Office of the United States Trade Representative
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Comments Regarding the Transatlantic Trade and Investment Partnership (T-TIP)
Environmental Review
Federal Register Docket USTR-2014-0012

I. Introduction

The Sierra Club appreciates the opportunity to comment on the scope of topics that should be included in the environmental review of the proposed Transatlantic Trade and Investment Partnership (TTIP).

With 2.4 million members and supporters the Sierra Club is the world's oldest and largest grassroots environmental organization. For more than two decades, the Sierra Club's Responsible Trade Program has worked to shed a light on the environmental threats posed by our current global trading system and to build support for a more just and equitable model of trade. We submit these comments on behalf of the Sierra Club, our millions of members and supporters, the Center for International Environmental Law, and Friends of the Earth U.S.

Because tariffs in the U.S. and the EU are already very low, the TTIP will have little to do with traditional trade issues such as tariffs.[1] Instead, much of the negotiations will focus on removing so-called "non-tariff barriers"—or regulatory differences—such as differences in environmental, food safety, and chemical standards. This approach is extremely concerning; while corporations may see regulatory differences between countries as costly hurdles to international business, governments use regulatory oversight and product standards to pursue important public interest goals such as protecting clean air and water, mitigating climate disruption, ensuring consumer safety, and guaranteeing the rights of workers. TTIP provisions to eliminate non-tariff barriers would be even *more* damaging if enforceable via investor-state dispute settlement, which would empower corporations to go before private trade tribunals to challenge public interest policies that they see as hurdles to international business.

The existence of relatively low tariffs between the U.S. and the EU is not a reason to conclude that the environmental impacts from TTIP will be limited. Indeed, the TTIP focus on non-tariff

measures indicates that the greatest impacts will come from commitments in non-traditional areas. Nor should the difficulty in quantifying environmental impacts be a reason to dismiss their significance.

As described below, any review of the environmental implications of TTIP must include the following topics: (A) energy, (B) investment, (C) regulatory cooperation, convergence, and coherence, (D) technical barriers to trade, (E) procurement, (F) conservation and natural resources and (G) fossil fuel subsidies. It is important to note that other potential TTIP chapters that deserve environmental review include, but are not limited to, sanitary and phytosanitary standards and services. These comments, however, focus on a subset of issues.

II. Scope of Topics to be included in Environmental Review

We urge a broad scope for the TTIP environmental review, and focus our comments on areas of great concern that a thorough environmental review must address.

A. Effects of Energy Provisions on the Environment and Climate

1. Effects of Increased Energy Exports

The European Union wants to include in TTIP "a legally binding commitment guaranteeing the free export of crude oil and gas resources by transforming any mandatory and non-automatic export licensing procedure into a process by which licenses for exports to the EU are granted automatically and expeditiously."[2] Automatic approval of crude oil and natural gas exports from the U.S. to the EU would lock the United States into increased exports of fossil fuels with no review of the environmental implications, incentivize more natural gas and oil development in the United States utilizing the dangerous process of hydraulic fracturing, or "fracking," and deepen Europe's dependence on dangerous fossil fuels. While these comments focus on the environmental and climate impacts of automatic exports of natural gas and crude oil, it is important to note the social impacts as well. Simply put, automatic exports of oil and gas in TTIP would remove the right of impacted communities to have a say on critical decisions that impact, for example, their health, environment, and overall well-being.

With respect to natural gas, the European Union proposal reinforces the U.S. Natural Gas Act's requirement that exports of natural gas to countries with which the U.S. has a free trade agreement requiring national treatment for trade in gas automatically be "deemed consistent with the public interest and approved without modification or delay."[3] Importantly, if no free trade agreement is in place, the Department of Energy must conduct a public analysis to determine whether exports are inconsistent with the public interest before granting a license.[4]

Automatic exports of natural gas from the U.S. to the EU—with no review or analysis—would have serious implications for the environment and climate that must be included in the TTIP environmental review. More specifically, the environmental review must include analysis on the effects of automatic approval of natural gas exports with respect to:

- **Increased Natural Gas Production and Fracking:** In order to feed foreign markets through exports, the U.S. will need to produce more gas—most of which will come from

fracking. Fracking emits large amounts of hazardous, smog-forming, and climate-altering pollutants into our air, is a serious threat to our water supply, and presents serious risks to the public health, our land, and communities.

