corporations’ use of the ISDS system has surged: Foreign investors have launched more ISDS cases in *each* of the last four years, on average, than in the first three decades of the ISDS system combined.¹¹

The TPP investment chapter replicates many of the most dangerous parts of investment chapters from past agreements, as described below. The TPP, however, would expand these rules more than any past U.S. trade agreement. In one fell swoop, the TPP would roughly double the number of firms that could use this system to challenge U.S. policies, as

foreign investor privileges would be newly extended to more than 9,000 firms doing business in the United States.¹² That includes, for example, the U.S. subsidiaries of Australian-based BHP Billiton, one of the world's largest mining companies, whose U.S. investments include coal mines in New Mexico, offshore oil drilling in the Gulf of Mexico, and natural gas fracking operations in Texas.¹³

Meanwhile, the TPP would newly empower U.S. corporations to challenge the policies of other TPP countries in private tribunals, on behalf of their more than 19,000 subsidiaries doing business in those countries. The U.S. corporations that would gain this power include oil giants ExxonMobil and Chevron, natural gas fracking pioneer Halliburton, and major coal corporations like Peabody Energy.¹⁴

While the Office of the U.S. Trade Representative (USTR) claims to have inserted “safeguards” into the investment chapter, a close analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals. For example, USTR claims, “New TPP language underscores that countries retain the right to regulate in the public interest...”¹⁵ The language in question, located in the preamble—a space generally reserved for toothless assertions—merely states that TPP governments “resolv[e] to...recognize” their theoretical right to regulate.¹⁶ This good-faith effort at “recognition” would not prevent ISDS tribunals from ordering government compensation to foreign fossil fuel corporations if a government’s exercise of its “right to regulate” interfered with the firms’ far more enforceable rights under the TPP.¹⁷

Another TPP provision that some have claimed as a protection for environmental and other public interest policies is actually a legally meaningless clause included in U.S. trade agreements since the 1990s.¹⁸ The provision is a self-cancelling statement that nothing in the investment chapter should prevent a government from implementing an environmental or other public interest policy, so long as that policy is “consistent with” the investment chapter’s broad rights for foreign investors.¹⁹ Even

ISDS tribunalists have described this as an example of a “diplomatic rather than legal” statement.²⁰ A recent legal review calls the clause “a nebulous provision that can easily be marginalized.”²¹

Without meaningful safeguards, the harmful investment rules in the TPP that threaten climate and environmental policies include:

1. INVESTOR-STATE DISPUTE SETTLEMENT: A PARALLEL LEGAL SYSTEM FOR FOREIGN CORPORATIONS

In a near word-for-word replication from past U.S. trade and investment agreements, the TPP would empower foreign investors to bypass domestic courts and challenge environmental and other public interest policies in trade tribunals.²² The trade tribunals would be staffed by three private sector lawyers who are able to rotate between acting as “judges” and representing corporations in cases against governments.²³ Despite USTR’s claim of a new “safeguard” regarding “arbitrator ethics,”²⁴ the TPP text includes no code of conduct to limit such conflicts of interest; it merely states that TPP countries will at some unspecified time “provide guidance” on the application of ethical guidelines to ISDS lawyers.²⁵ As in past agreements, the lawyers would not be bound by any system of legal precedent. They would be empowered to order governments to pay foreign firms compensation for what they deem to be violations of the TPP’s broad foreign investor rights, and governments would have no right to appeal their decisions on the merits.²⁶ The TPP sets no cap on the amount of taxpayer money that tribunals could order a government to pay.²⁷ Given such unpredictable costs, the mere threat of an investor-state case can be, and has been, enough to dissuade governments from enacting important public interest measures.²⁸

2. BROAD DEFINITIONS OF “INVESTMENT” AND “INVESTOR”

The definition of “investment” in the TPP goes far beyond real property and opens up governments to a wide range of cases not even related to actual investments. The final text’s definition of investment is: “every asset that an investor owns or controls,

directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”²⁹ That definition would empower foreign corporations to launch ISDS cases against U.S. climate policies even if they merely own a minority share in a company that, in turn, owned a U.S. fracking, oil drilling, or coal mining operation. For example, the TPP would empower an Australian subsidiary of HSBC, a multinational bank, to launch an ISDS case against U.S. policies affecting BHP Billiton’s U.S. fossil fuel operations, despite the fact that the HSBC subsidiary only owns a 19 percent share in BHP Billiton.³⁰

The TPP investment chapter would even allow foreign investors to launch ISDS cases against policies that affect “written agreements” with governments that give rights to the “exploration, extraction, refining, transportation, distribution or sale” of government-controlled natural resources. Unlike *any* previous U.S. trade agreement, the TPP explicitly states that this covers agreements for the extraction, processing, and transportation of federally owned “oil” and “natural gas.”³¹ Were a new U.S. climate policy, for example, to restrict a foreign-owned corporation’s ability to extract oil or natural gas on public lands under an existing government lease, the firm could ask three lawyers on an ISDS tribunal to order compensation from U.S. taxpayers.³²

The investment chapter’s new rights and privileges for foreign investors would extend to investments *already existing* on the day the TPP would take effect.³³ This means that foreign investors could, for example, launch ISDS claims against policies affecting any existing pipelines, natural gas fracking operations, coal mines, or oil drilling projects in any of the 12 TPP countries. The chapter’s similarly broad definition of an “investor” would even allow corporations to launch ISDS cases over failed attempts to make an investment. As long as a foreign fossil fuel firm had “taken concrete action or actions to make an investment,” including “applying for permits or licenses,” they would be permitted to challenge government policies in ISDS tribunals.³⁴

3. “MINIMUM STANDARD OF TREATMENT”: AN OBLIGATION TO NOT FRUSTRATE CORPORATE EXPECTATIONS

The TPP guarantees a “minimum standard of treatment” (MST) for foreign investments, which includes a right to “fair and equitable treatment” (FET).³⁵ These vague obligations for TPP governments largely replicate the language found in previous U.S. pacts and have been the basis of many alarming ISDS rulings, including an order for Ecuador to pay more than \$1 billion to Occidental Petroleum, as described below.

