



Comments by Friends of the Earth U.S. Regarding Transatlantic Trade and Investment Partnership

Via Electronic Filing

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Office of the United States Trade Representative
Washington, D.C.

Re: Request for Comments on the Proposed Transatlantic Trade and Investment Partnership

Friends of the Earth - U.S. appreciates this opportunity to submit comments on the proposed Transatlantic Trade and Investment Partnership agreement with the European Union. We believe that trade agreements should enhance environmental protection, sustainable development, and economic justice, at home and abroad. The current model of U.S. trade and investment agreements does not meet these criteria. We hope that a different approach will be taken in TTIP negotiations.

Unfortunately, the information available now on objectives for TTIP negotiations raises concerns. This includes, for example, calls by a High Level Working Group¹ for WTO-plus provisions in such areas as sanitary measures related to genetically engineered (GE) food products and food safety generally, as well as technical barriers to trade related to toxic chemicals regulation and product labeling. Friends of the Earth also has concerns about how the TTIP would affect a number of policy areas of particular environmental sensitivity, such as climate policy and water policy. Our review of policy areas of potential concern is not yet complete. We are concerned, for example, that the TTIP could encourage expanded trade in corn ethanol -- a fuel with lifecycle greenhouse gas emissions exceeding those of conventional gasoline -- and thus could exacerbate global warming.

In advance of the first round of TTIP negotiations this summer, we expect to make available a more complete analysis that will be informed by several general themes that sum up Friends of the Earth's views about upcoming TTIP negotiations. These include such general propositions as:

- The TTIP should not drive a harmonization down to the lowest common regulatory denominator, especially with respect to regulation of toxic chemicals, food safety, and GE organisms; and

¹ Final Report of the U.S.-E.U. High Level Working Group on Jobs and Growth, February 11, 2013, available at <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg>.

- The threat presented to human civilization and the planet from climate change trumps all other trade considerations.

Finally, Friends of the Earth believes that TPP negotiations could not only pose risks to sound climate and environmental policies, but they could also present opportunities for U.S. and E.U. negotiators to take steps to protect the environment by including in the text three essential provisions:

- Incorporate an environment chapter in the TTIP, based on the U.S. model that will bind the parties to enforce domestic environmental laws and multilateral environmental agreements;
- Incorporate a positive list of commitments for services and other environmentally sensitive chapters;
- Incorporate across the board exceptions for government measures that protect the climate, natural resources, public health, and the environment generally.

Overriding concerns: an enforceable environment chapter, a positive list of commitments, and across the board environmental exceptions.

TTIP environment chapter. A TTIP environment chapter is an opportunity to do more than simply establish, in theoretical legal principle, an obligation to enforce domestic environmental measures and abide by multilateral environmental agreements. Friends of the Earth believes that a TTIP environment chapter must itself be enforceable through dispute resolution.²

Friends of the Earth believes that the core provision of a TTIP environment chapter should be an obligation for countries to enforce their domestic environmental laws and all multilateral environmental agreements, which they have joined and are on the list of MEAs³ covered in the chapter. The environment chapter also should address, for example, issues of biodiversity conservation, illegal logging, illegal wildlife trade, economic subsidies that lead to overfishing and illegal fishing more generally.

Friends of the Earth believes that a TTIP environment chapter should include robust provisions on public participation in the implementation process. This would include provision for public access to information about TTIP enforcement and a process for environmentalists and other members of civil society to communicate their concerns. This process should include a formal administrative

² In the same way, a TTIP labor chapter should provide for obligations to enforce domestic labor laws and labor rights protections established by the International Labor Organization that are themselves enforceable by dispute resolution.

³ The list of MEAs covered by the TTIP environment chapter should include but not be limited to the Convention on International Trade in Endangered Species (CITES); Montreal Protocol on Ozone Depleting Substances; Convention on Marine Pollution; Inter-American Tropical Tuna Convention; Ramsar Convention on Wetlands; International Whaling Convention; and Convention on Conservation of Antarctic Marine Living Resources

mechanism for citizen and civil society submissions regarding enforcement of environmental laws, compliance with multilateral environmental agreements, and initiation of dispute resolution against other TTIP parties.