- **Increased Reliance on Fossil Fuels in the EU:** According to the European Wind Energy Association (EWEA), in 2011 Europe spent €406 billion (approximately U.S. $563 billion) on imports of fossil fuels. In 2012 that number rose to €545 billion.[5] According to EWEA, this cost is around three times more than the cost of the Greek bailout (up to 2013).[6] Europe's dependence on fossil fuel imports is high, and as a result of increased access to U.S. fossil fuels, will likely continue to rise. This not only undermines Europe's economic future, but also may undermine Europe's clean-energy transition by diverting resources from renewable energy projects towards natural gas infrastructure.[7]

- **Increased Climate Emissions:** Natural gas, in order to be exported from the U.S. to the EU, must first be cooled and liquefied. Liquefied natural gas itself is a carbon-intensive fuel,[8] with life-cycle emissions significantly greater than those of natural gas. The energy needed to cool, liquefy, and store natural gas for overseas shipment makes LNG more energy- and greenhouse-gas-intensive than ordinary pipeline gas and even some fuel oils.[9] Moreover, natural gas production and infrastructure, including wells and pipelines, have been found to leak methane, a potent greenhouse gas that traps nearly 86 times as much heat as carbon dioxide over the crucial 20-year period, and 34 times as much heat over a 100-year period.[10]

  In addition, U.S. exports of natural gas would raise international demand for U.S. natural gas, causing an increase in domestic gas prices.[11] Analysis shows that the price increase in U.S. natural gas will shift the domestic gas market back towards coal.[12] As the U.S. Energy Information Administration (EIA) notes, "the decrease in natural gas consumption is replaced with increased coal consumption."[13] Specifically, EIA predicts that 72 percent of the decrease in gas-fired electricity production will be replaced by coal-fired production in the U.S.[14] As a result, LNG exports will likely increase CO_2 emissions from U.S. power generation, thereby further exacerbating global climate disruption.

With respect to crude oil exports, the U.S. Energy Policy and Conservation Act of 1975 (EPCA) requires that companies secure a license for all crude oil exports, and only allow for the approval of licenses if exports meet certain conditions[15] or on a case-by-case basis *if* exports are determined by the President to be consistent with the national interest.[16] The EU proposal is inconsistent with U.S. law, as it would require the United States to "automatically and expeditiously" approve crude oil export licenses without any review of the implications on the national interest.

Automatic exports of crude oil from the U.S. to the EU—with no review or analysis—would have serious implications for the environment that must be included in the TTIP environmental review. More specifically, the environmental review must include analysis on the impacts of increased exports of crude oil with respect to:

- **Increased Oil Production and Fracking:** In order to export crude oil the U.S. will need to produce more crude oil—much of which will come from fracking.[17] And, as explained above, fracking emits large amounts of hazardous, smog-forming, and climate-altering pollutants into our air, is a serious threat to our water supply, and presents serious risks to public health, our land, and communities.

- **Increased Climate Emissions:** Analysis from Oil Change International reveals the significant climate impacts associated with relaxing crude oil export restrictions.[18] More specifically, the analysis shows that eliminating existing regulations on crude oil exports—to which TTIP could be a precursor—could lead to an additional 9.9 billion barrels of U.S. oil production between 2015 and 2050. Put in the climate context, 9.9 billion barrels of oil would release more than 4.4 billion tons of CO2 into the atmosphere when burned—the equivalent of annual emissions from 1,252 average U.S. coal power plants, or lifetime emissions from 42 coal plants.[19]

- **Increased Risk of Oil Spills:** Increased crude oil exports would not only incentivize increased crude oil extraction, but also crude oil transportation throughout the continent, endangering communities and the environment. Already, increased development and transportation of oil has prompted major spills from pipelines and rail lines. The 2010 pipeline spill into the Kalamazoo River, for which clean-up efforts are still ongoing, remains the most expensive oil cleanup project in U.S. history.[20] Recent analysis of federal data showed that in 2013, more oil spilled in rail accidents in the U.S. than in the four previous decades combined.[21] The number of oil spills associated with rail and pipeline accidents would likely increase if the U.S. were to start exporting more crude oil, which would require increased crude oil transportation.