Indeed, in three out of every four ISDS tribunal rulings under U.S. pacts in which the government lost, the foreign investor won on the basis of the broad MST/FET obligation.³⁶ A number of ISDS tribunals have interpreted this standard as a requirement for a government to ensure “the stability of the legal and business framework.”³⁷ This means that a government could face ISDS cases for changing its policies to better protect the climate, the environment, or its citizens, if doing so frustrates the expectations that foreign firms held when they made their investments.

USTR claims to have inserted new “safeguards” in the TPP to narrow the extremely broad MST/FET obligation, such as a provision asserting that “the mere fact” that a government does something “inconsistent with an investor’s expectations” is not enough to qualify as an MST/FET violation.³⁸ This provision, however, would still allow an ISDS tribunal to use frustration of an investor’s expectations as *one* reason to rule against a government policy. It would also still allow the tribunal to use the firm’s frustrated expectations as the *only* reason for ruling against the government, if the firm could show that its expectations were based on a statement from a government official (e.g., that an official did not foresee future restrictions on fracking).³⁹ In response to the new provision, longtime ISDS lawyer Todd Weiler stated, “I can’t recall any tribunal that, if you put this provision in that agreement, that the result would be different either way.”⁴⁰

Even if the new provision were meaningful, an ISDS tribunal could simply ignore it, given that the TPP fails to limit the broad discretion of ISDS lawyers,

and still rule against a government on the mere basis that a new policy frustrated a foreign investor's unsubstantiated expectations. Indeed, ISDS tribunals have ignored the last attempt by the U.S. government to narrow the MST/FET standard, opting instead to use a broader interpretation of MST/FET to order government compensation to foreign firms.⁴¹

4. "INDIRECT EXPROPRIATION": A RIGHT TO COMPENSATION FOR POLICIES THAT REDUCE AN INVESTMENT'S VALUE

Virtually replicating past free trade agreements, the TPP explicitly obligates governments to compensate foreign investors for "indirect" expropriation.⁴² Past ISDS tribunals have interpreted this broad obligation as allowing foreign corporations to demand compensation for government policies or actions that have the effect of merely reducing the value of a foreign investment.⁴³ By contrast, in most domestic legal systems, governments typically are not required to provide compensation unless they actually seize the property of an individual or firm.⁴⁴ And the U.S. Supreme Court has consistently ruled that a mere reduction in the value of private property does not require the U.S. government to provide compensation.⁴⁵

The TPP's inclusion of this expansive foreign investor right could allow a foreign corporation, like BHP Billiton, for example, to challenge a new environmental regulation, such as additional permit requirements, as a TPP-prohibited "indirect expropriation" if it diminished the value of its fracking operations. In fact, an annex in the TPP makes explicit that "non-discriminatory regulatory actions...designed to protect public welfare objectives, such as public health, safety, and the environment" can constitute "indirect expropriations" "in rare circumstances."⁴⁶ While USTR touts this provision as a "safeguard," it would be up to an unaccountable ISDS tribunal to decide which environmental or other public interest policies fall into the "rare circumstances" loophole.

CORPORATE TRIBUNAL CASES AGAINST CLIMATE AND ENVIRONMENTAL PROTECTIONS

These are not hypothetical dangers. ISDS cases against environmental, health, and other public interest policies are increasing in frequency, while the scope of policies being challenged is widening. These are just a few ISDS cases that exemplify how investment rules can limit a government's ability to mitigate climate disruption, protect the environment, and ensure the safety of its people:

ENVIRONMENTAL IMPACT ASSESSMENT FOR MINING IN NOVA SCOTIA

In 2007, the government of Nova Scotia in Canada rejected a proposal by Bilcon of Delaware, a U.S. mining company, to use invasive "blasting" methods to extract rock near the Bay of Fundy and ship it to the United States.⁴⁷ The government acted in response to an environmental impact assessment, which found that the project could harm endangered species, including the North Atlantic right whale and Inner Bay of Fundy salmon.⁴⁸ The assessment also highlighted concerns by commercial fishers, indigenous communities, and local residents about threats to the local landscape, diverse wildlife, and community, leading the Nova Scotia and Canadian governments to agree that the mining project threatened "core values that reflect [the local community's] sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."⁴⁹

In response to the government's rejection of the project, Bilcon launched an ISDS case against Canada under NAFTA, arguing that its right to a "minimum standard of treatment" (among others) had been violated.⁵⁰ In 2015, two of the three lawyers on the ISDS tribunal ruled against Canada, arguing that the environmental impact assessment frustrated Bilcon's expectations, and thus violated Bilcon's right to a "minimum standard of treatment," because it took into consideration the local community's values, including their concerns about the environment.⁵¹ The dissenting tribunalist warned that the decision

would be seen as “a remarkable step backwards in environmental protection,” and predicted that “a chill will be imposed on environmental review panels.”⁵² Bilcon is demanding at least \$300 million in compensation from Canadian taxpayers.⁵³

