



TPP and Fast Track: What they mean for our Environment and our Country

Fast Track – What is It and How Does It Relate to the TPP?

What U.S. Law is and Should be:

The U.S. Constitution is clear about how it divides authority for dealing with foreign nations:

- The U.S. Constitution gives Congress exclusive authority to “To regulate commerce with foreign nations” and to “lay and collect taxes, duties, imposts and excises”.
- The President is given the authority, with the advice and consent of Congress and their 2/3 vote, to make treaties with foreign nations.

“In other words, under the Constitution, the president may negotiate international trade agreements at will, but the United States can only be bound to a trade agreement through a vote of Congress.”¹ By providing this shared authority, the Constitution creates checks and balances on both Congressional authority and Presidential authority for dealmaking with foreign nations.

The Law the President Wants to Create:

President Obama wants to change all this, and following the path of some of his predecessors, he wants passed a piece of legislation, the Bipartisan Congressional Trade Priorities Act of 2014 (also referred to as “TPA” or “Fast Track”), that would allow the President to:

- ☞ sign an international trade agreement
- ☞ he has negotiated, in private,
- ☞ before the Congress or the public have even had a chance to see it.

Furthermore, under this law, once he, the President, signs the U.S. on to his international trade deal, he would then be authorized to draft the implementing legislation which will repeal or amend any existing laws or provide new statutory authority necessary to ensure compliance with the international agreement he has agreed to.

¹ **The Rise and Fall of Fast Track Trade Authority**, by Lori Wallach, Public Citizen’s Global Trade Watch, 2013.

Fast Track law would then allow the President to wait until 60 days after he has entered into his trade agreement on behalf of the United States before he has to provide a report to Congress describing how the trade agreement will impact existing US laws.

Finally, Fast Track would relegate the Congress to only an up or down vote on the legislation that would implement the President's international deal. As a result, Fast Track takes the ability for Congress to have reasonable input on trade negotiations, agreements and resulting documents by removing their power to review them and make them better – instead, all they get is a simple “yay” or “nay”. The legislation removes the opportunity for Congressional hearings, expert testimony and input, committee mark up, any legitimate level of review and debate, and ensures absolutely no amendments may be offered or considered.

While the Fast Track bill put forth has been officially named the “Bipartisan Congressional Trade Priorities Act of 2014”, there is no Democrat who has been willing to sponsor a version of that bill in the US House of Representatives. By contrast, a number of both democrats and republicans have already gone on record, in writing, with the President to oppose the bill.

Providing Negotiating Objectives in Fast Track Doesn't Realistically Give Congress a Voice in the Dealmaking Process.

While the Fast Track legislation includes Trade Negotiating Objectives as a supposed mechanism for Congress to have input into trade negotiations pre- final deal, the objectives given are:

- 👉 broad and malleable in their articulation and interpretation,
- 👉 unenforceable in their text, and
- 👉 based on past experience, they are likely to be ignored by the Executive Branch.²

And after 6 years in negotiations, with only a few months left of scheduled discussion, it is unlikely any of the Fast Track legislation, including the stated negotiating objectives, would or could have any influence on the current Trans Pacific Partnership Trade Agreement (TPP) for which this Fast Track authorization is currently being sought. Negotiations for the TPP began in 2008, the President's goal is to have the deal wrapped up and signed before Summer, 2014.

Furthermore, while Fast Track legislation can include objectives the U.S. will seek to strive for in negotiations, even if embraced there can be no reasonable expectation that these objectives will, to any particular degree, be achieved in multi-national negotiations.

- 👉 Trade agreements are the result of negotiation, the U.S. has no unilateral ability to dictate their terms. And so if there are negotiating objectives of paramount importance to the U.S. Congress, including them in a Fast Track bill actually undermines Congress' ability to ensure their inclusion in an international agreement -- by empowering the President's negotiating team to negotiate also on Congress' behalf, Congress has also authorized the U.S. Negotiating team to negotiate those objectives away if they so choose for any reason whatsoever.

² See **The Rise and Fall of Fast Track Trade Authority**, by Lori Wallach, Public Citizen's Global Trade Watch, 2013.

- ☞ Once Fast Track authority is granted, if priority negotiating objectives are not achieved in trade agreements, the Congress has no ability to place them back on the table short of voting “no” to the final agreement.