2. Effects of Expanded Definition of Freedom of Transit

The European Union has proposed to make Article V of the General Agreement on Trade in Tariffs (GATT) on freedom of transit explicitly applicable to energy transport via pipeline and transmission grid. The freedom of transit provision guarantees "freedom of transit through the territory of each member, via the routes most convenient for international transit--"[22] not for purposes related to safety or environmental protection. This could have grave environmental consequences, particularly under circumstances in which energy projects, such as pipelines transporting tar sands crude, present increased environmental risks and must be diverted or stopped. The TTIP environmental review must assess whether and how an expanded definition of freedom of transit affects the rights of countries and states to prevent, restrict, or alter the route of pipeline transit for environmental purposes.

B. Effects of Investment Provisions on the Environment and Climate

The investment chapter of TTIP will have serious environmental implications that USTR must examine in its environmental review. Investor-state dispute settlement (ISDS), if included in the pact, would grant foreign corporations the right to go before private trade tribunals and directly challenge government policies and actions that corporations allege reduce the value of their investments.

In recent years, the use of ISDS to challenge a diverse array of government policies has expanded dramatically. Inclusion of ISDS in free trade agreements and bilateral investment treaties has allowed corporations to file over 568 cases against 98 governments.[23] Increasingly, corporations are using ISDS to challenge non-discriminatory environmental and climate policies, as described below. With TTIP, the risks to environmental, climate, and other public interest policies are particularly strong; more than 3,000 European firms own more than 24,000 subsidiaries in the United States and more than 14,000 U.S. firms own more than 50,000 subsidiaries in EU nations. If ISDS were included in TTIP, these thousands of firms would be empowered to use ISDS to challenge the policies of U.S. and European governments before private trade tribunals with no expertise in climate science or policy. As only five percent of these subsidiaries are covered by existing pacts with ISDS, the inclusion of ISDS in TTIP would spell an unprecedented and unacceptable increase in ISDS liability for U.S. and EU environmental policies.

Investor-state dispute settlement is particularly dangerous when paired with the very broad and vague guarantees to investors that have been included in U.S. and EU free trade agreements. Therefore, both the effects of ISDS and the substantive rules in the investment chapter must be reviewed for their environmental impact. Among the rules and definitions that must be reviewed are:

- *Definition of Investment:* The definition of investment in U.S. and EU trade pacts goes far beyond real property and capital investments, but includes, for example, the "expectation of gain or profit."[24] This overly broad definition of investment opens up governments to a wide range of cases against environmental and climate policies not related to actual investments.

- *Minimum Standard of Treatment and Fair and Equitable Treatment:* Vaguely defined guarantees of a "minimum standard of treatment" (MST) and "fair and equitable treatment" leave governments vulnerable to challenges from foreign investors simply for introducing or amending environmental laws and policies. As explained below, recent attempts to clarify the definition of minimum standard of treatment have not prevented investor-state tribunals from using expansive interpretations to rule against domestic policies.

- *Indirect Expropriation:* Under the expropriation provisions of U.S. and EU pacts, investors can claim compensation if a law or regulation merely reduces the value of a foreign firm's investment.[25] For example, a new regulation in the natural gas industry that reduces the value of an "investment," such as additional permit requirements, could be considered not only a violation of the fair and equitable treatment provision described above, but also indirect expropriation.

Investor-state dispute settlement and the vaguely defined and overly broad rights have led to egregious challenges to environmental policies. For example, in September 2013, Lone Pine Resources, a U.S. oil and gas firm, filed an investor-state case against Canada for CAD $250 million under the North American Free Trade Agreement (NAFTA). The policy in question was a moratorium on shale gas exploration and development, including fracking, under the St. Lawrence River.[26] According to Lone Pine representatives, the Quebec government acted "with no cognizable public purpose," and violated the Enterprise's "valuable right to mine for oil and gas under the St. Lawrence River," despite the fact that fracking contaminates drinking water,

pollutes the air, and is known to induce earthquakes.[27] Lone Pine, however, argues that its loss of a "stable business and legal environment" violated its guarantee of a minimum standard of treatment and should be counted as expropriation.[28]

The increasing use of investor-state cases to target environmental policies threatens to weaken governments' resolve to enact new environmental protections or strengthen existing ones. When governments lose a case, the requirement to pay compensation to one firm can result in the rollback of the challenged policy to avoid claims from other firms. But even when governments win cases, they are often ordered to pay for a share of tribunal costs, which average $8 million per case.[29] The prospect of having to spend millions to defend a given policy, and potentially being ordered by a tribunal to pay millions more, can have a chilling effect on the establishment of climate and environmental policies.