FRACKING IN QUEBEC

In September 2013, Lone Pine Resources, a U.S. oil and gas firm, launched an ISDS case against Canada under NAFTA in response to a moratorium enacted by Quebec on shale gas exploration and development, including fracking, under the St. Lawrence River.⁵⁴ A Quebec government review has concluded that fracking in the area could pollute the air and water and have “major impacts” on local communities.⁵⁵ In launching its ISDS case, Lone Pine claimed the Quebec government acted “with no cognizable public purpose,” and violated the firm’s “valuable right to mine for oil and gas under the St. Lawrence River.”⁵⁶ Lone Pine argued that Quebec’s fracking moratorium violated NAFTA’s guarantee of a “minimum standard of treatment” for foreign investors because it “violated Lone Pine’s legitimate expectation of a stable business and legal environment.”⁵⁷ Lone Pine also called the fracking moratorium a NAFTA-prohibited “indirect expropriation.”⁵⁸ The firm is demanding \$119 million from Canadian taxpayers as compensation, in addition to asking Canada to cover Lone Pine’s legal fees.⁵⁹



COAL-FIRED POWER PLANT STANDARDS AND NUCLEAR ENERGY IN GERMANY

In 2007, the government of Hamburg, Germany, granted Swedish energy firm Vattenfall a permit to begin construction of a new coal-fired power plant.⁶⁰ In an attempt to allay strong concerns from policymakers and the public that the plant would contribute to climate disruption and could pollute the adjacent Elbe River,⁶¹ the government of Hamburg required Vattenfall to comply with environmental requirements to protect the river.⁶² Instead of meeting those requirements, however, Vattenfall launched a \$1.5-billion ISDS case against Germany under the Energy Charter Treaty,⁶³ claiming that the environmental rules constituted an expropriation of its investment and a violation of its right to “fair and equitable treatment.”⁶⁴ To avoid a potentially costly case, the German government reached a settlement with Vattenfall in 2010 that required Hamburg to abandon its environmental conditions for the coal-fired plant (even ones Vattenfall had already agreed to) and allow the plant to be built.⁶⁵ Hamburg complied, and Vattenfall’s coal plant there began operating in 2014.⁶⁶

Two years after successfully using ISDS to roll back German restrictions on its coal-fired power plant, Vattenfall decided to launch an ISDS case against German restrictions on nuclear power. Following Japan’s Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German Parliament decided to phase out nuclear power and shift toward cleaner renewable energy sources.⁶⁷ In response, Vattenfall, which had investments in German nuclear energy, launched an ISDS case against Germany under the Energy Charter Treaty.⁶⁸ Vattenfall is now seeking more than \$5 billion from German taxpayers for losses that it may sustain during the nuclear phase-out.⁶⁹

OIL EXPLORATION IN ECUADOR

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon rainforest.⁷⁰ In accordance with Ecuador’s laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government

approval.⁷¹ This legal requirement provided the government the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to exercise caution: For nearly three decades, Texaco, which Chevron later acquired in 2001, dumped billions of gallons of toxic water into Ecuador's Amazon region while drilling for oil.⁷² Just one year after signing its contract, Occidental violated it (and Ecuadorian law) when the corporation sold 40 percent of its production rights to Alberta Energy Company without formally informing, or seeking authorization from, the Ecuadorian government.⁷³ In response, Ecuador terminated Occidental's contract and investment, which prompted Occidental to launch an ISDS case against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty.

Although the ISDS tribunal agreed that Occidental broke the law and that Ecuador was within its legal rights to terminate the contract and investment,⁷⁴ the tribunal used a broad interpretation of Occidental's right to "fair and equitable treatment" to rule against Ecuador.⁷⁵ The tribunalists ordered Ecuador to pay more than \$2 billion to Occidental⁷⁶—the largest ISDS penalty at the time, and equivalent to what the Ecuadorian government spends each year on healthcare for half of its population.⁷⁷ A later, partial annulment of the decision left the ruling largely intact and left Ecuador with a penalty of more than \$1 billion.⁷⁸

LOCKING IN NATURAL GAS EXPORTS AND FRACKING

As scientists and experts have warned, in order to solve the climate crisis we must keep the majority of fossil fuels in the ground.⁷⁹ Yet, the TPP would provide a lifeline to the natural gas industry, encouraging increased production of U.S. natural gas for export markets where the industry can earn more than three times what they can earn by selling natural gas in the U.S.⁸⁰

Before authorizing the export of natural gas to most countries in the world, the U.S. Department of Energy (DOE) is required under U.S. law to conduct a careful



PHOTO: ECOFLIGHT

and public analysis to determine whether natural gas exports are in the public interest.⁸¹ But the 1992 amendment to the Natural Gas Act states that DOE must forego this analysis and approve applications "without modification or delay" to export natural gas to any countries with which the United States has a free trade agreement requiring "national treatment for trade in natural gas."⁸² Because the TPP includes this requirement,⁸³ the DOE would be bound under U.S. law to automatically approve *all* exports of U.S. liquefied natural gas (LNG) to all countries in the agreement⁸⁴—including Japan, the world's largest LNG importer.⁸⁵ The TPP, therefore, could lock in U.S. natural gas production and LNG exports despite the threats to clean air and water, healthy communities, and a stable climate.