Rather than having negotiating objectives, Congress should maintain the right to specifically review, discuss, hold hearings on, and as appropriate amend any trade agreements under consideration for U.S. participation.

Fast Track Includes a Race to the Bottom for Regulation

The proposed Fast Track legislation includes as a goal of international trade negotiations a race to the bottom on government regulations between the U.S. and its trade partners. Section 2(b)(7) seeks “to promote regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards and to encourage the use of international and interoperable standards, as appropriate...” Given the low wages, low working standards, and low environmental standards of many of the countries involved in various international negotiations it is wrong to set as an objective harmonizing and equivalencing our legal standards.

The section on labor and environmental negotiating objectives, Sec 2(b)(10), primarily seeks to ensure that parties to trade agreements comply with “internationally recognized core labor standards” and “obligations under common multilateral environmental agreements”. There is no effort to ensure the U.S. is only entering into trade agreements, opening our borders to increased trade in goods, with those countries that meet the same minimum labor and environmental protection standards the U.S. achieves – to do anything less gives a big competitive advantage to countries who underpay and mistreat their workers, and who damage the environment and as a result have a significantly lower operating cost. In addition, it also opens the opportunity for legal challenges by foreign corporations and interests who assert U.S. legal standards are harming their bottom line.

Much of the language in the Fast Track bill is carefully crafted to look good at first glance but in reality is relatively meaningless – for example, while it includes a provision that seeks to make environmental provisions of trade agreements enforceable, such a mandate is only of value if the negotiating team actually includes it in an agreement that has been struck and it is then only of value if the trade agreement actually includes meaningful environmental terms.

Fast Track Empowers Foreign Investors and Corporations to Sue the United States for Environmental, Labor and Other Laws they Don’t Like.

The Fast Track bill includes acceptance of the Inter State Dispute Resolution (ISDR) process which allows foreign interests to sue countries, including the United States, in multi-million dollar claims for damages to their properties, investments, interests and/or profits.

While Fast Track agrees to the ISDR process – a process that is untenable if one wants to achieve environmental protection in a country – at least Fast Track asserts that this enforcement mechanism should apply equally to environmental terms of a trade deal as it applies to other elements of a trade deal. But we can already see that the negotiating objectives of the Fast Track legislation regarding this dispute resolution process have not been achieved – a demonstration of their powerlessness – in the TPP that would be the first international agreement passed through

the Fast Track process, this objective of enforceability for environmental agreements has been specifically and directly rejected in the Environment Chapter of that trade deal.

Fast Track Language Provides a False Perception of Environmental Legal Authority for the U.S.

While the Fast Track legislation asserts that

- “No provision of any trade agreement entered into under section 3(b), nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States, any State of the United States, or any locality of the United States shall have effect.” (Sect 8(a))

and that

- “No provision of any trade agreement entered into under section 3(b) shall prevent the United States, any State of the United States, or any locality of the United States from amending or modifying any law of the United States, that State, or that locality (as the case may be).”

and it sets as a negotiating objective, among other things

- “to seek provisions in trade agreements [that] ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade....”

The fact of the matter is, if signed on to by the President, any domestic law that contradicts the terms of the trade agreement or its promises made, would be at risk. That is because U.S. law is clear:

“international agreements of the United States are law of the United States and supreme over the law of the several states.” (sec. 111, The Foreign Relations Law of the United States)

That means federal law, state law and local laws are all superseded by the trade agreement if signed on to by the United States. And so while these laws may still be applicable within the United States, they would not protect the U.S. from claims by foreign countries or interests that the U.S. is in violation of a trade agreement and therefore can be subject to all appropriate remedies, including assignment of damages under ISDR claims.

In addition, the provisions above are limited to existing legislation and amendments or modifications to it, so it would not provide any shelter for new legislation. New laws mandated by new technology, new science, and the learning that comes from new experiences would be prohibited if seen as impeding the trade supported by a signed international agreement. A trade agreement and fast track law that inhibits our ability to pass new environmental protection laws as science and experience requires inappropriately ties the hands of present and future legislators and generations.

And in all instances, the chilling effect of the threat of litigation could be enough to intimidate some jurisdictions from regulating for fear of the legal backlash it will create.

