

U.S. House of Representatives Committee on Ways & Means

Minority Staff Report 114th Congress



November 17, 2015

TPP Issue Analysis: Environment Chapter

In 2007, in what has become known as the “May 10th Agreement,” four pending trade agreements (Colombia, Panama, Peru, and Korea) were changed to provide strong environmental provisions. These provisions crafted by House Democrats and accepted by the Bush Administration were fully enforceable through the dispute settlement mechanism just like all other provisions in the agreement.

Specifically, those four trade agreements contain important substantive obligations: Seven core multilateral environmental agreements (MEAs), including the Convention on International Trade in Endangered Species (CITES), became directly enforceable through the agreement.¹ Parties also committed to enforce their environmental laws and to not waive or derogate from those laws for

¹ See, e.g. U.S.-Peru Trade Promotion Agreement (Peru FTA), Article 18.2. A breach occurs if a party “has failed to adopt, maintain, or implement laws, regulations, or other measures to fulfill an obligation under a covered agreement in a manner affecting trade or investment between the Parties.” See Article 18.2, footnote 2.

the purpose of promoting trade and investment.² The agreement with Peru included an annex specific to forestry sector governance, given the particular concerns about deforestation and illegal harvesting of, and trade in, timber from the Amazon.³

This paper outlines the key principles of the May 10th Agreement and explains how the TPP environment chapter compares to it. A preliminary analysis of the chapter indicates that the TPP parties have accepted some aspects of the May 10th Agreement, such as the full incorporation of CITES and dispute settlement, while not accepting others, such as making the other six MEAs directly enforceable through the agreement. There are provisions that cover the same subject matter as the other six MEAs, but through different commitments, many of which are weaker than having the six MEAs directly enforceable through the agreement. On the other hand, the TPP contains new provisions that go beyond the seven MEAs (e.g., a prohibition on certain fishing subsidies, and conservation provisions that go beyond CITES).

The question is how to weigh the chapter as a whole when there are both new provisions and deficiencies as compared to the May 10th Agreement. In addition, some stakeholders have expressed concerns that, regardless of the strength and *enforceability* of the TPP environmental obligations, those obligations may not be *enforced*. This concern is also an important subject for discussion.

The May 10th Agreement

Multilateral Environmental Agreements (MEAs)

- Under the May 10th Agreement, parties to the agreements had to “adopt, maintain, and implement” measures to fulfill the obligations under seven MEAs. Incorporating MEAs into the text of our trade agreements, and making them fully enforceable, effectively gives these MEAs “teeth” because, under the normal dispute settlement mechanism of our trade agreements, a violation of an obligation can result in the imposition of additional import duties or other countermeasures. While some of the MEAs have dispute settlement mechanisms, there has been a longstanding concern that those mechanisms are not adequate. The parties to the trade agreements (South Korea, Peru, Colombia, Panama, and the United States) were also parties to the MEAs.
 - *The Convention on Trade in Endangered Species (CITES)*: CITES governs trade in certain endangered species and contains binding provisions. For example, Articles III, IV, and V “require” export permits as a condition of export from any of the signatories and set out mandatory conditions for the issuance of any such permit.
 - *Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)*: The Montreal Protocol governs consumption and production of, and trade in, substances that deplete the ozone layer and contains binding provisions. For example, Article 2A requires each party to “ensure” that it “does not exceed” its calculated levels of consumption and production.

² Peru FTA, Article 18.3.2.

³ Peru FTA, Annex 18.3.4.