The USTR stated in the interim environmental review of the Trans-Pacific Partnership Agreement that "substantive clarifications and procedural innovations" in investment chapters of recent FTAs has led to "clarifications of the definitions for expropriation and minimum standard of treatment ("fair and equitable treatment"); increased transparency in the administration of the trade and investment regime; and provisions to establish fair, transparent, timely and effective procedures to settle disputes."[30] The USTR concluded that "based on the previous analysis," it does not expect that the TPP will result in a significant potential for negative effects on U.S. environmental measures.

The Sierra Club is deeply concerned about USTR's assessment and its implications for the environmental review of TTIP, as recent investor-state tribunal rulings have demonstrated that the modifications *have not* translated into substantive change. For example, the June 29, 2012 investor-state ruling[31] on the merits in the Central America Free Trade Agreement (CAFTA) *Railroad Development Corporation (RDC) v. Republic of Guatemala* case confirmed that an Annex intended to clarify the definition of minimum standard of treatment, which was included in CAFTA and proposed for TPP and possibly TTIP, is insufficient to foreclose tribunals from generating expansive interpretations of the MST language. (In this case, the U.S.-based Railroad Development Corporation, or RDC, claimed that the Guatemalan government violated CAFTA by initiating a legal process to weigh revocation of the company's disputed railroad contract.) In the final ruling on the case, the tribunal explicitly rejected arguments raised by Guatemala, the United States, El Salvador and Honduras that under Customary International Law, the tribunal must base its MST analysis on actual state practice.[32] Instead, the tribunal relied on a definition issued by a tribunal in the North American Free Trade Agreement (NAFTA) *Waste Management II* award to find against Guatemala. The $11.3 million judgment in favor of RDC also ordered compound interest to be paid dating back to the government action RDC challenged.[33] Therefore, Guatemala must pay at least $2 million in interest in addition to the over $11 million penalty.[34] Guatemala was also ordered to pay nearly $200,000 for RDC's tribunal fees from the jurisdictional phase, in addition to its own tribunal fees.[35]

And the *RDC* ruling is not an isolated case. In *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, another CAFTA case, an investor-state tribunal ruled in favor of TECO in December 2013, deciding that Guatemala's policy for setting electricity rates had violated the MST obligation. As with the *RDC* tribunal, the *TECO* tribunal ignored the CAFTA annex that attempted to assert a narrower MST definition and instead borrowed the broad interpretation of the obligation from the

NAFTA *Waste Management II* case. On that basis, the tribunal ordered Guatemala to pay the company $25 million (including interest), plus $7.5 million to cover the company's own legal expenses.[36]

In sum, based on the recent evidence that modifications to broad foreign investor protections are not being taken into account by investor-state tribunals; the increased liability of the both the United States and the European Union if ISDS were to be included in TTIP as a result of the more than 75,000 cross-registered corporations; and the proliferation of investor-state cases that directly challenge environmental policies, is it absolutely critical that the USTR include a thorough review of the environmental risks associated with investment provisions, including investor-state dispute settlement, taking into account the above-mentioned factors.

C. Effects of Regulatory Cooperation, Convergence, and Coherence

Much of the TTIP negotiations will focus on removing so-called "non-tariff barriers"—or regulatory differences—such as differences in environmental, food safety, and chemical standards. Given the significant environmental implications of such an approach, as explained below, the environmental review must include an analysis of how a chapter on regulatory cooperation, convergence and coherence (hereinafter "regulatory cooperation") could undermine the ability of countries and states to implement effective environmental and public health policies. The environmental review should assess any and all ways that regulatory cooperation could roll back existing protections, slow the implementation of existing legislation, and hinder the development of new laws and other safeguards to protect human health and the environment.