One reason this Fast Track legislation is so concerning is that it would grease the wheels for passage of a new, massive trade agreement that has already been under negotiation for 6 years and is set to be agreed upon and signed in the coming few months – if Fast Track allows it to

happen. The agreement is called the Trans Pacific Partnership Trade Agreement, or TPP for short.

The TPP – What Is It and Why Should We Be Concerned?

The Trans Pacific Partnership Trade Agreement is an international trade agreement being negotiated in secret between the United States and 12 nations from the Pacific Rim including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. While China is not currently party to this secret dealmaking, it is believed that they and others will eventually become a part of the pact.

The TPP has been under secret negotiation since 2008 and the only glimpses the public has had of the deal are those secretly leaked and shared on the <http://www.wikileaks.org> website. The deal is so secret that not only is the public prohibited from reading its terms, but so too is Congress.

While Congress and the public do not get to review the document, it is reported that over 500 corporate representatives have had a chance to delve into the terms of the deal in their capacity as part of the trade negotiations team. Among the corporations who are negotiating representatives on behalf of the United States on the TPP are DuPont, Chevron, Exxon Mobil, Dow Chemical and Halliburton.

It is reported that there are 29 Chapters to this supposed trade agreement many of which have nothing to do with regulating trade but instead focus on limiting environmental, food safety, health and other community protections. So far only the Environment Chapter, Intellectual Property Chapter and the Investment Chapter have been linked – and that is thanks to Wikileaks. Despite the limited information leaks, there is enough information to know that the Trans Pacific Partnership Trade Agreement (TPP) is a bad deal for the people of the United States and it should be rejected by Congress when it finally has a chance to give it an up or down vote.

Investor State Dispute Resolution – Giving Corporations Equal Legal Footing with Nations

Leaked versions of the TPP include an Investor State Dispute Resolution provision whereby the United States agrees to give up a piece of its sovereignty so foreign interests and corporations can bring legal challenges pressing their corporate claims, while standing equal with our country before an interstate tribunal which is not subject to normal and natural rules of conflict of interest.³

The TPP would, like other trade agreements, prohibit the direct or indirect expropriation of a covered investment.⁴ Where a foreign investor believes this prohibition has been violated, the Investor State Dispute Resolution (ISDR) provision allows foreign investors, including corporations, to bring legal actions against sovereign nations, like the U.S. government, and to stand as legal equals. The provision would allow the foreign investor to assert in a legal action

³ The foreign investor/corporation may be required to first resort to laws and regulations of the Party-Nation but only for a 3-month period. And after a brief 6-month period (including the aforementioned 3 months) the complaining investor is entitled to submit its claim to Arbitration under the TPP.

⁴ Investment Chapter Article 12.12 (1)

that a Party-Nation took some action in conflict with their obligations under the TPP which the investor asserts caused “loss or damage to ... its investment” in that country.

The term “investment” for purposes of pursuing such a claim under the TPP is broadly defined and includes assets, stock, credit, contracts, intellectual property rights, permits, expectations of future gains and profits or “other tangible or intangible, movable or immovable property, and related property rights,”

Under trade agreement provisions similar to those being discussed for the TPP, investors have taken legal action, using the ISDR process, against Party Nations “on the ground of non-renewal or change in the terms of a licence or contract and changes in policies or regulations that the investor claims will reduce its future profits.”⁵

Damages awarded through the ISDR arbitration mechanism can include awards of money damages, restitution of property and/or attorneys fees. The process does not provide for appeal.

Legal disputes brought by foreign interests through the ISDR process are decided by an arbitration tribunal. There is a built in conflict in the arbitration process in that there are a limited number of lawyers who are involved in these kinds of arbitrations and while sometimes they may be arbitrators in some cases they act as lawyers in others. The result is a rather incestuous process. It is reported that in “a few cases, an arbitrator was on the board of directors of the parent company of the investor that took up the case.”⁶

According to leaked notes titled [TPP State of Play After Salt Lake City 19-24 November 2013 Round of Negotiations] the U.S. is pressing hard for not just inclusion of the ISDR process, but its expansion to cover “Investment Agreements and Investment Authorisations”. According to the leaked notes there is concern by other states that “under the concept of Investment Agreement nearly all significant contracts that that can be made between a State and a foreign investor are included.”⁷ (extra “that” in original document)

