

The TPP, the Environment, and Implications for Developing Countries

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The Trans-Pacific Partnership (TPP) arguably contains the highest level environmental provisions ever agreed in a regional trade agreement (RTA). Its scope is ambitious and covers areas that did not exist in previous free trade agreement (FTAs) subscribed to by the US and many of the other 11 participating nations, particularly in relation to certain marine environment protection measures. The TPP [contains](#) environmental-related provisions in a specific [environment chapter](#), but also in other relevant chapters such as those on investment, technical regulations to trade, and intellectual property.

In general terms, the environmental chapter aims at promoting mutually supportive trade and environmental policies, higher levels of environmental protection, and effective enforcement of environmental law. It also seeks to enhance capacities on trade-related environmental issues through cooperation. The environmental chapter includes a soft reaffirmation of [Principle 12](#) in the UN's 1992 seminal Rio Declaration on Environment and Development when indicating that environmental laws and other measures should not be established or used in a manner which would constitute a disguised restriction on trade and investment, and mention of the sustainable management of resources, as [enshrined](#) in Preamble of the Marrakech Agreement that created the WTO. The TPP environment chapter, however, does contain a variety of legal formulations that go from fully binding clauses to best endeavour. In some cases, there is only a simple recognition of the importance of particular environmental concern, implying that not all issues covered by the chapter are considered "hard law" obligations or enforceable.

The environment chapter establishes a consultation mechanism to address and resolve any matters raised by TPP parties. The mechanism includes the possibility of initiating consultations among parties, then senior representatives, and eventually at ministerial level. If these multi-stage consultations fail, parties have access to the broader TPP trade dispute settlement mechanism, which largely reflects the US' approach in other FTAs. Other significant traders such as the EU – not a party to the TPP – have not commonly linked the environmental provisions in trade deals to broader dispute settlement.

The right of governments to legislate and regulate in the public interest, including for public health and environment purposes, is reaffirmed in the TPP's [investment chapter](#). This is considered as positive to avoid "regulatory chilling" effects in the environmental field caused by excessive litigation, especially under investor-state dispute settlement (ISDS) arrangements. In the environment chapter, parties recognise the sovereign right of each participant to establish its own level of environmental protection, and their own environmental priorities. Nevertheless, the investment chapter does include prohibitions on certain "performance requirements" such as local content and technology localisation as a criteria for recognition of the investor status, which would affect the capacity of TPP parties to require the transfer of environmentally sound and climate technologies.

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Still another chapter on [technical barriers to trade](#) includes a series of annexes related to the regulation of specific products and sectors in order to promote common regulatory approaches. This could have an important impact on certain environmental and safety policies, administrative practices, and trade in some goods. These annexes tend to cover regulatory approval, assessment, and conformity procedures, verification, mutual recognition, and packaging of several products for direct human consumption such as certain foods, alcoholic drinks, food additives, cosmetics and organic agricultural products. Separate assessment on these implications may be needed.

Multilateral environmental agreements

The TPP includes a commitment by the parties to fulfil obligations under multilateral environmental agreement (MEAs) in which they participate, effectively enforce their own environmental laws, and not waive or derogate from these in order to promote trade or attract investment. No party shall fail in enforcing their environmental laws whether by action or inaction, such as through lack of resource allocation, or inexistence of relevant competent authority. However, while there is a need for improving compliance, the above mentioned principle is a quite ambitious and perhaps unrealistic at this stage due to historical low levels of environmental compliance in many TPP parties. Further, these obligations may have a big impact on developing country parties, given that the lack of implementing capacity, effective institutions, or insufficient resources may not be presented as an excuse for lack of compliance.

The environmental chapter requires parties to comply with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the International Convention for the Prevention of Pollution from Ships (MARPOL). Footnotes and accompanying annexes are included to clarify what constitutes compliance in the TPP context. None of these multilateral conventions is new and their practical application is considered as very positive to promote the protection of endangered species, the ozone layer, and marine ecosystems. Overall these commitments appear to go beyond ratification and legal development of obligations under national legislation and put an emphasis on practical application, monitoring, and enforcement. Parties shall also take measures to promote awareness of their own national environmental laws including procedures to investigate violations; availability of administrative, quasi-judicial and judicial procedures for enforcement; as well as appropriated sanctions and remedies. Opportunities for allowing consultations and public submissions regarding the implementation of the TPP environment chapter are provided for.

