



Board of Directors

John Applegate
Robert Glicksman
David Hunter
Thomas McGarity
Catherine O'Neill
Amy Sinden
Sidney Shapiro
Rena Steinzor

May 4, 2012

Ambassador Ron Kirk
Office of the United States Trade Representative
600 17th Street Northwest
Washington, District of Columbia 20508

**Re: Trade Promotion Authority for the Trans-Pacific Partnership and
Future Trade Agreements**

Dear Ambassador Kirk:

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
W. Thompson Comerford, Jr.
Sally Greenberg
John Passacantando
Henry Waxman
Robert Weissman

We are writing to encourage the Office of the United States Trade Representative to draft trade promotion authority legislation for implementing the Trans Pacific Partnership (TPP) and other future trade agreements that includes strong provisions for addressing trade-environment linkages. Although the United States has completed eleven rounds of negotiations to establish a Trans Pacific Partnership (TPP) with eight trading partners, it still has not requested trade promotion authority from Congress. As you noted in your testimony on February 29, 2012, to members of the House Ways and Means Committee, the Obama Administration needs trade promotion authority to approve the TPP and any other future trade agreements.

In the nearly 20 years since the North American Free Trade Agreement (NAFTA) entered into force, we have learned much about the linkages between trade and the environment. For example, despite the focus during the NAFTA debates on the concern that U.S. companies would move to Mexico to take advantage of less stringent environmental laws, there is little evidence that businesses relocate to jurisdictions with lower environmental standards or that large-scale shifts in industrial investment and relocation to pollution havens occur.¹ We have, however, learned that trade agreements can lead to significant adverse environmental impacts, particularly when countries do not have sufficient environmental laws, policies, and institutions. The Commission for Environmental Cooperation (CEC), established by the NAFTA environmental side agreement, has found little evidence to support the theory that trade alone will increase the demand for higher environmental standards.² Instead, free trade agreements (FTAs) may lead to significant increases in pollution and serious adverse impacts from specific economic sectors.³ In fact, there is a consensus that "increased trade and growth without appropriate environmental policies in place may have unwanted effects on the environment."⁴



¹ U.S. Cong. Office of Tech. Assessment, Trade and Environment: Conflicts and Opportunities 40 (1992); G. Fredriksson & Daniel L. Millimet, *Is There a Race to the Bottom in Environmental Policies?: The Effects of NAFTA*, in Commission for Environmental Cooperation of North America, *The Environmental Effects of Free Trade* 241, 245 (2002).

² SCOTT VAUGHAN & GREG BLOCK, COMM'N FOR ENV'TL COOPERATION: THE PICTURE BECOMES CLEARER 26 (2002).

³ KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 2 (2004); CEC, UNDERSTANDING AND ANTICIPATING ENVIRONMENTAL CHANGE IN NORTH AMERICA: BUILDING BLOCKS FOR BETTER PUBLIC POLICY 20-22, 35-36 (2003).

⁴ World Bank, *Trade, Global Policy, and the Environment*, at 1 (Discussion Paper No. 402, 1999) (prepared by Per G. Fredriksson).

Moreover, the Government Accountability Office (GAO) and others have concluded that the time to leverage environmental benefits and make improvements to laws and institutions in order to avoid adverse environmental impacts is *before* the FTA is signed.⁵ A GAO review of four U.S. FTAs reported that “implementation of environmental laws [in Chile, Jordan, Morocco, and Singapore] ... continues to be a challenge” and that “[s]ome of the challenges were common across these partners, such as weaknesses in their government institutions implementing environmental laws and regulations.”⁶ Even though the pre-FTA environmental review of Chile showed concerns relating to mining, fishing, forestry, agriculture, and environmental enforcement, the United States did not require improvements prior to entry into force of the agreement and the commission subsequently established under the United States–Chile Environmental Cooperation Agreement (ECA) has failed to incorporate these sectors as a priority for cooperation.

While one should not expect FTAs and the environmental cooperation agreements negotiated as part of FTAs to cure a trading partner’s environmental problems, where the FTA may exacerbate or create certain environmental problems, the United States should ensure that the proper laws and institutions are in place to avoid those problems. With these lessons in mind, we urge the Office of the Trade Representative (USTR) to propose the following elements in any trade promotion authority it forwards to Congress to ensure that FTAs improve trade-environment linkages:

1. **“Country Readiness.”** Prior to the adoption of any FTA, the USTR, in consultation with relevant agencies, should evaluate the institutional and legal capacity of the prospective trading partner. Where problems exist, those problems must be resolved before the United States adopts the FTA. This assessment can be done in the context of assessing a country’s readiness to enter into an FTA with the United States.
2. **Environmental Impact Assessment.** To inform and assist with the evaluation of a country’s institutional and legal capacity, the United States should assess the potential environmental impacts of an FTA on the prospective trading partner. Executive Order 13,141 directs agencies to assess only the impacts of FTAs in the United States and, as appropriate, global and transboundary impacts. As the GAO concluded, “the environmental reviews we examined for [four] FTAs do not provide in-depth or comprehensive descriptions of the myriad environmental challenges faced by FTA partners.”⁷ This must change to minimize trade’s environmental impacts.
3. **Post-Implementation Impact Monitoring.** Once the FTA is in effect, the United States should evaluate the environmental impacts of the FTA to determine whether any adjustments should be made to (a) the FTA’s core trade obligations; (b) legislation, institutions, and institutional structures needed to implement the FTA; and (c) the type and amount of capacity building given to U.S. trading partners. Ideally, these evaluations would be done through an international or independent body, as the CEC has done for NAFTA.
4. **Multilateral Environmental Agreements.** The carefully crafted trade restrictions in multilateral environmental agreements (MEAs) such as the Montreal Protocol have been an important reason why these MEAs have succeeded in achieving their environmental goals. For that reason, we urge the United States to include provisions in the TPP and future FTAs that exempt trade restrictions in MEAs from trade challenges. We also urge the inclusion of provisions, as in Article 18.2 of the U.S.–Peru FTA, that require FTA parties to implement their MEA obligations.