In the U.S. and EU, laws and policies are introduced and implemented through various government processes which include Congressional legislation, federal rules, EU primary legislation and non-legislative acts, and regulations proposed by EU member states and U.S. states. Regulations and legislation serve many functions, including the protection of human health and the environment. In many cases, the strength of U.S. and EU regulations in protecting the public and the environment vastly differs. For example, over 1,300 chemicals are banned from use in cosmetics in the EU; in the U.S. the Food and Drug Administration only bans or restricts 11.[37]

U.S. and EU trade officials maintain that regulatory barriers are "the most significant impediment to trade and investment between the EU and the USA."[38] U.S. and EU negotiators, therefore, propose "regulatory cooperation"—which could mean modifying existing and proposed regulations, creating new requirements for the process of developing regulations, and requiring countries to recognize foreign governments' less stringent safeguards as equivalent to their own—as a way to accomplish convergence and coherence between the U.S. and EU regulatory systems.

It is important to note that, in the view of the EU, regulatory cooperation should cover "any planned and existing regulatory measures with significant (potential or actual) impact on international (and in particular transatlantic) trade."[39] According to the EU proposal, this would include "EU primary legislation (regulations and directives), as well as implementing measures adopted at EU level and delegated acts ('non-legislative acts')" and, for the U.S., would include "Congress Bills as well as rules by U.S. federal executive and independent agencies."[40] The

proposal additionally states that "the rules of this Chapter should also extend to regulations by U.S. States and EU Member States, subject to possible adaptations."

Regulatory cooperation would alter the ways in which countries and states design and implement safeguards against threats such as pollutants, including harmful chemicals and greenhouse gas emissions. Proposals, as described in greater detail below, include fundamental changes to the process by which laws and policies are developed and implemented by the U.S., and would be overseen by an institutional framework that would enable European governments and businesses to influence decisions made by U.S. authorities.

1. New Requirements for Regulations and Regulators

A chapter on regulatory cooperation could alter the way that the U.S. and EU craft and implement rules and regulations, as described by the leak of an EU proposal for a regulatory cooperation chapter in the TTIP in December of 2013.[41] Specifically, the EU has called for additional requirements for regulators to analyze and report on proposed and existing regulations. These requirements would slow the regulatory processes and provide new opportunities for multinational corporations and foreign governments to influence domestically-set regulations.

According to the EU proposal, regulatory cooperation would create additional requirements for regulators to defend proposed regulations through the lens of how they could affect trade. Regulators in the U.S. and EU would be required to "maximize common regulatory goals" as part of "fulfilling their domestic objectives."[42] This requirement for regulators could conflict with their existing mandate; the mission of the Environmental Protection Agency, for example, is simply "to protect human health and the environment."[43]

Additional requirements could further hinder the ability of regulators to fulfill institutional mandates such as the protection of human health and the environment. These requirements may include, for example, the creation of additional consultation requirements, analyses, responses to inquiries, and justifications of proposed policies. The EU proposal's list of requirements for regulators under the EU proposal is exhausting:

- Regulators would be required to undergo extensive new dialogues with foreign governments and stakeholders on proposed regulations. Regulators would be required to give consideration to the proposals of stakeholders – including the industries being regulated – on how to modify regulations, and to defend their response to these proposals. If stakeholders raised concerns, regulators would need to provide additional justifications in writing. (There is reason to anticipate that multinational corporations, rather than concerned members of the public and non-governmental organizations, would benefit from these additional opportunities for intervention in rulemaking processes. For example, more than 85 percent of the USTR's official trade advisors represent corporations and industry groups, demonstrating the disproportionate level of influence that they have in access to and discussions on trade policy.[44] And, corporations have historically had the resources to commission analyses that put a high monetary cost on

proposed U.S. environmental and safety policies, without calculating the significant and diffuse benefits to communities.[45])

- Upon request, regulators would need to produce "information on underlying assumptions, scientific evidence and data as well as methodology applied."

- Regulators would need to perform new analyses, in addition to existing cost-benefit analyses, on how proposed regulations could affect transatlantic trade, and use the least trade restrictive option. Regulators would have to consider input from stakeholders in calculating regulations' costs for trade without any parallel requirement to calculate regulations' benefits for society. This trade impact assessment would have to be published along with the final rule.