Commitments to cover environmental and climate policies under TTIP chapters. In assessing the environmental impact of a particular trade agreement chapter, the first question is whether a specific environmental measure (law, regulation, or enforcement action) is covered by that chapter – in other words, whether the rules and obligations of that chapter apply at all to the environmental measures in question, under either a positive or negative list of commitments.⁴

A negative list approach to coverage of government measures involves the comprehensive coverage under trade rules (such as non-discrimination, for one example) of all economic sectors or government measures, unless a specific reservation is listed for an economic sector (water transport, for example) or a government measure (Maryland’s regulation of toxic chemicals in toys, for example). By contrast, under a positive list approach to commitments under a trade agreement chapter, such as that used under the WTO services agreement (GATS), specific economic sectors or government measures are voluntarily listed on a national schedule.

The positive list approach should be preferred in TTIP chapters, especially those that are most likely to generate conflicts with environmental and climate measures, including the chapters on services, procurement, investment, sanitary and phyto-sanitary measures, and technical barriers to trade, among others. Only a positive list of commitments provides reasonable certainty about which green policies are covered and which are not. It also provides far more policy space for the adoption of new measures and amendments to existing environmental policies. Finally, it is just more practical: it is a monumental task to list every measure conceivably subject to inappropriate trade agreement litigation on a negative list.

Across-the-board environmental exceptions. Across-the-board exceptions should be included in the TTIP to effectively ensure that environmental laws, regulations, and enforcement actions are not undermined. The GATT article XX exception⁵ related to trade in goods and the GATS article XIV⁶

⁴ One must also look at the definitions section of the chapter to see if a specific measure is covered by definition: for example the definition of “investment” in an investment chapter.

⁵ GATT article XX provides an exception to the overall agreement on trade in products “**necessary** to protect human, animal or plant life or health” and “related to conservation of exhaustible natural resources” (provided that they are linked to domestic resource conservation measures). The article XX “necessity” test can be hard to meet. Alternative regulatory schemes for addressing environmental problems in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts give to economic regulations. In addition to that, the “chapeau” or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a “**means of arbitrary or unjustifiable discrimination**,” or a “**disguised restriction** on international trade.” Terms of art such as “unjustifiable discrimination” and “disguised restriction” are vague and subjective.

⁶ GATS article XIV excuses conflict with services chapter trade rules if a necessity test is met and the purpose of the government measure is to protect public morals, to protect human or animal health, to protect privacy or prevent fraud, or to safeguard essential security interests. Significantly, the exception does not cover natural resources, plant or other life forms, and the climate in general.

exception for trade in services are frequently seen as models for environmental exceptions in other free trade agreements, but they are flawed models that are stingy in carving out policy space for essential government action related to climate, natural resources, public health, and other environmental policies. Furthermore, trade agreements generally do not provide across-the-board coverage to all relevant chapters. In particular, the failure to provide strong environment exceptions in international investment agreements and agreements on technical barriers to trade has opened the floodgates to damaging lawsuits challenging sound environmental policies.

Concerns about objectives of TTIP negotiations.

Based on the model of past U.S. trade agreements, statements by officials, and published documents including a U.S.-E.U. “High Level Working Group” report outlining the objectives for negotiations, it appears that the goal of U.S. trade policy is to grant transnational corporations and governments expanded “rights” under the transatlantic agreement to challenge government regulations before international tribunals. For example, in its short report the working group proposes an agreement that would focus on environmental and other regulations that allegedly interfere with free market efficiency, rather than traditional trade issues such as lowering tariffs.⁷ The HLWG report explicitly recommends going beyond even World Trade Organization standards in the areas of sanitary measures, services, and so-called “technical barriers to trade” that already threaten to vitiate environmental protections.

*Investor-state arbitration.*⁸ Equally disappointing, the U.S. Trade Representative’s office has confirmed press reports that it will seek to include investor-state arbitration in the TTIP, presumably based on the template of the U.S. Model Bilateral Investment Treaty, which Friends of the Earth believes to be flawed.⁹ Under the U.S. model, investors may seek awards of money damages, of unlimited size, in compensation for the cost of complying with environmental and other public interest regulations, including climate change measures. A large portion of suits brought under existing trade agreement investment chapters and bilateral investment treaties involve challenges to environmental policy, in particular cases related to mining, oil production, and water policy.