⁵ The Trans-Pacific Partnership Agreement (TPPA): When Foreign Investors Sue the State, by Martin Khor, Global Research, Nov 10, 2013, Third World Economics Issue No. 552, 1 Sept, 2013

⁶ The Trans-Pacific Partnership Agreement (TPPA): When Foreign Investors Sue the State, by Martin Khor, Global Research, Nov 10, 2013, Third World Economics Issue No. 552, 1 Sept, 2013

⁷ The definition of these terms in the leaked Investor Chapter reads as follows:

[investment agreement means a written agreement⁴ between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;]

[investment authorization⁶ means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party;]

In a foot note it is stated: [4 “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 12.24(2). For greater certainty, (a) a unilateral act of an administrative or judicial authority such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.]

And while the ISDR provision can be used by investors to enforce financial rewards, it is not available for enforcing the limited environmental agreements that are actually included in the TPP, nor is there any other enforcement provision for the agreements included in the Environment Chapter. In other words, ISDR can be used by corporations to challenge environmental and community protection laws in order to pursue their own corporate objectives, but it cannot be used to enforce environmental and community protection obligations in order to serve the interests of the public.

Investor State Dispute Resolution – Giving Corporations a Strong Hammer to Undermine Environmental Protection Laws.

The Investor State Dispute Resolution Process provides a big hammer for undermining environmental protection laws and preventing the passage of new laws that are required by emerging technology, new science, and informed experience. Awards can be enforced through the seizure of assets that are owned located abroad, making the ISDS process very powerful⁸ from the perspective of the successful corporate challenger.

While arbitral panels are supposed to consistently apply customary international law, which respects the rights of countries to exercise their regulatory powers in a non-discriminatory way, there are numerous examples of large, multi-national corporations suing countries over laws that aim to protect public health and the environment and which the companies assert negatively affect their investments. By the end of 2012, corporations had initiated 514 investor-state cases against 95 governments and had launched attacks on a range of regulations, including toxic chemical bans, timber regulations, green jobs requirements, and more.⁹

There are a variety of ways the ISDR process can and has been used to undermine environmental protection.

In *Occidental v. Ecuador*, Ecuador was sued for canceling Occidental's contract when Occidental sold forty percent of its interest in a section of the Amazon where the company was exploring and extracting hydrocarbons. Occidental had signed a contract that required government approval for a transfer of interest, and which stated that Ecuador would have the option to terminate the contract if such a transfer occurred without approval. The ICSID issued its largest award in history, \$2.3 billion (US), in favor of Occidental.¹⁰

In September, 2013, Lone Pine Resources, Inc. filed a Notice of Arbitration against Canada because of claimed violations of NAFTA. According to the filing, the company states its intent to secure \$250 million dollars from Canada for its "arbitrary, capricious, and illegal revocation of the [company's] valuable right to mine for oil and gas under the St. Lawrence River by the

⁸ The Trans-Pacific Partnership Agreement (TPPA): When Foreign Investors Sue the State, by Martin Khor, Global Research, Nov 10, 2013, Third World Economics Issue No. 552, 1 Sept, 2013

⁹ http://www.huffingtonpost.com/ilana-solomon/fracking-causes-friction-b_2146939.html

¹⁰ One of the three arbitrators in the panel wrote a scathing dissent describing the award as a "manifest excess of power." *Occidental Petroleum Corporation v. The Republic of Ecuador*, Dissent, ICSID Case No. ARB/06/11 (October 2012), at paragraph 5. Ecuador promptly filed for an annulment of the award. In the Tribunal's most recent award, which granted Ecuador a stay of enforcement, the Tribunal stated that it is "unlikely" that the award against Ecuador will be sustained. *Occidental Petroleum Corporation v. The Republic of Ecuador* (September 2013) Decision on the Stay of Enforcement of the Award, at 16.

Government of Quebec ... without due process, without compensation, and with no cognizable public purpose.”¹¹ The legal action stems from a ban on fracking in the St. Lawrence River, legally passed by the Province of Quebec, and its effect on Lone Pine’s permit to explore for gas under the River. The private drilling company is seeking \$250 million from Canada because of the fracking ban which was enacted to allow Quebec time to study the dangerous process.