- *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL)*: MARPOL governs pollution resulting from ships and contains strong obligations. Specifically, under Article 1 signatories “undertake to give effect” to the obligations in MARPOL and its annexes. Article 4 provides that any “violation of the requirements of the . . . Convention shall be prohibited”
- *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (RAMSAR)*: RAMSAR governs wetlands. Under Article 2.1, each signatory must designate “suitable wetlands” within its territory, and under Article 2.4 must designate at least one in order to be a signatory to the agreement. Under Article 4.2, if a signatory shrinks a wetland designated under RAMSAR, it “should as far as possible compensate” by creating other wetlands. In addition, under Article 4.1, each signatory “shall promote” conservation of wetlands and waterfowl by establishing nature reserves on wetlands. In general, the obligations under RAMSAR are not as strong as the obligations under the other MEAs.
- *Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC)*: The treaty establishes a commission, and the commission sets out measures governing fishing of yellowfin, bigeye, and skipjack tuna.⁴ These limits include a moratorium for certain periods of time,⁵ as well as quotas.⁶ These obligations are strong. For example, with respect to the moratorium, signatories must “take the legal and administrative measures necessary to implement” the moratorium, inform interested parties, and inform the Commission that the steps have been taken.⁷
- *Convention on the Conservation of Antarctic Marine Living Resources (CAMLR)*: CAMLR establishes a regional marine management organization covering the Antarctic. It covers “fin fish, mollusks, crustaceans and all other species of living organisms, including birds”⁸ As with the IATTC, CAMLR establishes a commission. The commission adopts conservation measures, which “shall be implemented” by the signatories and provides that such measures “shall become binding” barring notification to the contrary.⁹ The conservation measures range from marking of fishing vessels,¹⁰ to port inspections,¹¹ to catch documentation.¹²
- *International Convention for the Regulation of Whaling (International Whaling Convention)*: Among other obligations, the Whaling Convention imposes a moratorium on commercial whaling. It provides that “the killing for commercial

⁴ See, e.g., IATTC Resolution C-13-01, paragraph 1.

⁵ See, e.g., IATTC Resolution C-13-01, paragraph 3.

⁶ See, e.g., IAATC Resolution C-13-01, paragraphs 9 and 11.

⁷ See, e.g., IAATC Resolution C-13-01, paragraph 8.

⁸ Article I.2.

⁹ Article IX.6.

¹⁰ Conservation Measure 10-01 (2014).

¹¹ Conservation Measure 10-03 (2014).

¹² Conservation Measure 10-05 (2014).

purposes of whales, except minke whales using the cold grenade harpoon, shall be forbidden”¹³

Non-Derogation

- Agreements prior to the May 10th Agreement included an obligation for parties to “strive” to ensure that it does not waive or derogate from their environmental laws in a manner that weakens or reduces the protections afforded in those laws for the purpose of encouraging trade or investment.¹⁴ The May 10th Agreement strengthened that provision, eliminating the aspirational obligation of “striving” and instead stating that a party “shall not waive or derogate”¹⁵ and, as discussed below, made it enforceable through the same dispute settlement mechanism as the other agreement chapters. Thus, this obligation takes on much more significance in the May 10th Agreement.¹⁶

Enforcement of Environmental Laws and Exercise of Prosecutorial Discretion

- Prior to the May 10th Agreement, provisions in the environment chapters required parties to “enforce its environmental laws” (regardless of how strong or weak those laws were).¹⁷ But those chapters also recognized that parties could exercise prosecutorial discretion, and that such decisions would not constitute a breach of any of the provisions of the chapter as long as a “course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.”¹⁸
- The May 10th Agreement retained the “enforce your own laws” requirement but altered the prosecutorial discretion standard. While parties retain prosecutorial discretion, that exercise of discretion is permitted “where a course of action or inaction reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources.”¹⁹ Thus, rather than the alternatives of having the course of action be reasonable, *or* the allocation of resources to be *bona fide*, the May 10th Agreement required either decision – the course of action or the allocation of resources – to be both reasonable and *bona fide*. It also required the decisions to be articulable.

Dispute Settlement

¹³ Article III.6, Schedule to International Convention for the Regulation of Whaling.

¹⁴ See, e.g., U.S.-Chile FTA, Article 19.2.

¹⁵ See, e.g., Peru FTA, Article 18.3.2.

¹⁶ Indeed, when Peru changed its environmental laws, a group of non-governmental organizations contended that Peru has breached Article 18.3.2 of the Peru FTA. See March 2, 2015 letter from nine NGOs to Ambassador Froman requesting that the United States initiate consultations with Peru.

<https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Letter%20re-%20Action%20on%20Peruvian%20Law%2030230.pdf>

¹⁷ See, e.g., U.S.-Chile FTA, Article 19.2.

¹⁸ See, e.g., U.S.-Chile FTA, Article 19.2.

¹⁹ See, e.g., U.S.-Peru FTA Article 18.3.1.b.i.