Automatic exports of U.S. LNG to TPP countries would be particularly dangerous. TPP member Japan imported more than 88 million metric tons of LNG in 2014, which amounted to more than 40 percent of global LNG imports. No existing U.S. free trade agreement (FTA) partner comes close to that level of import demand. South Korea is the closest, and its 2014 LNG imports were less than 42 percent of Japan's level.⁸⁶ And, since the TPP is a "docking" agreement that additional countries could join in the future, it could create an expanding web of countries with automatic access to natural gas from the United States.⁸⁷

By locking in large-scale LNG exports, the TPP would threaten our environment and climate by:

- Facilitating Increased Fracking:** The U.S. Energy Information Administration (EIA) estimates that a significant rise in LNG exports above current projections, which the TPP would facilitate, would spur up to a 10 percent increase in U.S. natural gas production.⁸⁸ The EIA further predicts that about three-quarters of the increased production would come from shale gas. This would spell a rise in fracking, the dominant extraction method for shale gas.⁸⁹ An intrusive procedure, fracking involves pumping millions of gallons of water, sand, and chemicals underground to create pressure, which forces out natural gas. According to a 2015 review of academic studies on the effects of fracking, 69 percent of recent studies have found potential or actual water contamination, 88 percent have found indication of air pollution, and 84 percent have found potential or actual health risks.⁹⁰ The U.S. Geological Survey also reports that underground wastewater disposal associated with fracking “has been linked to induced earthquakes.”⁹¹
- Exacerbating Climate Disruption:** Recent studies find that natural gas has significant climate disrupting impacts, due in part to leaks of methane (a potent greenhouse gas), in the extraction, processing, and domestic transport of natural gas.⁹² And LNG has even greater life-cycle greenhouse gas emissions than natural gas, due to the energy needed to cool, liquefy, store, ship, and re-gasify the gas.⁹³ In fact, DOE estimates that liquefaction, overseas shipping, and re-gasification contribute 21 percent of the life-cycle greenhouse gas emissions of LNG exported from the United States to Asia.⁹⁴ DOE’s analysis indicates that LNG exports from the United States to Asian TPP countries (e.g., Japan) likely represent higher life-cycle greenhouse gas emissions than LNG shipments from closer LNG-exporting nations (e.g., Australia).⁹⁵ By locking in U.S. LNG exports to Japan, the TPP would thus facilitate Japan’s use of a more climate-disruptive fossil fuel. A reliable supply of LNG exports from the United States would likely also displace renewable energy production in Japan, spurring further climate disruption. More broadly, since the TPP is a docking agreement for other countries to
- join, opening our natural gas reserves to unlimited exports to all current and future TPP countries would increase the world’s dependence on a fossil fuel with significant climate effects.
- Locking in Fossil Fuel Infrastructure:** LNG export requires a large fossil fuel infrastructure, including a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that all require careful environmental review. For example, whether exporters are expanding old pipelines or building new ones, these construction projects can cut across private property and public land, further fragmenting landscapes and increasing pollution. There are also environmental effects associated with the building of natural gas export terminals, which may require the dredging of sensitive estuaries to make room for massive LNG tankers. Expanding facilities and ship traffic also takes a toll on coastal communities and the environment. Moreover, the construction of new fossil fuel infrastructure to enable LNG exports would lock in the production of climate-disrupting fossil fuels for years to come—years during which we ought to be dramatically reducing fossil fuel production.⁹⁶
- Potentially Shifting the Domestic Gas Market Toward Coal:** The EIA projects that by raising demand for U.S. natural gas, increased LNG exports would cause U.S. natural gas prices to increase. In the near term, the EIA projects that more expensive natural gas would spur increased use of coal in power generation (with coal rising more than nuclear or renewables).⁹⁷ The extent to which this projection would pan out would depend somewhat upon how U.S. states choose to implement the Clean Power Plan. In states with policies that more aggressively seek to phase out coal production (as opposed to focusing more on energy efficiency, for example), such efforts would likely nullify upward pressure on coal use from LNG exports.⁹⁸ In states more permissive toward coal, LNG exports could spur a shift, in the short term, toward coal-fired power, causing increased greenhouse gas emissions.

HOW THE TPP WOULD INCREASE GREENHOUSE GAS EMISSIONS

In addition to locking in large-scale exports of greenhouse gas-intensive LNG to TPP countries, including Japan, the TPP would likely increase climate-disrupting emissions by:

- **Shifting Manufacturing to Countries With Carbon-Intensive Production:** The TPP, by eliminating tariffs, would put manufacturing firms in relatively high-wage nations, like the United States and Canada, into direct competition with manufacturing firms in low-wage countries, like Vietnam and Malaysia.⁹⁹ The resulting shift in manufacturing to low-wage countries would not only cost U.S. manufacturing jobs, but would also spur higher greenhouse gas emissions. Production in Vietnam is more than four times as carbon-intensive as U.S. production, and production in Malaysia is more than twice as high (due to lower energy efficiency and/or a higher concentration of dirty fossil fuels in energy production).¹⁰⁰
- **Increasing Shipping:** A TPP-spurred shift in manufacturing from countries like the United States and Canada to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions. The International Maritime Organization (IMO) estimates that international shipping already accounts for 2.1 percent of global greenhouse gas emissions. IMO projects that carbon emissions from shipping will increase between 50 percent and 250 percent by 2050, depending largely on the extent to which demand for traded goods rises.¹⁰¹ Increased demand for traded goods is a stated objective of the TPP.¹⁰²
- **Escalating Tropical Deforestation Via Cash Crop Expansion:** The TPP would encourage increased production of cash crops, like oil palm, that have played a leading role in destroying carbon-capturing tropical forests.