These additional requirements could seriously slow the ability of regulators to implement effective safeguards at a time when regulators already say that the existing level of reporting requirements and cost-benefit analyses have slowed the passing of important safeguards. For example, in June 2014, Robert Adler, acting chair of the U.S. Consumer Product Safety Commission (CPSC), stated that additional requirements being considered under TTIP "could extend an incredibly cumbersome process that we face when we write regulations."[46] Mr. Adler stated that in 1981, Congress modified the CPSC's statute to require extensive cost-benefit analyses, which contributed to the agency only issuing nine safety standards in the last 33 years. Commenting on a process that could add even more years to the approval process, Mr. Adler said, "I think that we all know that safety delayed is safety denied in too many respects."[47]

While the EU proposals for regulatory cooperation raise serious concerns for environmental policymaking, what we know of the U.S. proposal is also concerning. U.S. officials have proposed using TTIP's regulatory cooperation provisions to export the current U.S. rulemaking process to the EU. The U.S. proposal for regulatory cooperation would require excessive and duplicative notice and comment procedures beyond those already provided to the public on both sides of the Atlantic. Such procedures could further slow the development of critical environmental protections, and could result in further delays or abandonment of regulations due to increased foreign government and industry intervention in the U.S. lawmaking process.

The environmental review should analyze how U.S. and EU regulatory cooperation proposals could affect the ability of U.S. and EU regulators to swiftly and effectively implement regulations that protect populations and the environment. More specifically, the USTR should include in its analysis quantifiable effects of regulatory cooperation including with respect to the pace of developing and implementing environmental regulations and the costs to regulators to comply with new consultation and analysis requirements.

2. Creation of New Governance Structures

The environmental analysis of TTIP should review how "governance structures" and/or transatlantic bodies set up to enhance regulatory cooperation could put pressure on regulators in the U.S. and EU to modify existing and proposed environmental protections. Specifically, the U.S. suggests the creation of an institutional framework and the EU calls for a Regulatory

Cooperation Council (RCC), which, with respect to the RCC, would seek input from stakeholders on how the U.S. and EU deepen regulatory cooperation "for both future and existing regulatory measures."[48] Such a structure could put pressure on countries to modify existing regulations in order to combat non-tariff barriers to trade. The EU also calls for an "EU-U.S. multi-stakeholder advisory committee… that would regularly meet with and work with EU competent authorities and U.S. regulators in crafting regulatory measures or taking decisions how to further compatibility of existing one" [sic]. The environmental analysis should review how this new body could influence existing regulatory processes and potentially weaken standards in an effort to make U.S. and EU rules more compatible.

3. Tools of Regulatory Cooperation

Among the tools that the U.S. and EU could be required to use in order to achieve regulatory cooperation are harmonization, mutual recognition and equivalence.[49] The environmental analysis should review how each of these specific tools could lower standards in the U.S. and EU in order to make them less trade restrictive.

Harmonization, which would be used to make U.S. and EU trade regulations more similar, could undermine domestic efforts to implement, maintain, and strengthen environmental safeguards. Where levels of protection are unequal, harmonization typically results in an averaging of higher and lower standards, or even a lowest-common denominator approach; it does not raise everyone to the higher standards. Harmonization would thus likely result in a weakening of standards or a ceiling for standards on at least one side of the Atlantic.

Similarly, mutual recognition or equivalence, whereby countries would be required to accept products inspected by other countries' regulators or meeting other countries' standards, could lead to increased transatlantic trade in lower-quality goods that pose harm to communities and the environment. A parallel case can be drawn from the international meat trade: before the 1994 Uruguay Round Agreement Act, meat being imported into the U.S. needed to be inspected by standards "equal" to U.S. inspections. After the act, meat could be imported if it had undergone so-called "equivalent" inspections to those in the U.S. In fact, inspections in many other countries were far weaker than U.S. inspections, meaning large U.S. meat corporations shifted their operations abroad to countries with low inspection standards, and then shipped those products back to the U.S.[50]

The environmental review should analyze in depth how regulatory cooperation tools such as harmonization, mutual recognition and equivalence could weaken countries' existing regulations, stymie efforts to strengthen domestic policies, create loopholes whereby corporations could simply shift operations to locations with lower standards, and displace sales of environmentally-sound goods with environmentally-harmful ones. It should, in particular, focus on areas where existing standards are different, and not preclude assessment under the notion that, justified or not, different EU and U.S. standards offer similar or equivalent levels of protection. In addition, the analysis must consider the potential effect of these regulatory cooperation tools on the future elevation of standards by either the U.S. or the EU.