- The May 10th Agreement made the environment chapter subject to the same dispute settlement provisions as other FTA chapters.²⁰

TPP

MEAs

- Contrary to press reports,²¹ the final TPP environment chapter does not make all of the May 10th Agreement MEAs directly enforceable through the agreement, even for the TPP parties that are signatories to them.²² That is true for one of the seven MEAs: CITES.²³ The obligations for the subjects covered by the other MEAs are handled differently for each one.
 - *Montreal Protocol*. The environment chapter provides that “each Party shall take measures to control production and consumption of, and trade in” substances that can “significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment.”²⁴ A footnote to the provision indicates that Parties have complied with this requirement by adopting laws that implement the Montreal Protocol.²⁵ While this is not the “adopt, maintain and implement” language of the May 10th Agreement, it may result in the same level of protection. The laws referenced in the footnote do, according to the Administration, implement the obligations under the Montreal Protocol, and if so, then the TPP parties will already have adopted and implemented those obligations. As discussed below, the chapter also contains a non-derogation clause, as well as a cause of action for a party’s failure to enforce its laws. Thus, if a party fails to “maintain” the laws implementing the Montreal Protocol, or its fails to enforce those laws, then the party is in breach of its obligations under the agreement.
 - *MARPOL*. MARPOL is handled in a fashion similar to Montreal Protocol. The chapter provides that “each Party shall take measures to prevent the pollution of the marine environment from ships.”²⁶ A footnote to the provision indicates that Parties have complied with its requirement by adopting laws that implement

²⁰ Compare, for example, the U.S.-Chile FTA, Article 22.16, where dispute settlement for the labor and environment chapters is subject to different sanctions than for the other chapters.

²¹ See, for example, “Environmentalists Praise Wildlife Measures in Trans-Pacific Trade Pact”, New York Times, October 6, 2015, http://www.nytimes.com/2015/10/06/business/environmentalists-praise-wildlife-measures-in-trans-pacific-trade-pact.html?_r=0 (stating that the TPP text from the Atlanta round includes a requirement that the parties abide by the May 10 MEAs). The article also stated that the TPP Agreement included “new enforcement methods,” but those methods (i.e., enforcing MEAs through trade agreement dispute settlement mechanisms) are part of the May 10 Agreement.

²² Section 102(b)(10)(A)(i) of the Congressional Trade Priorities and Accountability Act sets out as a negotiating objective the inclusion of the MEAs, as well as other common multilateral environmental agreements.

²³ Article 20.19.2.

The list of MEAs, along with their formal and informal names, can be found at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf

²⁴ Article 20.5.1.

²⁵ Footnote 4.

²⁶ Article 20.6.1.

MARPOL.²⁷ Similar to the analysis with respect to the Montreal Protocol, these provisions are not identical to the May 10th Agreement but arguably deliver the same opportunities for enforcement.

- *RAMSAR/Wetlands*. The TPP chapter requires each Party to commit to “take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, such as wetlands.”²⁸ As noted above, RAMSAR’s obligations are relatively weak (e.g., “take appropriate measures”) and limited in nature; to participate, a signatory must designate at least one wetland, and must otherwise designate “suitable” wetlands. A signatory must also promote conservation of wetlands by establishing nature reserves on wetlands.

The obligations in TPP are comparable to, if not stronger than, RAMSAR. Parties must take measures to protect and conserve at-risk wild flora and fauna, including by conserving the integrity of wetlands. The obligation to “take measures to protect and conserve” certainly leaves leeway for parties to adopt policies of varying strength – the obligation is not to protect and conserve, but to take measures to protect and conserve. A party can take measures that are for the purpose of protecting and conserving without necessarily resulting in protection or conservation. At the same time, the RAMSAR obligations are themselves not as strong as those in other MEAs. Therefore, the TPP provision on wetlands is arguably equivalent to, or perhaps even superior to, RAMSAR.

- *IATTC*. The IATTC is not referenced in the agreement. There is a requirement for parties to “seek to operate a fisheries management system that regulates marine wild capture fishing and that is designed to . . . prevent overfishing and overcapacity, to reduce bycatch . . . and to promote the recovery of overfished stocks.”²⁹ That system must be “based on” the best scientific evidence available and internationally recognized best practices. However, the provision does not require Parties actually to operate that system; instead, they must “seek to” operate that system. By contrast, the IATTC imposes binding catch limits that include seasonal bans on fishing certain species of tuna, as well as quotas during other times of the year.