Recent studies have found the expansion of oil palm plantations to be the primary cause of the widespread destruction of carbon-rich peat swamp forests in TPP member Malaysia.¹⁰³ Scientists estimate that each hectare of peat swamp cleared for oil palm releases up to 723 metric tons of carbon into the atmosphere.¹⁰⁴ Malaysia is already the world's second-largest exporter of palm oil (the primary product of oil palm).¹⁰⁵ Seven TPP countries currently impose tariffs on palm oil, ranging from 3 to 25 percent, including major palm oil importers like Mexico.¹⁰⁶ The TPP would eliminate or reduce all of these tariffs, encouraging greater oil palm production, and thus increasing climate-disrupting deforestation, in palm oil-exporting TPP countries like Malaysia.¹⁰⁷

- **Expanding Production and Consumption:** Even the World Trade Organization (WTO) concludes that trade liberalization would likely increase greenhouse gas emissions due to increased production and consumption. A 2009 review by the WTO and United Nations Environment Programme of studies measuring the impact of trade liberalization on greenhouse gas emissions concluded, "Most of the econometric studies suggest that more open trade would be likely to increase CO₂ emissions," due largely to an increase in production and consumption.¹⁰⁸
- **Increasing Exports of Coal:** While most TPP countries have already eliminated tariffs on the importation of coal and coal products, the TPP would eliminate the few coal tariffs that remain, making the carbon-intensive fuel and energy source more affordable in select TPP countries.¹⁰⁹ For example, Japan would eliminate its 3.2 percent tariff on coke and semi-coke of coal from the United States¹¹⁰—a carbon-intensive product for which Japan is the world's second-largest importer and the United States is the world's sixth-largest exporter.¹¹¹

Despite these likely effects of increasing LNG exports, the TPP would strip the ability of the United States to even *examine* whether greater natural gas exports are in the interest of our communities and climate.

NEW LIMITS ON CLIMATE AND ENVIRONMENTAL REGULATIONS

Various other TPP chapters would impose additional limits on the ability of governments to tackle climate disruption and other environmental imperatives.

The TPP includes a chapter on Technical Barriers to Trade (TBT), for example, that could limit the ability of governments to establish new energy-saving or environmentally-friendly labels, technical regulations, and standards. The TPP's TBT chapter builds on the WTO TBT agreement, and includes commitments to ensure that technical regulations do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary."¹¹² Such expansive requirements have led to a recent string of anti-environment and anti-consumer TBT cases. In 2015, for example, the WTO ruled against the U.S. "dolphin-safe" tuna label—a voluntary label that applies to U.S. and foreign tuna producers, which has contributed to a dramatic reduction in dolphin deaths—on the basis that the label constitutes a "technical barrier to trade."¹¹³ The WTO also recently ruled that a ban on candy-flavored cigarettes and popular country-of-origin meat labels violate the broad TBT rules.¹¹⁴ The TPP's expansion of those rules would likely leave even less room for climate and environmental labels and standards.

In another example of new limits that the TPP would impose on governments, the chapter on government procurement would limit the ability of governments to mandate "green purchasing" in government contracts or for government purposes. Requirements for recycled content in paper and other goods, or for energy to come from renewable sources, for example, could be challenged under the TPP for having the unintended "effect of creating an unnecessary obstacle to trade."¹¹⁵

Green jobs programs could also be challenged as violating TPP rules concerning trade in goods if they included provisions to incentivize local job creation. Indeed, the TPP virtually replicates rules that the WTO used in 2013 to rule against Ontario's successful clean energy program, which reduced emissions while creating thousands of local jobs.¹¹⁶ Rather than reform decades-old rules to make space for such popular initiatives to combat climate disruption, the TPP would further constrain green policies.

THE ENVIRONMENT CHAPTER

One of the 30 TPP chapters focuses on the environment, and USTR often claims the pact would benefit the environment based exclusively on this chapter. And yet, despite the fact that the TPP would likely increase climate-disrupting emissions by enabling corporate challenges to climate protections while increasing carbon-intensive production, fossil fuel exports, shipping, and deforestation, the TPP environment chapter fails to even mention the words "climate change."¹¹⁷ The environment chapter also excludes core environmental commitments that have been included in all U.S. trade agreements since 2007, including those negotiated by the George W. Bush administration.

Instead, the chapter narrowly focuses on a set of conservation rules that are likely to be too weak to curb environmental abuses in TPP countries. The provisions are also unlikely to be enforced, since violations of environmental terms in existing U.S. trade deals have been repeatedly ignored. Moreover, the environment chapter fails to protect climate and environmental policies from the myriad threats that other parts of the TPP pose.