A good example of the TPP’s potential effect on a State’s ability or willingness to enact environmental regulations comes from another Canadian case under NAFTA. In 1997, Canada enacted a law restricting the import and interprovincial transport of methylcyclopentadienyl manganese tricarbonyl (MMT) a gasoline additive that contains manganese, and that was thought to be injurious to public health. Soon after, the sole supplier of the additive, a Virginia company named Ethyl Corporation, claimed that this amounted to expropriation in violation of NAFTA and sought \$350 million (CA).¹² The Prime Minister, believing Canada could lose in arbitration, ordered the Canadian negotiators to settle, repealed the MMT law, issued an apology, and paid \$19.5 million (CA) to the corporation.¹³ This case demonstrates the threat to existing environmental laws, as well as the potential chilling effect that the threat of arbitration may have on a country’s willingness to enact new environmental regulations. The fear of loss is a powerful tool wielded by corporate interests in their efforts to reduce, diminish, avoid, undermine, displace and/or remove critical environmental protections in Party-Nations.

In addition, U.S. environmental protection laws like the Clean Water Act and Clean Air Act were designed to be technology forcing, to require industries to come up with cleaner and better practices if they hope to comply with US environmental laws and to get the permitting they need to operate. Under the ISDR concept these technology forcing approaches are, by their very existence, hurdles to operations and profits, and so become obvious targets of ISDR challenge. TPP and Fast Track undermine these fundamental US environmental protection strategies that have been so irreplaceably important in advancing environmental protection technology and practices in almost every industry.

As an International Trade Agreement, signed by the U.S., the TPP will supersede environmental protection and other U.S. laws passed by federal, state, local and interstate governments and agencies that conflict with its terms. As a result, critical environmental and community protections that have been carefully crafted, informed by science, data, analysis, input, legislative negotiation, and thoughtful decisionmaking could be superseded by the desires and goals of foreign interests, corporations and/or investors. As the law of the land the TPP would also prevent passage of new laws that might conflict with the terms of the TPP and yet are demonstrated as necessary by the advent of new technologies, the release of new science, and/or the result of real life experiences on the ground by people and communities who are harmed or helped by an industry, innovation or activity that has impacted them.

¹¹ Lone Pine Resources Inc. v. Government of Canada, Notice of Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement, filed Sept. 6, 2013, *available at*:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/lone-02.pdf>; Cole Stangler, Mining Company Sues Canada Over Fracking Ban in Quebec, November 2013, *available at*:

http://inthesetimes.com/article/15847/mining_company_sues_canada_over_fracking_ban_in_quebec/.

¹² This case is strikingly similar to the *Methanex* case, discussed below. It would have been beneficial if both had gone to arbitration, in order to see how two different arbitration panels would rule on a very similar situation arising under the same treaty.

¹³ Elizabeth May, *What happened under Chapter 11 of NAFTA??* Available at: <http://elizabethmaymp.ca/investor-state-treaties/what-happened-under-chapter-11-nafta>.

Environmental protection is not an impediment to healthy and vibrant trade – to the contrary, healthy environments support economic growth, trade and vitality while at the same time ensuring the health of our communities. Our healthy Delaware River is not only the drinking water supply for 17 million people but it also contributes \$22 billion in annual economic activity. Removing federal, state, local and regional legal protections for the Delaware River will diminish the economic vitality and contributions of the River.

TPP Pumps Up the Pressure on Drilling, Fracking and LNG Exports.

The TPP would pump up the pressure on shale gas development and fracking in the United States, while at the same time it is empowering, through its terms and the ISDS process, foreign interests to challenge legal protections and putting a chill on the creation of new protections which science and experience call for.

How? ...

The Natural Gas Act (15 U.S.C. § 717b) prohibits the import or export of natural gas, including liquefied natural gas (LNG), to or from any foreign country without receiving prior approval from the U.S. Department of Energy (DOE).