The U.S. model would allow foreign investors to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment. Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias.

⁷ According to a European Commission statement on the launch of U.S.-E.U. trade talks: “In today's transatlantic trade relationship, the most significant trade barrier is not the tariff paid at the customs, but so-called “behind-the-border” obstacles to trade, such as, for example, different safety or environmental standards for cars.” European Commission, European Union and United States to Launch negotiations for a Transatlantic trade and Investment Partnership, 13 February 2013, available at, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=869>.

⁸ For background see, Robert Stumberg, Professor of Law, Georgetown University, “Reform of Investor Protections,” Testimony before U.S. House Ways and Means Subcommittee on Trade, May 14, 2009. <http://waysandmeans.house.gov/media/pdf/111/stumberg.pdf>.

⁹ 2012 U.S. Model Bilateral Investment Treaty, available at, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

Investor rights are broadly and imprecisely defined in the U.S. Model BIT. They include the designation of expected future profits as a property interest and provide procedural rights that are unavailable under domestic law. Also, the substantive rights such as “expropriation” and especially the “minimum standard of treatment under international law” are vague and have been read broadly and narrowly by different tribunals. The broad readings go considerably beyond the general practice of nations for protecting property rights and due process.

Friends of the Earth believes that it is unnecessary to provide for investor-state arbitration in the TTIP. The U.S. and E.U have well-developed and generally fair court systems to resolve allegations of property rights and due process violations resulting from environmental and public health violations.

Services chapter – highest level of liberalization. Services provisions in trade agreements broadly affect the environment, including services related to waste water, solid waste, hazardous waste, electricity, pollution control, transportation, oil/gas pipeline transportation, and other energy services, to name a just a few. As a consequence, the High Level Working Group recommendation that “in the services area the goal should be to bind the highest level of liberalization that each side has achieved in trade agreements to date” concerns Friends of the Earth.¹⁰

The HLWG seems to be encouraging deregulation and privatization of services related to the environment based on broad ideological criteria. This could lead to implementation of TTIP services provisions that ignore appropriate distinctions between what economists call public goods, such as mass transit systems, and true private goods. In particular, given the experience with some existing trade agreements, in cases where the privatization of public services (such as water services) has gone badly wrong, it could hinder governments from returning service provision to the public sector.

Furthermore, heavy government regulation, rather than “the highest level of liberalization,” would appear to be appropriate given the mixed public-private or even the monopolistic character of some services, such as electric and water utilities. In the same way, the cost of serious environmental externalities, in the case of some private services, argues for government regulatory intervention, rather than “leaving it to the market to decide.”

Finally, problems with the “commoditization of the commons” could arise. The essential nature of water and sanitation for human health and survival sets this area apart from other sectors. The human right to water and sanitation, recognized by the United Nations General Assembly in July 2010 means that extra care must be taken before water policy in any form is subject to services chapter obligations.

SPS-plus. With respect to sanitary and phyto-sanitary measures, the U.S.-E.U. High Level Working Group has called for “SPS-plus” provisions in the TTIP. Friends of the Earth is concerned that this nomenclature suggests that TTIP provisions would make it easier to challenge safeguards that fall into the categories of sanitary measures related to food safety, such as bacterial contamination, and phyto-sanitary measures related to animal and plant health, such as animal diseases.

¹⁰ HLWG, p.2.

The history of successful U.S. suits in the WTO challenging European policies on genetically modified organisms and food safety under the SPS agreement should be a warning.¹¹ The broad concept of SPS-plus suggests an even more rigorous TTIP review that could constitute even more of a threat to GMO and food safety regulations than WTO rules.