A STEP BACKWARD FROM PAST TRADE DEALS

In some respects, the TPP environment chapter actually takes a step *back* from environment chapters of previous trade pacts. For example, pursuant to a bipartisan agreement between then-President George W. Bush and congressional Democrats,¹¹⁸ all U.S. FTAs since 2007 have required each of our FTA partners to "adopt, maintain, and implement

laws, regulations, and all other measures to fulfill its obligations under” a set of seven multilateral environmental agreements (MEAs).¹¹⁹ With proper enforcement, this obligation should deter countries from violating their critical commitments in environmental treaties in order to boost trade or investment. The TPP, however, only requires countries in the pact to “adopt, maintain, and implement” domestic policies to fulfill *one* of the seven core MEAs: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹²⁰ This regression violates the minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as fast track.¹²¹

WEAK CONSERVATION RULES

While the range of conservation issues mentioned in the TPP may be wide, the TPP countries’ obligations are generally shallow, as detailed in the Sierra Club’s textual analysis.¹²² Vague obligations combined with weak enforcement may allow countries to continue with business-as-usual practices that threaten our environment. For example:

- **Illegal Trade in Flora and Fauna:** Rather than *prohibiting* trade in illegally taken timber and wildlife—major issues in TPP countries like Peru and Vietnam—the TPP only asks countries “to combat” such trade. To comply, the text requires only weak measures, such as “exchanging information and experiences,”¹²³ while stronger measures like sanctions are merely listed as options.¹²⁴ Moreover, the TPP states that “each Party retains the right to exercise administrative, investigatory and enforcement discretion in its implementation” of the commitment to combat illegal trade in flora and fauna, providing TPP countries a giant escape hatch to avoid fulfilling this already weak obligation.¹²⁵
- **Illegal, Unreported, and Unregulated (IUU) Fishing:** Rather than *obligating* countries to abide by trade-related provisions of regional fisheries management organizations (RFMOs), which could help prevent illegally caught fish from entering international trade, the TPP merely calls on



countries to “endeavor not to undermine” RFMO trade documentation—a non-binding provision that could allow the TPP to facilitate increased trade in IUU fish.¹²⁶

- **Shark Finning and Commercial Whaling:** Rather than *banning* commercial whaling and shark fin trade—major issues in TPP countries like Japan and Singapore—the TPP includes a toothless aspiration to “promote the long-term conservation of sharks...and marine mammals” via a non-binding list of suggested measures that countries “should” take.¹²⁷ Meanwhile, the TPP would actually encourage increased shark finning by eliminating the significant shark fin tariffs that major shark fin importers, such as Vietnam and Malaysia, currently impose on major shark fin exporters, such as Mexico and Peru.¹²⁸

LACK OF ENFORCEMENT

Even if the TPP’s conservation terms included more specific obligations and fewer vague exhortations, there is little evidence to suggest that they would be enforced, given the historical lack of enforcement of environmental obligations in U.S. trade pacts. In fact, the United States has never *once* brought a trade case against another country for failing to live up to its environmental commitments in trade agreements, even amid documented evidence of countries violating those commitments.

For example, the U.S.–Peru FTA, passed in 2007, included a Forestry Annex aimed at stopping the large, illegal timber trade between Peru and the



United States. The pact not only required Peru “to combat trade associated with illegal logging,” but also included eight pages of specific reforms that Peru had to take to fulfill this requirement.¹²⁹ The obligations were far more detailed than any found in the TPP environment chapter, and were subject to the same enforcement mechanism.¹²⁰

But after more than six years of the U.S. – Peru trade deal, widespread illegal logging remains unchecked in Peru’s Amazon rainforest. A 2014 study in *Scientific Reports* found that about 70 percent of Peru’s supervised logging concessions are being used for illegal logging.¹³¹ In an investigation conducted that same year, Peru’s own authorities found that 78 percent of wood slated for export was harvested illegally.¹³²

For years, U.S. environmental groups have called on USTR to use the rules in the trade deal to counter Peru’s extensive illegal logging.¹³³ Yet to date, Peru has faced no formal challenges, let alone penalties, under the trade pact,¹³⁴ despite ample evidence that Peru has violated the pact’s rules by illegally cutting Amazonian trees and exporting them for sale to unwitting U.S. consumers.¹³⁵ Given that the Peru deal’s stronger environmental obligations have failed to halt illegal logging in Peru, it is hard to imagine that the TPP’s weaker provisions would be more successful in combatting conservation challenges.

FAILURE TO PROTECT CLIMATE POLICIES

Nothing in the TPP, including the environment chapter, offers adequate protection from the myriad TPP threats that would constrain the ability of countries to combat climate disruption. There is no protection from rules that would allow foreign investors to challenge climate and clean energy policies in unaccountable trade tribunals. There are no meaningful safeguards for green jobs programs that could run afoul of the TPP’s procurement rules. There is no flexibility offered to governments who wish to restrict the exports of climate-disrupting fossil fuels. There are no sufficient safeguards for energy-saving labels that could be construed under the TPP as “technical barriers to trade,” or for border adjustment mechanisms that could conflict with TPP rules regarding imports. Therefore, the TPP could not only spur increased climate-disrupting emissions, but also inhibit domestic efforts to curb such emissions.