In order to receive approval of an application for export of natural gas to a foreign nation, Section 3 of the Natural Gas Act requires DOE to first make a determination that the proposed export of natural gas “will not be inconsistent with the public interest.”¹⁴ A public interest determination includes consideration of both environmental and economic impacts. Section 3(a) thus establishes DOE’s authority to deny an application requesting authorization to export natural gas to foreign countries upon a showing of inconsistency with the public interest.¹⁵

As a result, applications for export of natural gas to non-Free Trade Agreement countries are not deemed to be in the public interest, and so require the DOE to engage in an explicit process for determining whether the grant of export authorization would in fact serve the public interest

BUT

Section 3(c) of the NGA requires the DOE to deem as consistent with the public interest any applications to authorize the import or export of natural gas, including LNG, from and to nations which have entered into a free trade agreement with the U.S. requiring national treatment for trade in natural gas – i.e. Free Trade Agreement countries, or FTA countries. As such,

¹⁴ 15 U.S.C. § 717b(a).

“(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.”

¹⁵ *Id.*; see also *Sabine Pass Liquefaction, LLC*, FE10-111-LNG, DOE Order No. 2961 (May 20, 2011); *Sabine Pass Liquefaction, LLC*, FE10-85-LNG, DOE Opinion and Order No. 2833 (Sept. 7, 2010).

applications for authorization to export natural gas to FTA countries is required, by the NGA, to be “granted without modification or delay.”¹⁶

As of October 31, 2012, FTA countries that require national treatment for trade in natural gas, included: Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea and Singapore. If the TPP were entered into, it is anticipated to provide this FTA status and add to the list of FTA countries for whom automatic LNG export approval would be granted: Brunei, Japan, Malaysia, New Zealand, and Vietnam. Additionally, because China is expected to join the TPP at some point in the near future they too would be added to the list of counties for whom LNG export approval would be “granted without modification or delay”.

And because the TPP is being designed as a docking agreement, it means that it can be joined by any nation willing to meet its terms. So the list of FTA nations is open to growth.

By adding to the list of FTA countries for whom LNG export would be deemed in the public interest and therefore subject to automatic approval, the TPP will be increasing the speed and volume of shale gas exports overseas. This will in turn ramp up the pressure for more shale gas development including associated deforestation, development, fracking, drilling, pipelines, compressors and other associated construction, infrastructure, devastation and pollution.

As of September, 2013, the Federal Energy Regulatory Commission (FERC) has before it 13 applications and 8 potential projects identified by the industry, in the United States, that if approved would export almost 43% of the natural gas produced in the United States in a given year.¹⁷

Japan, according to the U.S. Energy Information Administration, is the world’s largest importer of liquefied natural gas.¹⁸ Japan relies almost entirely on imports for its natural gas needs. In 2012, it consumed nearly 4.4 trillion cubic feet,¹⁹ and so their addition alone to the list of automatically approved nations could have a dramatic impact on US exports of shale gas.

Shale gas is a community and environmentally destructive process. Even the relatively conservative Pennsylvania Supreme Court²⁰ has recognized the inevitability of destruction wrought by shale gas development:

“The industry uses two techniques that enhance recovery of natural gas from these “unconventional” gas wells: hydraulic fracturing or “fracking” (usually slick-water

¹⁶ 15 U.S.C. §717b(c)

“(c) Expedited application and approval process

For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.”

¹⁷ Based on Energy Information Administration forecasts for total natural gas production rate in the U.S. in 2013 and on Office of Energy Projects chart of [North American LNG Import/Export Terminals, Proposed/Potential](#), Sept 12, 2013.

¹⁸ <http://www.eia.gov/countries/country-data.cfm?fips=ja>

¹⁹ U.S. Energy Information Administration, <http://www.eia.gov/countries/cab.cfm?fips=JA>

²⁰ [Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth of Pennsylvania](#), --- A.3d ---, 2103 WL 6687290 (Pa., Dec. 19, 2013)

fracking) and horizontal drilling. Both techniques inevitably do violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical hole to 5,500 to 6,500 feet – several hundred feet above the target natural gas pocket or reservoir – and then directing the drill bit through an arc until the drilling proceeds sideways or horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of water.” (p. 8).[majority on this part]

“The public natural resources implicated by the “optimal” accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania’s environment, which are part of the public trust.” – p. 117

“By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.” – p. 118

The TPP Seemingly Beneficial Language Not So Beneficial

The leaked portions of the TPP include language that at first blush seem beneficial, including for environmental protection, but upon analysis are not.