Friends of the Earth believes that genetic engineering of commercial products presents many known and suspected risks to people and nature that require government regulation based on the precautionary principle: in other words, the burden of proof for demonstrating a new product's or technology's safety should fall on those who would introduce it into the marketplace. The SPS-plus concept may limit the ability of governments to appropriately implement the precautionary principle in regulating GE products and technologies. Friends of the Earth, also, is concerned that the U.S. Trade Representatives' 2013 Report on Sanitary and Phyto-sanitary measures targets E.U. measures on GE products as "substantial barriers to trade."¹²

Similarly, we are concerned about how other food safety disputes would be treated under an SPS-plus regime. Among the many areas of our concern are EU food safety measures targeted as trade barriers in the USTR 2013 SPS report, including restrictions on imports of beef treated with growth hormones, tallow, chicken washed in chlorine, and meat produced with growth stimulants (rectopamine). The 2013 USTR SPS report targets France in particular for its 2012 ban on use of materials produced using BPA in food contact surfaces for food products designed for infants, pregnant women or lactating women. We understand that other U.S.-E.U. food safety issues that *might* arise include meat treated with antibiotics (where there is no therapeutic purpose), hormones in milk, and fresh eggs that may be infected with salmonella.

TBT-plus. With respect to technical barriers to trade, the HLWG call for "TBT-plus" obligations in the TTIP text ignores the risk to important environmental and public health measures illustrated by recent WTO decisions. TBT-plus may also present a risk to toxic chemicals regulation, including the European REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) program.

Several TBT challenges in the WTO have succeeded in undermining important environmental and public health measures, particularly those related to product labels. For example, the WTO Appellate Body found that the U.S. dolphin safe labeling program violates the WTO TBT agreement.¹³ Plaintiffs have recently succeeded in a WTO TBT challenge to U.S. measures related to country of origin labeling.¹⁴ The dolphin safe and COOL labeling cases suggest that environmental and public health labeling measures, more generally, could be at risk of a TBT-plus challenge, including government measures related to eco-labels and labels for energy efficiency, organic food, and sustainable agriculture.

¹¹ Doug Palmer, US farmers urge sanctions against EU's GM crop ban, Reuters, July 26, 2010, available at <http://in.reuters.com/article/2010/07/27/idINIndia-50441920100727>.

¹² Available at, <http://www.ustr.gov/sites/default/files/2013%20SPS.pdf>.

¹³ Available at, [http://www.worldtradelaw.net/reports/wtoab/us-tunamexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf)

¹⁴ Available at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

Toxic chemicals regulation such as the European REACH system may similarly be at risk. The 2013 USTR report on Technical Barriers to Trade¹⁵ targets the REACH system as a trade barrier, and USTR also has raised objections to REACH in the WTO TBT committee and in other fora. USTR and other critics of the REACH program argue that registration, data gathering, and notification requirements under REACH impose higher costs on chemical products imported into the EU.

The text of any TTIP chapter on technical barriers to trade should protect the REACH program from such claims of discriminations and should also preclude TTIP tribunal decisions similar to the WTO decisions in *US – Tuna II* and *US-COOL*.

Regulatory coherence chapter. The HLWG report calls for the TTIP to include a cross-cutting discipline on regulatory coherence “for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services.”¹⁶ In all probability, this recommendation by the HLWG contemplates something similar to the draft regulatory coherence chapter of the Trans Pacific Partnership agreement, a proposal, about which Friends of the Earth has raised concerns.

The leaked draft of the regulatory coherence chapter of the Trans Pacific Partnership trade agreement¹⁷ encourages countries joining the pact to conduct regulatory impact assessments or RIAs when developing regulations, including environmental regulations, which have more than a minimal cost burden on business and the economy. Cost-benefit analysis to determine the net benefit of environmental regulations specifically is encouraged.

In the view of Friends of the Earth, the cost of environmental and other government regulations should not and cannot be ignored, but it ought to be looked at with a wider perspective. And, seemingly definitive “ratios of benefit to costs” should be considered with balanced skepticism. Identifying and quantifying the costs of environmental regulation can be inflated by assumptions, analyst bias, and flaws in data gathering. Quantifying the benefits of environmental regulation can be difficult, for example, because public health data is not as comprehensively collected as economic data. Or, it can be impossible: an attempt to attribute a price to the intrinsic value of human life, living things and nature itself. In our view, cost-benefit analysis, in many circumstances, can be at odds with a fundamental principle of environmental regulation: application of the precautionary principle in the face of an immeasurable environmental risk and inescapably uncertain outcomes.¹⁸

An excellent example of an environmental issue involving uncertain outcomes that requires application of the precautionary principle, not cost-benefit analysis, is regulation of synthetic

¹⁵ Available at, <http://www.ustr.gov/sites/default/files/2013%20TBT.pdf>.