⁵ See, e.g., Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 *Envtl. L.* 501, 526 (2003).

⁶ GOV’T ACCOUNTABILITY OFFICE, NO GAO-09-439, INTERNATIONAL TRADE: FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN 54–58 (2009). The four FTAs reviewed were Chile, Jordan, Morocco, and Singapore.

⁷ GAO, *supra* note 2, at 59.

- 5. Citizen Submissions on Environmental Matters.** The United States has included a submission process for citizens to allege that a trading partner is failing to effectively enforce its environmental law in the NAAEC and FTAs with Colombia, Panama, Peru and CAFTA–DR. Most commentators believe that these citizen submissions provide a valuable means for citizens to communicate their concerns regarding enforcement of environmental law. However, they also agree that the processes have become highly politicized and far less useful and effective than originally intended, largely because of the interference of governments in determining the scope of the factual record and the lack of any post-submission remedy or monitoring to determine whether enforcement has improved.⁸ We urge the United States to continue including these citizen submission processes in trade agreements, and to ensure that a secretariat or other body has the independence to determine the scope of the factual record and a monitoring mechanism is included in the process.

In addition, more transparent dispute settlement and more representative trade advisory committees could help the public understand the benefits of liberalized trade. State-to-State trade dispute settlement and investor-State arbitration have always been subject to confidential proceedings, except in very limited circumstances. The secrecy that shrouds trade dispute settlement does nothing to convince citizens that trade is beneficial to them. Moreover, these closed-door policies only fuel public suspicion that governments, through trade agreements, have something to hide that they do not want citizens to see. This lack of accountability delegitimizes decisions regardless of the careful scrutiny that panel members may give a dispute. There is no valid public policy reason for keeping trade dispute settlements confidential.

Similarly, members of Congress and trade advisory committees have complained that they have had little or no access to actual U.S. negotiating positions prior to or during U.S. negotiations of FTAs.⁹ Effective and meaningful communication with Congress is an essential aspect of the Constitutional compromise at the heart of trade promotion authority. Environmental and other members of the Trade and Environment Policy Advisory Committee (TEPAC) and other committees are likely to make valuable contributions to the U.S. negotiating position if given the chance. Again, the failure to allow meaningful participation sends a message to the public that trade must be “bad” if trade policymakers are not willing to be transparent in their dealings with Congress and other experts.

For these reasons, we make the following three additional recommendations for USTR to propose to Congress in any trade promotion authority:

- 1. Transparent Dispute Settlement.** We urge the United States to make all dispute settlement in both State-to-State and investor-State disputes subject to open, public hearings in which all documents are made public.
- 2. Representative Trade Advisory Committees.** We urge to the United States to provide Congress and TEPAC with meaningful opportunities to contribute to the U.S. position. Moreover, environmental and other public-interest representatives have been woefully underrepresented on trade committees. Trade promotion legislation should increase the number of such representatives on the TEPAC, the Advisory Committee for Trade Policy and Negotiations, and other trade advisory committees.

⁸ See, e.g., Joint Public Advisory Committee, Advice to Council No: 11-04 (Dec. 7, 2011); U.S. National Advisory Council, Advice 2007-7 (Nov. 19, 2007); Joint Public Advisory Committee, Advice to Council No. 03-05, Dec. 17, 2003.

⁹ GAO, No. GAO-08-59, International Trade: An Analysis of free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority 29, 42 (2007); The Trade Advisory Committee System: Hearing before the Subcomm. on Trade of the H. Comm. on Ways and Means, 111th Cong. 5 (2009) (statement of Daniel B. Magraw, Jr. President, Center for International Environmental Law).

- 3. International Institutions.** Recent agreements lack an international organization with a dedicated secretariat and sources of funding, as well as a joint public advisory committee. We believe that the secretariat and funding have been crucial not only to the CEC's citizen submissions process, but also to the success of the CEC's intergovernmental programs. In addition, the CEC's Joint Public Advisory Committee has provided a tangible example of transparency in the trade-environment field and has helped ensure the independence of the submissions process. We urge the United States to include an independent secretariat as part of any FTA package, including a dedicated source of funding and a joint public advisory committee.

While FTAs can result in both environmental benefits and harms, carefully crafted trade promotion authority legislation can ensure that the environmental benefits are maximized and the harms minimized. We believe our recommendations provide a means to do just that.

Respectfully,

John H. Knox
Member Scholar,
Center for Progressive Reform
Professor of Law,
Wake Forest University

Chris Wold
Member Scholar,
Center for Progressive Reform
Professor of Law,
Lewis & Clark College of Law

David Hunter
Member Scholar,
Center for Progressive Reform
Professor of Law, American University
Washington College of Law

Carmen G. Gonzalez
Member Scholar,
Center for Progressive Reform
Professor of Law,
Seattle University School of Law

cc: Representative Dave Camp, Chairman, House Ways and Means Committee