The TPP includes the following language:

“Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs .. shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;*
- (ii) necessary to protect human, animal, or plant life or health; or*
- (iii) related to the conservation of living or non-living exhaustible natural resources.” (Article 12.7 (3)(c))*

But this language contains a lot of qualifying language that undermine its apparent environmental protection objectives. Words/phrases like “necessary to” and “not inconsistent with this Agreement” provide broad room for argument over the necessity of environmental protection laws/regulations/decisions and whether or not they are consistent with the 29 other chapters of the TPP. As such, this provision does not provide the unqualified recognition of U.S. Federal, State and local rulemaking authority necessary to ensure our laws are honored and respected by foreign nations and interests and cannot be undermined by the ISDS process.

In addition, the leaked version of the TPP shows this language to be in square brackets. According to Oxford Dictionaries square brackets typically means something not added by the original author (<http://www.oxforddictionaries.com/us/words/brackets>). As such, this somewhat/arguably beneficial language is apparently just a suggestion and not something agreed to by all parties.

The Investment Chapter of the TPP includes:

“No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ... except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation ...; and (d) in accordance with due process of law.” (Article 12.12 (1))

This language makes clear that compensation is required even for actions that are undertaken for a public purpose and in accord with due process of law – i.e. environmental protection laws. And so it provides easy argument for a foreign investor to demand compensation regardless of the importance of the law for protecting the environment and community health, safety and/or welfare.

Article 12.15 (1) of the Investment Chapter states:

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a matter sensitive to environmental [, health, safety, or labour] [, health or safety] concerns.”

The qualifier “consistent with this Chapter” undermines the suggestion that a Party-Nation can in fact pass defensible environmental protection laws under the TPP, and at the very least the language creates a loophole that opens the door for a legal claim by a foreign investor which would cost a Party-Nation many millions to defend and as a result would create a chilling affect on the desire to pass such laws. Furthermore, all of this language is, once again, in square brackets, demonstrating that whether or not language of this kind would be included in the final TPP is up in the air.

Annex 12-D²¹ of the leaked TPP Investment Chapter reads:

**²¹ Annex 12-D
Expropriation**

2. Expropriation may be either direct or indirect:

....

(b) indirect expropriation occurs when a state takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.

3. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be:

- (a) either severe or for an indefinite period; and
- (b) disproportionate to the public purpose.

“such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.” [5. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.]]”²²

This language seemingly reflects the accepted principle of customary international law that “non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, and/or land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.”²³ But once again the language is square bracketed suggesting that while some party has presented it for discussion the language is not currently agreed upon by all parties. In addition, language like “reasonably justified” and “legitimate” provide enough wiggle room for a foreign interest to bring a legal challenge which could result in an award of fees and damages or may simply have the impact of creating a chilling affect on legislators, concerned that their environmental protection measures will spark a legal challenge that will cost their government hundreds of millions of dollars, if only to defend a legal challenge before a potentially biased Arbitration Tribunal.

The Limited Scope of the Environmental Chapter Made More Limited by Its Terms

The Environmental Chapter, Chapter SS, is very limited in scope, it focuses on prevention and abatement of pollution discharges, on control of hazardous or toxic substances, and the protection of wild flora or fauna including endangered species and their habitats, but fails to include the wealth of other environmental issues of pressing importance in the United States and beyond, such as the flooding, pollution and habitat impacts of increasing floodplain development; the damages caused by manipulation of our natural waterways and/or deforestation whether or not a special species is involved; the impacts of dredging and streambank hardening, proliferation of dangerous contaminants from an increasing array of sources, and more. There is no provision that is focused on protection of the environment in all the array and wealth of ways that each country struggles with and which cannot be totally captured in a specific list of just three subject areas found in the TPP Environment Chapter.

The Chapter talks about addressing several topic areas but then only provides discussion of very weak approaches for doing so. I.e. addressing:

- ✓ Terrestrial and aquatic invasive alien species by identifying “cooperative opportunities” for sharing information and taking action.
- ✓ Climate change – by recognizing it as a global concern requiring collective action, and then dealing with it by:

5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.] [5. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.]]²¹

²²TPP INVESTMENT Annex 12-D, paragraph 5.