¹⁶ HLWG, p.3.

¹⁷ Available from Public Citizen at, <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf>

¹⁸ The Wingspread Consensus Statement on the Precautionary Principle is available at: <http://www.sehn.org/wing.html>.

biology. While genetic engineering involves the exchange of genes between species, synthetic biology involves artificially creating new genetic code and inserting it into organisms. Synthetic organisms self-replicate. No one knows how they will interact with naturally occurring organisms or the consequences for the ecosystem as a whole. Standard forms of risk assessment and cost-benefit analyses used by current biotechnology regulatory approaches are inadequate to guarantee protection of the public and the environment.¹⁹

Selected policy areas of concern

In addition to studying TTIP issues chapter-by-chapter, another way to analyze the prospective agreement is to look for potential conflicts in important areas of environmental policy, such as renewable energy, fossil fuel exports, water policy and so forth.

Green energy trade wars. An overriding general concern of Friends of the Earth is the effect of the TTIP on the climate. The climate crisis is the definitive challenge of our time. Burning dirty fuels threatens human civilization and the planet itself. That is why Friends of the Earth promotes energy conservation and clean energy, including wind, solar and geothermal power. It is also why we have called for an end to our economic dependence on coal, oil, liquefied natural gas, and corn ethanol.

In the past two years, we have witnessed an alarming rise in the number of international trade disputes related to renewable energy and climate policies, including a WTO Appellate Body ruling that the Ontario's "feed-in tariff" program for clean generation of electricity violates international trade law.²⁰ The WTO decision comes at a time when a trade war on solar energy policy is well under way. The United States has imposed a 31 percent tariff on solar panels imported from China, alleging violation of U.S. law on unfair subsidies and "dumping" of excess inventory on the U.S. market.²¹ China has retaliated by threatening to impose tariffs on poly-silicon imported from the U.S. used to make solar energy products²², and by bringing a World Trade Organization complaint against U.S. imposition of countervailing duties on a number of Chinese products, including solar panels.²³ Similarly, the U.S. has threatened a WTO suit challenging domestic content provisions in

¹⁹ See a landmark report published by Friends of the Earth, the International Center for Technology Assessment, and the ETC group, *The Principles for the Oversight of Synthetic Biology*, available at http://libcloud.s3.amazonaws.com/93/ae/9/2287/1/Principles_for_the_oversight_of_synthetic_biology.pdf.

²⁰ World Trade Organization, Dispute DS 426, Canada – Measures Relating to Feed in Tariff Program, May 6, 2013, available at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.

²¹ Keith Bradsher, Diane Campbell, "US Slaps High Tariff on Chinese Solar Panels, New York Times, May 17, 2012, available at, http://www.nytimes.com/2012/05/18/business/energy-environment/us-slaps-tariffs-on-chinese-solar-panels.html?pagewanted=all&_r=0.

²² Ray Yu, Chinese Polysilicon Makers Come Back to an Uncertain future, Solar PV Investor News, April 23, 2013, available at <http://solarpvinvestor.com/spvi-news/480-chinese-polysilicon-makers-come-back-to-uncertain-future>

²³ WTO establishes panel to examine US countervailing duties against China, Global Times, September 29, 2012, available at <http://www.globaltimes.cn/content/736060.shtml>.

Indian renewable energy programs, and India has suggested the possibility of retaliatory suits challenging similar programs in U.S. states.²⁴

This alarming trend of international trade disputes poses significant risks to global efforts to curb climate change. Trade tribunals that focus on theoretical free market efficiency are becoming the de facto forum for resolving international disputes over climate policy. Such international trade litigation can drag on for years and often results in tribunal decisions that run many hundreds of pages and that often are subject to multiple interpretations, easily leading to renewed litigation. Long delays and ambiguous results in trade litigation of this character can dry up both private and public investment in clean energy. Investors of both kinds need substantial certainty and stability in international trade rules before they commit the billions of dollars needed to build a green energy economy. Nor can delay be justified. The global atmosphere is warming rapidly.

Climate policy should not be decided by TTIP, WTO or similar dispute resolution panels, based on trade law. The last thing we need is an expanded and long lasting green energy trade war. Comprehensive exclusions of coverage of climate measures and strongly worded exceptions for such measures should be part of any TTIP agreement.