There is a valid argument that not all TPP parties are signatories to the IATTC and that this provision is therefore broader than the IATTC. Moreover, the provision covers more than tuna and more than the limited region of the IATTC – it covers all fish subject to a regional fisheries management system, and it applies to a party’s system no matter where located. While the scope is indeed broader, the obligations are weaker. The strength of the obligations could have been maintained by having

²⁷ Footnote 7.

²⁸ Article 20.17.4(a).

²⁹ Article 20.16.3.

them be applicable with respect to those regional fisheries management organizations to which each TPP party is a signatory.³⁰

- *CAMLR*: CAMLR is not referenced in the agreement. The agreement includes the provisions described above, *i.e.*, an obligation to “seek to operate a fisheries management system” It does not include the conservation measures CAMLR has adopted to protect Antarctic marine life, such as mandatory provisions on vessel marking, port inspections, or catch documentation. There are provisions elsewhere in the chapter that relate to port measures and illegal fishing. These include an obligation to “implement port state measures”³¹ without specifying what those port state measures are, as well as an obligation to “support” monitoring and enforcement systems including measures to “deter” flag vessels from engaging in illegal fishing.³²

In addition, CAMLR contains a range of binding obligations that protect more than just fish – mollusks and seabirds, for example. The TPP chapter requires that, beyond fisheries management, parties “promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals.”³³ The provision goes on to state that conservation measures “should include, as appropriate . . . conservation measures in accordance with relevant international agreements” Therefore, a TPP party that is also a signatory to CAMLR has an obligation to implement CAMLR, but that obligation is advisory (“should”), rather than mandatory (“shall”). Under the May 10th Agreement, the obligation was mandatory.

As with the IATTC, there is a valid argument that not all TPP parties are signatories to CAMLR and that this provision is therefore broader than the CAMLR. Moreover, the provision covers more than the Antarctic – it covers all regional fisheries management systems regardless of location. As with the IATTC, the obligations in TPP could have been structured in a way that maintained the strength of the obligations in CAMLR.

- *Whaling*: As noted above, the chapter provides that each Party “shall promote the long-term conservation of . . . marine mammals, through the implementation and effective enforcement of conservation and management measures.”³⁴ It then lists what those measures “should include, as appropriate.” The anchoring obligation is

³⁰ Moreover, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 sets out a negotiating objective that contemplates inclusion of common MEAs, even if not every party to the negotiation is a signatory. Section 111(6) provides that: “The term ‘common multilateral environmental agreement’ means any agreement specified in subparagraph (B) or included under subparagraph (C) to which **both the United States and one or more other parties to the negotiations are full parties**, including any current or future mutually agreed upon protocols, amendments, annexes, or adjustments to such an agreement.” (Emphasis added). The objective does not require that *all* parties be signatories to the MEA in question, but rather than “one or more” of the parties be signatories to the MEA.

³¹ Article 20.16.14(c).

³² Article 20.16.14(b).

³³ Article 20.16.4.

³⁴ Article 20.16.4.

to “promote” long-term conservation, in contrast to the Whaling Convention, which bans commercial whaling.

New Environmental Provisions

There are also several new provisions in TPP, which were not part of the May 10th Agreement:

- *Fish subsidies.* The chapter prohibits fish subsidies that “negatively affect fish stocks that are in an overfished condition.”³⁵ While subsidies, including fish subsidies, can be challenged at the WTO, there must be some evidence of harm to the *industry*. Here, no harm to the industry must be shown: instead, the harm in question is to the stocks – that is, whether the subsidies will negatively affect those stocks. There are also disciplines on subsidies to vessels engaged in illegal fishing. WTO Members have been debating similar provisions but were not able to reach agreement on them. The inclusion of this provision in TPP is an important step forward.
- *Wildlife and timber trafficking.* As noted above, the chapter makes CITES fully enforceable. While CITES is limited to certain species, the chapter contains an additional provision that affords protection to all wild species that are illegally taken and traded. Specifically, the chapter requires Parties to “take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party’s law or another applicable law”³⁶ These measures “shall include sanctions, penalties, or other effective measures . . . that can act as a deterrent to such trade.”³⁷ (Although statements have been made indicating that this is the first agreement to address deforestation, it should be noted that not only does CITES (which was part of the May 10th Agreement) cover trade in endangered species of wood, but the U.S.-Peru trade agreement had an entire annex devoted to forest governance.³⁸)