CONCLUSION

The TPP poses a panoply of threats to our climate and environment. The weak conservation provisions of the TPP environment chapter do not change the fact that, under the TPP, governments would *lose* autonomy to enact policies to address the climate crisis, while corporations would *gain* new powers to challenge climate and environmental policies. As the world moves toward a clean energy future, we cannot afford to let the TPP keep us in the fossil fuel-dominated past. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

ENDNOTES

1. See Article 30.4 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf>. “TPP Full Text,” Office of the U.S. Trade Representative, accessed November 10, 2015, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.
2. “The Trans-Pacific Partnership: Preserving the Environment,” Office of the U.S. Trade Representative, October 2015, <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf>.
3. “TPP Full Text,” Office of the U.S. Trade Representative, accessed November 10, 2015, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.
4. Philip Bump, “We Made President Obama’s Big TPP Trade Deal Searchable,” *The Washington Post*, November 5, 2015, <https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/we-made-president-obamas-big-tpp-trade-deal-searchable/>.
5. Peter Robinson, “TPP: A 21st Century Trade Agreement,” United States Council for International Business, September 14, 2015, <http://www.uscib.org/tpp-a-21st-century-trade-agreement/>.
6. Article 9.6 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
7. Lori Wallach, “‘Fair and Equitable Treatment’ and Investors’ Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed,” Public Citizen, September 5, 2012, <http://www.citizen.org/documents/MST-Memo.pdf>.
8. These cases include: *Dow AgroSciences LLC v. Canada* (<http://www.italaw.com/cases/3407>), *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (<http://www.italaw.com/cases/1225>), *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (<http://www.italaw.com/cases/257>), and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (<http://www.italaw.com/cases/767>).
9. “Recent Trends in IIAs and ISDS,” United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.
10. For summaries of these and other ISDS cases affecting environmental protections, see “Trading Away Our Climate? How Investment Rules Threaten the Environment and Climate Protection,” The Sierra Club, 2014, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Investor-State-Climate-FINAL.pdf>. See also: “Case Studies: Investor-State Attacks on Public Interest Policies,” Public Citizen, 2015, <http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf>.
11. “Recent Trends in IIAs and ISDS,” United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.
12. The figure counts only the U.S. subsidiaries of foreign corporations based in TPP countries that do not currently have an ISDS-enforced agreement with the United States: Australia, Brunei, Japan, Malaysia, New Zealand, and Vietnam. Data on foreign-owned firms doing business in the United States from “Foreign Firms Operating in the United States,” Uniworld, extracted September 21, 2015, <https://www.uniworldbp.com/search.php>.
13. “Resourcing Global Growth: Annual Report 2015,” BHP Billiton, 2015, at 36 and 44, <http://www.bhpbilliton.com/-/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en>.
14. Data on foreign-owned firms doing business in the United States from Uniworld, “Foreign Firms Operating in the United States,” extracted September 21, 2015, <https://www.uniworldbp.com/search.php>.
15. “The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement,” Office of the U.S. Trade Representative, October 2015, <https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf>.
16. Preamble of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf>.
17. In the words of a recent pro-ISDS law review article, in TPP-like investment agreements “the power to regulate operates within the limits of rights conferred upon the investor.” Rudolf Dolzer, “Fair and Equitable Treatment: Today’s Contours,” *Santa Clara Journal of International Law*, 12: 1, January 17, 2014, at 21, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil>.

18. See, for example, Varun Sivaram, “TPP: A Small Step in the Right Direction on Climate,” Council on Foreign Relations, November 6, 2015, <http://blogs.cfr.org/levi/2015/11/06/tpp-a-small-step-in-the-right-direction-on-climate/>.
19. Article 9.15 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
20. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz (on the Partial Award), November 12, 2000, at para. 117, <http://italaw.com/sites/default/files/case-documents/ita0748.pdf>.
21. Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012), at 70-71.
22. See Chapter 9, Section B of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
23. For a summary of such dual roles and the conflict of interest it creates, see Pia Eberhardt and Cecilia Olivet, “Profiting from Injustice,” Corporate Europe Observatory and Transnational Institute, November 2012, <https://www.tni.org/files/download/profitfrominjustice.pdf>.
24. “The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement,” Office of the U.S. Trade Representative, October 2015, <https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf>.
25. Article 9.21.6 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
26. Tribunal decisions could only be “annulled” on narrow grounds such as “corruption” by a tribunal member or “departure from a fundamental rule of procedure.” International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, at Article 52, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. The TPP text addresses the possibility of an actual appellate mechanism for ISDS decisions by stating that “in the event” that one is created “under other institutional arrangements,” the Parties merely commit to “consider” whether it could be used to appeal ISDS decisions. Article 9.22.11 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
27. See Article 9.28 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
28. See “Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges,” Public Citizen, 2015, at 8-9, <http://www.citizen.org/documents/ustr-isds-response.pdf>.
29. Article 9.1 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
30. HSBC’s subsidiary in Australia is HSBC Australia Nominees Pty Limited. “Resourcing Global Growth: Annual Report 2015,” BHP Billiton, 2015, at 309, <http://www.bhpbilliton.com/-/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en>. This example spotlights the fact that Article 9.14 of the TPP would allow a firm (e.g., HSBC’s subsidiary in Australia) to bring an ISDS case against another TPP government (e.g., the United States) even if it is owned or controlled by a parent firm in a non-TPP country (e.g., United Kingdom-based HSBC), so long as it has “substantial business activities” in the TPP country from which it launches the case (e.g., Australia). Article 9.14 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
31. Article 9.1 of the TPP final text, under the definition of “investment agreement,” <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
32. An oil and gas lease with the U.S. Bureau of Land Management, for example, would seem to meet the conditions of an “investment agreement,” as it “creates an exchange of rights and obligations, binding on both parties,” it “grants rights” to an investor, and the investor relies on it “in establishing or acquiring a covered investment.” For a description of the rights and obligations associated with such leases, see “Qs & As about Oil and Gas Leasing,” Bureau of Land Management, U.S. Department of the Interior, accessed November 10, 2015, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/questions_and_answers.html. Such leases could also potentially fall under the TPP’s definition of “investment,” which explicitly mentions “leases” as a covered item. Article 9.1 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
33. See Article 1.3 of the TPP final text, definition of “covered investment,” <https://ustr.gov/sites/default/files/TPP-Final-Text-Initial-Provisions-and-General-Definitions.pdf>.