Fossil fuel exports. Global warming is fueled by oil, coal, and natural gas exports, but international trade and investment agreements generally treat these high carbon products the same as other goods. Friends of the Earth believes that TTIP negotiators should steer a different course: one that leaves enough policy space for bold governmental action on fossil fuel exports by governments in future years.

U.S. coal exports are on a record pace.²⁵ As a result of environmentally-destructive hydraulic “fracking” and other new technologies, the fastest-growing natural gas and oil producer on the planet is now the United States.²⁶ The International Energy Agency reports that the U.S. will become the largest oil producer in the world in a few years.²⁷ As the U.S. dependence on coal slackens, the coal industry is attempting to export it abroad.²⁸ Energy companies are also seeking new liquefied natural gas terminals for export to global markets,²⁹ where they can demand higher prices for LNG (a far more potent contributor to global warming than ordinary natural gas). Meanwhile, Canada

²⁴ Kavitha Rao, India’s Grand Solar Plans threatened by Ugly U.S. Trade Spat, The Guardian, April 23, 2013, available at <http://www.globaltimes.cn/content/736060.shtml>

²⁵ U.S. Energy Information Administration, U.S. coal export on a record pace, fueled by steam coal growth, available at <http://www.eia.gov/todayinenergy/detail.cfm?id=8490>.

²⁶ International Energy Agency, World Energy Outlook 2012, available at <http://www.iea.org/publications/freepublications/publication/English.pdf>; Mark Mills, Unleashing the North American Energy Colossus, Manhattan Institute, July 2012, available at http://www.manhattan-institute.org/html/pgi_01.htm.

²⁷ Id.

²⁸ Thomas K. Grose, “As U.S. Cleans Its Energy Mix, It Ships Coal Problems Abroad,” National Geographic News, March 15, 2013, available at <http://news.nationalgeographic.com/news/energy/2013/03/130315-us-coal-exports/>.

²⁹ U.S. Department of Energy, Applications Received by DOE/FE to Export Domestically Produced LNG, available at http://www.fossil.energy.gov/programs/gasregulation/reports/summary_lng_applications.pdf.

wants to transport tar sands oil through the Keystone XL pipeline to refineries in Texas and then ship it overseas where they can sell it far more profitably than in the United States.³⁰

All of this is terrible news for an overheated planet. The ongoing expansion of international trade in these fossil fuels promises to sharply increase greenhouse gas emissions, potentially pushing global warming to a catastrophic tipping point. Friends of the Earth believes that swift and strong climate action is necessary to mitigate the worst impacts of climate change, including rising seas, melting ice, superstorms and crippling drought. This will require an end to the “all of the above” energy policy of the United States. Eventually, it will require more regulation of fossil fuel exports, which currently in the U.S. is limited to regulatory oversight of natural gas exports – and even those provisions of the Natural Gas Act do not apply to countries with which the United States has a free trade agreement.³¹

Unfortunately, TTIP provisions on market access and trade in goods, if modeled on the WTO General Agreement on Tariffs and Trade, might unnecessarily chill future legislative action on fossil fuel exports, if the claims of some industry lobbyists are accepted. Some apologists for fossil fuels argue that GATT article XI:1 on “General Elimination of Quantitative Restrictions” prohibits restrictions on the export of products, including fossil fuels, to another WTO member, other than duties, taxes or other charges.³²

This claim, of course, may overlook GATT article XX, which provides an exception to the overall agreement on trade in products “**necessary** to protect human, animal or plant life or health” and “related to conservation of exhaustible natural resources” (provided that they are linked to domestic resource conservation measures).³³ Article XX is not as strongly worded as a should be, but if there were ever a measure that falls under the exception, it ought to be a climate change measure, such as a control on fossil fuel exports. The very survival of the life on the planet as we know it is at stake. Certainly, such export controls are not disguised protectionist measures.