The United States had initially sought a prohibition on trade in these goods.³⁹ A prohibition on trade in these goods would be reflected, for example, as a ban on imports or exports of these goods. A party can arguably “combat” trade in these goods through measures short of a prohibition.⁴⁰

However, the language requiring sanctions, penalties, or other effective measures bolsters that obligation. It means that whatever measures are taken to combat illegal take and trade must be backed up with sanctions, penalties, or other effective measures. The

³⁵ Article 20.16.5.

³⁶ Article 20.17.5.

³⁷ Article 20.17.5.

³⁸ Peru FTA, Annex 18.3.4. Peru has acknowledged that it has not fully implemented its obligations under the Annex. See, e.g., page 77 of http://issuu.com/embassyofperuintheusa/docs/peru-us_tpa_forestry_annex_compliance

³⁹ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership>

⁴⁰ Section 1(b) of the President’s Executive Order on wildlife trafficking (EO 13648) includes the following instruction to Executive Branch officials: “the United States shall promote and encourage the development and enforcement by foreign nations of **effective laws to prohibit** the illegal taking of, and trade in, these species and to prosecute those who engage in wildlife trafficking, including by building capacity” (Emphasis added).

downside to the sanctions language is that these measures need not actually act as a deterrent but rather “can” – in theory – act as a deterrent.

There is an additional paragraph of concern, providing for prosecutorial discretion.⁴¹ The chapter already includes an overarching provision providing for prosecutorial discretion.⁴² The fact that the new conservation language contains a restatement of that discretion suggests a further weakening of the obligation to combat wildlife trafficking.

Finally, in connection with this provision, the United States reached a bilateral agreement with Peru that states that “Peru will stop the illegal shipment entering its territory on the basis of [an official] communication” from another Party’s government.⁴³ Thus, a Peruvian border official could be aware that an import has been illegally harvested, yet would not be obligated to stop the import absent a communication from another TPP party.

- *Climate change.* The chapter includes provisions requiring cooperation with respect to matters relating to the transition to a low-emissions economy.⁴⁴
- *Sharks, turtles, seabirds, and marine mammals.* This is the same provision that covers whales, discussed above with respect to the Whaling Convention. As it also covers seabirds, it was discussed as well with respect to CAMLR. (See pages 6-7 above.) The provision requires promotion of long-term conservation of these species. In addition, it should be noted that the agreement does not actually ban shark-finning.
- *Illegal fishing.* The chapter requires parties to adopt “measures to deter” flag vessels and nationals of a party from engaging in illegal fishing and to “address the transshipment at sea of [illegally harvested] fish or fish products”⁴⁵ Requiring a party to take “measures to deter” is not the same as requiring a party “to deter” flag vessels from engaging in illegal fishing. A party can arguably adopt a measure with the goal of deterring flag vessels, but that measure need not necessarily be particularly effective. The same can be said for “measures to address” transshipment.

The chapter also requires parties to implement port state measures (though not the 2009 Port State Measures Agreement). There are additional provisions that require parties to “cooperate,” “strive,” and “endeavour.” Although press reports imply that the agreement will make a radical difference in addressing illegal fishing,⁴⁶ the language of the provisions does not appear to support such a

⁴¹ Article 20.17.6.

⁴² See Article 20.3.5.

⁴³ Bilateral Understanding between the U.S. and Peru on Conservation and Trade.

⁴⁴ Article 20.15.

⁴⁵ The obligations have been described as requiring parties to “implement measures” to combat illegal fishing, including inspections and seizures at ports and monitoring, surveillance, and enforcement systems to curb trade in pirated fish. The actual obligation in the chapter is “support” for monitoring, surveillance, and enforcement systems. Parties do not actually have to implement inspections and seizures at ports.