²³ *Supra n. 26*, at 4-5, *citing* M. Sornarajah, *The International Law on Foreign Investment* at 283, 1993.

- ensuring that measures to deal with climate change should be “cost effective”,
 - recognizing that both market and non-market approaches can help achieve objectives,
 - recognizing domestic circumstances and capabilities
 - encouraging and facilitating cooperation on the trade related aspects of mutual interest
 - supporting information sharing
 - encouraging discussion of best practices and lessons learned
 - undertaking, as appropriate, “cooperative and capacity building activities designed to facilitate effective implementing of “ commitments in the APEC forum, a forum designed to “promote free trade and economic cooperation”²⁴ in the Asia Pacific Region.
- ✓ Marine Capture Fisheries by acknowledging the importance of the marine fisheries sector and then discussing weak measures to prevent overfishing and bycatch, promoting recovery of overfished stocks, recognizing the importance of protecting the marine environment through pollution prevention, and “eventual” elimination of subsidies that contribute to overfishing and overcapacity.
 - ✓ Combatting the “illegal take of, and illegal trade in, wild fauna and flora...” by affirming pre-existing commitments under other international agreements, exchange information and experiences, taking “appropriate measures” to protect wild fauna, flora and natural protected areas; and take “appropriate measures that allow it to take action to prohibit the trade, transshipment or transaction within its territory of wild fauna and flora” including enforcing laws and imposing penalties. But this section, as so many others, explicitly “recognize[s] that each party retains the right to exercise investigatory and enforcement discretion...” and in so doing undermines the commitment to its implementation.
 - ✓ Encouraging environmental goods and services by eliminating customs and duties.

To the extent there is any discussion of protecting the environmental laws and regulations of a Party-Nation, in the U.S. the laws protected are those of the federal government, not state and local governments which often are the last or only line of defense on many key environmental protection issues, such as defense from fracking, and zoning for the appropriate locations of industrial operations in a community.

The objectives of the chapter are to promote “mutually supportive trade and environment policies” and to “promote high levels of environmental protection”, to recognize that “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” and admonishes against use of environmental laws as a “disguised restriction on trade or investment.” But as for making actual commitments, the Chapter is weak and ineffectual in so much as it commits the Parties to (emphasis added):

- “...recognize the importance of mutually supportive trade and environmental policies”
- “...recognize the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities”

²⁴ http://en.wikipedia.org/wiki/Asia-Pacific_Economic_Cooperation

- “...strive to ensure that []environmental laws and policies provide for and encourage high levels of environmental protection” and “strive to continue to improve ... environmental protection”
- not “fail to effectively enforce its environmental laws”
- “...recognize that each Party retains the right to exercise its discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources....”
- “...recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws.”

Throughout the Chapter action words which are used are weak, e.g.: “dialogue”, “request” a committee be convened to consider issues, “promote public awareness”, “shall seek to accommodate”, “recognize”, “encourage”, “recognize the importance of cooperation”, “endeavour to agree”, “recognize that flexible, voluntary mechanisms, such as voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement of high levels of environmental protection”,

There is no capacity to enforce the provisions of the Environment Chapter to the extent there are goals and actions discussed. The Dispute Resolution section is titled but as for implementing text is totally blank; and no where in the Chapter is there a mechanism for ensuring compliance by Party-Nations with the goals of environmental protection. The only mechanisms for seeking to ensure Party-Nations endeavour to comply with the environmental provisions of the chapter is through dialogue, requests, encouragement, cooperation and things like consultation. And while there is the ability to request an arbitral tribunal that will “examine, in the light of the relevant provisions of the Environment Chapter, the matter referred” and to secure a “report ... making recommendations for the resolution of the matter.” Once a report is issued the parties on both sides of the dispute “shall endeavor to agree ... on a mutually satisfactory action plan....” But the Chapter is very clear, the only remedies available for disputes regarding compliance with the Environment Chapter are these; there is no recourse beyond this process established in the Chapter.

Conclusion

The Trans Pacific Partnership Trade Agreement (TPP) is a secret deal being kept secret because “those in the know” are very aware that if the public and Congress could read what was in the document the majority would oppose it and it would never pass. It is time to take TPP into the light and let some informed dialogue and decisionmaking happen.

And that can only occur if Fast Track is never passed.