Friends of the Earth, nonetheless, believes that if the TTIP incorporates all or part of the GATT Article XI:1 even indirectly, by implication, or by reference, then the article XX “necessity” test might be unnecessarily hard to meet, especially as interpreted by an unsympathetic dispute resolution panel. Alternative regulatory schemes for addressing the climate crisis in less

³⁰ Oil Change International. Exporting Energy Security: Keystone XL Exposed. September 2011. pp. 7-9. <http://dirtyoilsands.org/files/OCIKeystoneXLExport-Fin.pdf>; Natural Resources Defense Council, The Keystone XL tar sands pipeline will hurt not help job creation in America.” available at <http://www.nrdc.org/energy/files/keystonejobs-4pgr.pdf>.

³¹ 15 U.S.C. 717b(c); Note that the Natural Gas Act requires natural gas exporters to get a permit from the Energy Department. The Act further provides that DOE must approve an application for a permit to export natural gas to countries with which the U.S. does not have a free trade agreement, unless there is a finding that it would be inconsistent with the “public interest.” The department also is authorized to attach terms and conditions to the export permit, which it finds are appropriate to protect “the public interest.” A number of factors are considered in the DOE public interest review including environmental considerations.

³² Article XI: 1 of the WTO General Agreement on Tariffs and Trade (General elimination of quantitative restrictions), available from the WTO at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_05_e.htm.

³³ It should also be noted that GATT article XI: 2(a) allows temporary restrictions on exports to relieve critical shortages of foodstuffs and similar essential products.

burdensome ways for international trade can always be hypothesized.³⁴ A necessity test, also, inappropriately reverses the deference that domestic courts give to economic regulations. The “related to conservation” test could also be problematic. In addition, the “chapeau” or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **“means of arbitrary or unjustifiable discrimination.”** The term “unjustifiable” is vague and subjective.

Friends of the Earth, therefore, recommends that TTIP negotiators reject any incorporation of GATT Article XI: 1 on export controls into the U.S.-E.U. agreement: directly, by reference, or by implication. In light of approaching climate calamity, democratic institutions must have the “policy space” to act in the future, without the article’s chilling effect. Ideally, it would be useful to exclude fossil fuels from the definition of a good or product altogether. Also as noted above, a general exception for climate, environmental, natural resources, and public health measures must apply to TTIP chapters and certainly to any chapter or provision related to trade in goods or market access in particular. Finally, this general exception must be drafted in more clear and certain terms than GATT article XX.

Although beyond the jurisdiction of the U.S. Trade Representative’s office, Friends of the Earth also recommends that Congress amend the Natural Gas Act so that LNG export regulations apply when exporting to a country with which the U.S. has a trade agreement.

Gene patents. Intellectual property issues, related to patents, trademarks, and copyrights, will be among the most technically complex under consideration in the TTIP negotiations. Friends of the Earth fears that U.S. negotiators will propose, as they have in Trans Pacific Partnership trade negotiations, IP chapter text that covers and protects patents on plants and animals.³⁵

Friends of the Earth - U.S. supports a ban on gene patenting, including not only human genes but also all the genes that occur naturally on the planet. Gene patents are dangerous and unfair, in our view. They give corporations monopolies over the use of parts of the genetic code that have evolved naturally and are part of our common natural and human heritage.

Green purchasing. Procurement chapters in free trade agreements generally forbid local preferences in government purchasing and require market access for foreign bidders on public contracts. Procurement chapters in U.S. free trade agreements generally apply to states when a governor make a commitment to permanently bind the state to them, which is almost always done without legislative approval. In some instances, mayors may bind localities. Although some environmental exceptions have been granted in recent U.S. agreements, there is a danger that TTIP rules on

³⁴ According to the World Trade Organization:” To determine whether a measure is **“necessary”** to protect human, animal or plant life or health under Article XX (b), a process of weighing and balancing a series of factors has been used by the Appellate Body, including the contribution made by the environmental measure to the policy objective, the importance of the common interests or values protected by the measure and the impact of the measure on international trade. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.” World Trade Organization, WTO rules and environmental policies:GATT exceptions, Degree of connection between the means and the policy objective, available at, http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.

³⁵ Available from Public Citizen at <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>.

government procurement will require that decisions about the award of public contracts must be almost exclusively based on product cost and performance, even when the contract bidding process is open to foreign firms.