D. Effects of Disciplines on Technical Barriers to Trade

The USTR should include in its environmental review the implications of disciplines on so-called technical barriers to trade (TBT), which refers to product standards, technical regulations and testing, and certification. While there already exists a World Trade Organization (WTO) Agreement on TBT, the U.S.-EU High Level Working Group on Jobs and Growth (HLWG) has proposed that TTIP include a "TBT plus" chapter that would likely go beyond the TBT commitments in the WTO.[51]

Both the United States and the European Union have put in place a number of standards designed to address climate disruption that could be affected by a TBT chapter in TTIP. For example, the U.S. and the EU have employed a variety of environmental labeling programs to promote the production of energy-efficient goods and to reduce greenhouse gas emissions.[52] Additionally, a number of European countries have begun experimenting with voluntary and mandatory carbon footprint labeling programs, and the European Commission itself is currently in the process of developing and proposing an EU carbon labeling system.[53] Energy efficiency standards are also important components of emissions reductions strategies used in both the U.S. and the EU.

The fifth annual *Report on Technical Barriers to Trade* (TBT), published in April 2014 by the Office of the USTR, highlights many of the specific policies that could be at risk a result of a TBT chapter.[54] The USTR report identifies laws and regulations in 16 countries that, in the opinion of the U.S. government, represent "significant standards-related trade barriers" to U.S. exporters. However, there has been no analysis on the environmental effect of potential disciplines on such programs. Among the policies highlighted in the USTR report are two landmark EU climate and environment policies:

- *The European Union Fuel Quality Directive*: In 2009, the European Union (EU) enacted the Fuel Quality Directive (FQD), which mandates that all fossil fuel suppliers reduce the greenhouse gas (GHG) intensity of their road transport fuels by six percent by 2020. Fuel companies are expected to meet this pollution-reduction target by shifting towards low-carbon fuel options. The USTR, however, has criticized the EU's development of a methodology for calculating the lifecycle GHG emissions of different fossil fuels, and raised the landmark climate policy as a potential trade barrier.[55]

- *EU's Regulation of F-Gas in Refrigerators and Freezers:* In early 2013, the EU proposed several changes to its regulation of F-Gases, including banning the use of hydrofluorocarbons (HFCs) with global warming potential (GWP) of 150 or more in residential refrigerators and freezers.[56] HFCs are potent greenhouse gases used primarily for air conditioning and refrigeration. Curbing emissions of HFCs not only a priority in the EU, but is also one of the pillars of President Obama's Climate Action Plan.[57] However, based on opposition from U.S. appliance industry to "particular product specific regulations and the aggressive 2015 timeline for implementation with respect to household refrigerators and freezers," the USTR has raised concerns about Europe's landmark climate policy based on TBT rules.[58]

As explained above, TBT rules present a clear threat to environmental and climate policies. USTR must take into account the environmental implications of a TBT chapter in its environmental review.

E. Procurement

The environmental review must analyze the effects of rules in TTIP that would restrict the use of local content requirements in renewable energy programs, either in a procurement chapter, an energy chapter, or elsewhere in the agreement. Local content requirements, also known as buy-local rules or domestic content rules, are requirements that an enterprise purchase or use goods of local origin. Local content requirements have been a standard policy tool used by governments to foster, nurture, and grow new industries. The ability of governments to adopt local content requirements favoring local producers and suppliers is critical to the goals of localizing energy production, incentivizing clean energy, and creating green jobs—all of which contribute to the broader goal of tackling climate disruption. The transition to a clean energy economy depends on a robust local supply of green goods, services, and jobs to cultivate a domestic renewable energy industry that can challenge the power of the fossil fuel industry in the setting of national climate policies.

Restrictions on local content requirements have even broader implications for developing countries, which could be implicated if the TTIP serves as a blueprint for future agreements. Particularly during the early stages of countries' development, it is critical that governments have the ability to nurture and grow domestic industries—including renewable energy industries—in order to cultivate a manufacturing base. History shows that governments need a range of policy tools, including local content requirements, to support such industries until they are internationally competitive.

It is critical that governments have every tool at their disposal to be able to develop, grow, and support renewable energy. Governments and communities must have the right to determine whether or not a local content requirement will increase the viability, success, and effectiveness of a renewable energy program.