⁴⁶ A recent essay in support of the TPP environment chapter by former USTR Zoellick stated: “Rough estimates by leading scientists suggest that illegal, unreported and unregulated fishing costs legitimate fishermen \$10 billion to \$23 billion annually, and at least \$6 billion in the Asia-Pacific region. By a wide margin, the U.S. and Japan are the

strong position. Moreover, as CAMLR makes clear, there are agreements that impose binding measures across a range of issues – marking vessels, requiring catch documentation, requiring port enforcement – to address the scourge of illegal fishing.⁴⁷

Non-Derogation

- The TPP text includes the obligation not to derogate from environmental laws to attract trade and investment. However, it includes a condition that the May 10th Agreement did not: it states that the non-derogation obligation is “without prejudice” to each party’s right to establish its own levels of environmental protections and to modify its policies accordingly.⁴⁸ It is not clear why this “without prejudice” clause was added. However, one interpretation is that the right to establish one’s own levels of protection trumps the obligation not to waive or derogate from those laws. Such an interpretation would, however, nullify the non-derogation obligation, an outcome not permitted by standard principles of treaty interpretation.⁴⁹ But it should not be interpreted to mean that the right to set environmental protections trumps the obligation not to derogate from environmental laws to attract trade and investment. To interpret the provision that way would render the non-derogation language meaningless.
- The TPP text does not include a May 10th Agreement provision clarifying that a party is not waiving an environmental law if the law itself provides for such waivers.⁵⁰ This appears to strengthen environmental protections under the agreement.

Enforcement of Environmental Laws and Exercise of Prosecutorial Discretion

- TPP requires parties to enforce their environmental laws but reverts to the pre-May 10th Agreement standard on prosecutorial discretion. That is, rather than requiring a course of action and the allocation of resources to be (1) reasonable; (2) *bona fide*; and (3) articulable, TPP only requires that the “course of action or inaction reflects a reasonable exercise of . . . discretion or results from a *bona fide* allocation of resources.”⁵¹

top importers of seafood. Yet a recent study in the Journal of Marine Policy estimates that 20% to 30% of U.S. seafood imports are caught illegally.” <http://www.wsj.com/articles/how-the-pacific-trade-pact-could-feed-a-hungry-planet-1436482280>. While the scope of the problem described is accurate, the TPP’s mandatory provisions in regards to curb illegal fishing are limited in nature.

⁴⁷ The TPP illegal fishing commitments have been described as “pioneering”. However, TPP’s illegal fishing commitments do not appear to be as strong as the commitments in CAMLR, as described above. CAMLR is enforceable through our FTAs with Korea, Panama, Colombia, and Peru.

⁴⁸ Article 20.3.6.

⁴⁹ See, e.g., Article 32(b) of the Vienna Convention on the Law of Treaties (avoiding interpretations that are “manifestly absurd or unreasonable.”) Tribunals have also recognized that provisions of an agreement should not be interpreted so as to render other provisions of the agreement “inutile”.

⁵⁰ See, e.g., U.S. Peru FTA Article 18.3.3. The language in this provision addresses concerns expressed by Senator Phil Gramm during debate over the U.S.-Jordan FTA that the Clean Air Act could be found inconsistent with our obligations under that FTA because the Clean Air Act authorizes the granting of waivers. Congressional Record, September 24, 2001, p. S9686.

⁵¹ TPP, Article 20.3.5.

- This language makes it more difficult to challenge a party’s failure to enforce its own laws. Under the May 10th Agreement standard, a complaining party could prevail by proving one of three elements: that the exercise of discretion was either not reasonable, not *bona fide*, or not articulable. Under the TPP chapter, the exercise of discretion can be reasonable but not *bona fide or* articulable, or the allocation of resources could be *bona fide* but not reasonable or articulable.⁵²

Dispute Settlement

- As with the May 10th Agreement, the TPP environment chapter is subject to the same dispute settlement provisions as the other chapters in the agreement.

⁵² Section 102(b)(10) of The Bipartisan Congressional Trade Priorities and Accountability Act sets out as a negotiating objective that “with respect to environment, parties to a trade agreement retain the right to exercise prosecutorial discretion and to make decisions regarding the allocation of enforcement resources with respect to other environmental laws determined to have higher priorities, and a party is effectively enforcing its laws if a course of action or inaction reflects a reasonable, bona fide exercise of such discretion, or results from a reasonable, bona fide decision regarding the allocation of resources.” Thus, TPA requires that decisions be both reasonable *and* bona fide. That is consistent with May 10 (although May 10 also required that the decisions be articulable).