Friends of the Earth believes that green purchasing preferences should not be limited by government procurement rules based almost exclusively on product cost and performance or any other basis. For example, a TTIP procurement chapter should allow governments to impose procurement rules that require products to be made with recycled, composted, or organic materials or to meet energy efficiency standards. And, governments should be able to discriminate against products made with environmentally destructive methods. In addition, trade agreement prohibitions on “buy local” purchasing policies should not undercut government policies intended to encourage the growth of green industries, such as solar and other renewable energy ventures that provide green jobs to local workers who may be displaced by government policies disfavoring carbon intensive industries that contribute to global warming. Similarly, school lunch programs that favor healthy food produced by local farmers, rather than giant agribusiness, should not be endangered.

Water. All life on this earth depends on water. Sustainable economic development, public health, and social justice depend on equitable access to clean water. But, freshwater resources are in danger. Reckless industrial pollution, corporate agricultural practices, global warming, and commercial exploitation are degrading the quality and availability of fresh water. The time for treating water as an abundant and endlessly available resource is long past. Some international water firms and investors recognize this, and aspire to take ownership of water resources and turn water into a tradable commodity, perhaps on a very large scale in future years. Peter Brabeck, the former CEO of Nestle, has stated bluntly that access to water should not be a public right.³⁶

Friends of the Earth believes that bulk water should not be considered a good or product subject TTIP or any other trade agreement provisions on trade in goods. This view might well be questioned by multinational water companies like Nestle and Suez that conceivably could seek to influence TTIP negotiators.

The threat of widespread commoditization of water should not be dismissed as theoretical. Massive international trade and transport of bulk water on the model of the oil transport and distribution system is admittedly a long-term prospect, not a current, large scale reality in most places. In decades to come, however, as water shortages increase and conditions of absolute water scarcity expand in more places around the globe, multinational corporations will have a huge incentive to control the supply of fresh water and build a global transportation network for its distribution (at their asking price). Now is the time to firmly establish in the text of the TTIP and in international law on trade in goods generally that water is part of the public commons.

In the same way, TTIP chapters on services and investment should reflect the principles that water is part of the public commons and that access to water is a human right. With respect to a TTIP services chapter, the omission of any exception for natural resources and water in particular in the WTO General Agreement Trade in Services should not be replicated. And, the lack of a strong environmental, natural resources, and water exception in the U.S. model investment agreement

³⁶ Robyn Pennacchia, “Nestle CEO: ‘Access to water should not be a public right,’” available at, <http://www.deathandtaxesmag.com/197822/nestle-ceo-access-to-water-should-not-be-a-public-right/>

should be avoided at all costs. Indeed, water services, water transport services, and sanitation are so essential to human survival and the health of ecosystems that they should be excluded altogether by definition, reservation, or schedule of commitments from coverage under TTIP services and investment chapters.

In sum, The TTIP should not thwart government water policy measures needed to protect people and the planet. It is essential that nations that are parties to existing agreements and TTIP negotiations retain authority to adopt water policy measures that:

- Protect the public health and the environment;
- Ensure sustainable supplies of water at a fair price for individual consumption and commercial use;
- Regulate or prohibit groundwater extraction for export to internal and international markets;
- Keep water in the public domain to preserve the right of access to water; and
- Stop any attempt by international corporate and financial interests to turn water into a mere commodity owned by investors and traded on international markets.

Summary themes

There are several general themes that sum up the views of Friends of the Earth about upcoming TTIP negotiations. We believe that:

- Environment and labor obligations are as important as commercial obligations.
- The threat presented to human civilization and the planet from climate change trumps all other trade considerations. In response to climate change, the TTIP should provide governments with policy space, free from the threat of trade litigation, to adopt climate change measures, such as a carbon tax, other tax measures and subsidies to encourage renewable energy, carbon and pollution regulations, and energy efficiency standards, among others.
- The TTIP should not facilitate the “commoditization of the commons” -- our natural resources, water, and animal, plant and human genes.
- The TTIP should not drive a harmonization down to the lowest common regulatory denominator, especially with respect to regulation of toxic chemicals, food safety, and GE organisms.
- Investment disputes, such those related to mining, oil production, water, and energy services, should be adjudicated not before arbitral tribunals biased in favor of multinational corporations, but before domestic courts and administrative bodies.
- The TTIP should not be negotiated in secret. Negotiating text should be available to everyone, and no special consideration or access should be given to corporate lobbyists.