Finally, beyond the implications of restrictions on buy-local policies, the environmental review must analyze the broader implications of TTIP procurement rules on policies related to "green purchasing," or conditions related to the environment that governments may attach to procurement contracts. Such requirements that could be threatened under the procurement rules in TTIP, may include, for example, requirements for recycled content in paper and other goods, or for energy come from renewable sources.

Moreover, the environmental review should analyze the risk that TTIP procurement rules could chill environmental procurement policies, as has happened as a result of existing government procurement rules. For example, the state government of Minnesota watered down a recycled paper requirement for the state's procurement of paper in the 1990s after Canada threatened a trade dispute on the basis of the U.S.-Canada Free Trade Agreement procurement rules. As noted by Earthjustice Legal Defense Fund:

> In the early 1990s, Canada threatened to challenge Minnesota's requirement for recycled paper content in state paper procurement bids. Canada argued that the requirement violated the U.S.-Canada Free Trade Agreement, the predecessor to the North American Free Trade Agreement. The requirement was not discriminatory on its face in that it treated foreign and domestic suppliers the same. However, Canada claimed that it had a discriminatory effect on Canadian suppliers because Canada has a smaller supply of recycled paper. To avert a trade challenge, Minnesota allowed nonconforming bids from Canadian suppliers.[59]

In sum, the environmental review must analyze the full effects of procurement policies on the environment and climate.

F. Conservation and Natural Resources

As trade increases, so can stress on natural resources. The environmental review should include a comprehensive analysis of the environmental impacts from increased trade and production, including agricultural production, and should incorporate in the analysis the global and trans-boundary impacts from increased demand on resources in supplier countries. The review should include an assessment of the impact of TTIP on greenhouse gas emissions; soil, air, and water quality; land use and land conversion; ecosystems and biodiversity; resource use (food, feed, timber, minerals); and waste generation. In particular, increased trade in agricultural products can lead to land conversion, reduced water quality, soil erosion, greenhouse gas emissions, and biodiversity loss.

In addition, it is critical that the TTIP contain an environment chapter that includes legally binding obligations for countries to enforce and strengthen their domestic environmental laws and policies and their commitments under multilateral environmental agreements (MEAs). The TTIP should commit the United States and the European Union to adopt, maintain, and implement the laws, regulations, and all other measures to fulfill its obligations MEAs that are relevant to the region, including the United Nations Framework Convention on Climate Change (UNFCCC). The TTIP environment chapter should be legally enforceable through the same state-to-state dispute resolution process that is available to commercial chapters.

The environment chapter must also address biodiversity and conservation challenges, including the elimination of fisheries subsidies; a ban on shark finning and shark fin trade; a prohibition on trade in illegally taken wildlife and fish; and commitments to strengthen implementation and enforcement of measures to eliminate trade in illegally harvested wood and wood products.

G. Elimination of Fossil Fuel Subsidies

Another issue that should be included in TTIP and the environmental review is the elimination of subsidies for the oil, coal, and gas industries. The exact level of fossil fuel subsidies in the U.S. and EU is difficult to quantify because of lack of transparency in reporting. However, official estimates show that up to $75 billion per year in Organization for Economic Cooperation and Development (OECD) countries goes to support oil, gas, and coal[60] -- and this figure may well be an underestimate.

Particularly in the context of the climate crisis, taxpayer-funded financial support for profitable, mature industries, and environmentally harmful industries must end. The U.S. and a number of EU countries have already committed to eliminate fossil fuel subsidies. In 2009, for example, G20 leaders committed to "phase out and rationalize over the medium term inefficient fossil fuel subsidies while providing targeted support for the poorest."[61] And President Obama has asked Congress to repeal the $4 billion in annual subsidies that the U.S. gives to oil companies.[62]

The USTR should include in its review the environment benefits of a legally binding commitment to phase out fossil fuel production subsidies and to increase the transparency of fossil fuel subsidies.

V. Conclusion

The TTIP is an expansive trade agreement that will include binding rules related to energy, investment, regulatory issues—including environmental, food safety, and chemical standards—labeling and technical standards, government procurement, natural resources, and more. The TTIP will have serious implications for our environment that must be thoroughly analyzed and taken into account in the negotiation process.

We welcome the opportunity to comment and would be happy to provide further information or clarifications as necessary.

Sincerely,

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