34. Article 9.1 of the TPP final text, at footnote 12, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
35. Article 9.6 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
36. Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, <http://www.citizen.org/documents/MST-Memo.pdf>.
37. *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, at para. 183, <http://italaw.com/sites/default/files/case-documents/ita0571.pdf>.
38. Article 9.6.4 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
39. Luke Eric Peterson, "A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-Style Structure with a Few Novel Twists," *Investment Arbitration Reporter*, November 5, 2015, <http://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familiar-us-style-structure-with-a-few-novel-twists/>. In addition, the TPP's "most-favored-nation treatment" provision could allow a foreign investor to try to use an older MST/FET definition from an entirely different agreement to circumvent the added provision in the TPP. Foreign investors have used the "most-favored-nation treatment" provision of ISDS-enforced agreements to import substantive foreign investor rights found in other agreements to which the government in the dispute is a Party. See: "Most-Favoured Nation Treatment," United Nations Conference on Trade and Development, 2010, at 59-60, http://unctad.org/en/Docs/diaeia20101_en.pdf. The TPP text makes clear that investors cannot use the "most-favored-nation treatment" provision to access procedural rights in existing agreements, but leaves open the possibility for them to access substantive rights in those deals. See Article 9.5.3 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
40. "TPP Investment Language Aims To Tighten Standard For MST Breach," *Inside U.S. Trade*, November 13, 2015, <http://insidetrade.com/inside-us-trade/tpp-investment-language-aims-tighten-standard-mst-breach>.
41. For example, the U.S. government and other Parties to the Central America Free Trade Agreement (CAFTA) inserted an annex into that agreement that was intended to narrow the MST obligation by requiring that it align with the "minimum standard of treatment" consistently practiced by governments. But in two of the first ISDS case rulings under CAFTA, tribunals simply ignored the annex, imported a broad interpretation of MST from yet another ISDS tribunal, and used that interpretation to order Guatemala to pay millions of dollars to foreign firms. "Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges," Public Citizen, 2015, at 4, <http://www.citizen.org/documents/ustr-isds-response.pdf>.
42. See Article 9.7 and Annex 9-B in the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
43. The tribunal in *Metalclad Corporation v. Mexico*, for example, concluded, "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour [sic] of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious benefit of the host State" (emphasis added). *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000, at para. 103.
44. "[...]the distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the latter is compensated as a rule. Normally, there will be no provision for compensation for deprivations or losses caused by police-power regulation of property." A.J. Van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Kluwer Law International, 1999), at 17. United States law is an exception to this general rule, but compensation for claims of "regulatory takings" under the Fifth Amendment of the U.S. Constitution is still only available in specific instances. Supreme Court rulings indicate that these include when a government measure results in "permanent physical invasion" of a property, causes a complete and permanent destruction of a property's value, constitutes a land-use exaction "so onerous that, outside the exactions

- context, they would be deemed *per se* physical takings,” or is otherwise “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540, 547-548 (2005).
45. “[O]ur cases have long held that mere diminution in value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California.*, 508 U.S. 602, 645 (1993).
 46. Annex 9-B in the TPP final text, at 3(b), <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.
 47. “News Release: Minister Rejects Whites Point Proposal,” Nova Scotia Department of Environment and Labour, November 20, 2007, <http://novascotia.ca/news/release/?id=20071120003>.
 48. “Environmental Assessment of the White Point Quarry and Marine Terminal Project,” Joint Review Panel, October 2007, at 57, 102-103, <http://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf>.
 49. “The Government of Canada’s Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project,” Fisheries and Oceans Canada, December 17, 2007, <http://www.dfo-mpo.gc.ca/reports-rapports/quarry/gr-quarry-eng.htm>.
 50. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Notice of Arbitration, May 26, 2008, at paras. 33-37, <http://www.italaw.com/sites/default/files/case-documents/italaw1143.pdf>.
 51. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at 124-179, <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>.
 52. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, March 10, 2015, at para. 51, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf>.
 53. Paul Withers, “Nova Scotia Taxpayers May Be on Hook for NAFTA,” *CBC News Canada*, March 24, 2015, <http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-taxpayers-may-be-on-hook-for-nafta-defeat-1.3006319>.
 54. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>. For a summary of the case, see: Ilana Solomon, “Fracking Causes Friction between Trade and Environment,” *Huff Post Green*, November 16, 2012, http://www.huffingtonpost.com/ilana-solomon/fracking-causes-friction-_b_2146939.html.
 55. Geoffrey Vendeville, “Fracking Provides Few Benefits to Quebec, Environmental Review Says,” *Montreal Gazette*, December 15, 2014, <http://montrealgazette.com/news/quebec/fracking-provides-few-benefits-to-quebec-environmental-review-says>.
 56. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, at para. 11, <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>.
 57. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, at para. 55, <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>.
 58. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Claimant’s Memorial, April 10, 2015, at para. 221, <http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf>.
 59. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Claimant’s Memorial, April 10, 2015, at para. 408, <http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf>.
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120. Article 20.17.2 of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf>.
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126. Article 20.16.14e of the TPP final text, <https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf>.
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