While some references are made to the importance of “low emission, resilient economies” and the conservation of biodiversity, no specific provision have been incorporated to ratify or apply the recent Paris Agreement under the UN Framework Convention on Climate Change (UNFCCC), or the Convention on Biological Diversity (CBD) and its Nagoya Protocol. It should be noted that the words “climate change” are not found anywhere in the environmental chapter. While this is consistent with political reservations or non-participation to these by some TPP parties, it suggests a “cherry picking” exercise around the most relevant or less controversial MEAs. Some critics consider the selection of MEAs in the TPP falls short on civil society expectations if compared to the seven MEAs identified by a 2007 US Congress bipartisan agreement as appropriate for inclusion in trade agreements.² Particularly regarding the CBD and the Nagoya Protocol, developing countries such as Mexico, Peru, Malaysia and Vietnam pushed for inclusion, but they could not overcome the resistance by US that has not yet subscribed the CBD. In compensation, however, some recognition of the importance of biodiversity conservation as well as appropriate access and benefit sharing (ABS) procedures around genetic resources can be found in the chapter. This is discussed in more detail below.

The treatment of marine resources

² CIEL (2015). The Transpacific Partnership Agreement and the Environment. See <http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf>

The TPP environmental chapter contains some landmark provisions related to the conservation of living marine resources. It should be noted that these provisions do not apply to aquaculture activities. These obligations are particularly important for international trade of fish products and sea food given that the parties include some of the world's largest consumers, producers, and traders of fish products. Fisheries management systems must be designed to prevent overfishing and overcapacity, reduce by-catch of non-targeted species, and promote recovery of overfished stocks. Management systems should also be based on best scientific evidence, recognised best practices, and international instruments listed in a footnote. Direct reference to multilateral UN instruments when setting fish management systems can make obligations under the TPP more precise and strengthen common interpretations over grey areas or legal vacuums.

Parties shall also establish measures for the long-term conservation for sharks, marine, turtles, seabirds, and marine mammals such as bycatch mitigation measures, conservation and relevant management measures, catch limits, and finning prohibitions. This obligation complements the protection of marine species covered by CITES and expands protection to non-covered marine species.

The TPP also contains novel provisions on the prohibition of certain type of fish subsidies. This is an area where advances in the WTO remain elusive. In this regard, the implementation of fish management systems must include the control of, reduction, and eventual elimination of all subsidies that contribute to over fishing and overcapacity. Accordingly, no party shall grant or maintain subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and subsidies provided to any vessels listed by the flag state or relevant regional fisheries management organisations (RFMOs) as being involved in illegal, unregulated and unreported (IUU) fishing. According to a footnote, "a fish stock is overfished if the stock is at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield or alternative reference points based on the best scientific evidence available. Fish stocks that are recognised as overfished by the national jurisdiction where the fishing is taking place or by a relevant regional fisheries management organisation shall also be considered overfished." The definition of overfishing under the TPP is therefore not linked to assessments made by the UN Food and Agriculture Organization (FAO), but rather to a "best scientific evidence" test, to national determinations by TPP parties, and determinations of relevant RFMOs.

The TPP also includes fisheries subsidy notification obligations and a best effort "stand still" provisions in relation to new or extending existing fisheries subsidies that contribute to overfishing or overcapacity. The political weight of the US, Australia, Canada, and New Zealand seems to have had a significant effect on Japan – home to one of the ocean's largest fleets and higher estimated level of subsidisation – to bring about outcomes that had previously seemed unachievable at the multilateral level. These are very important results for promoting global action on tackling fisheries subsidies and also to make progress towards achieving Sustainable Development Goal (SDG) 14.6. However, the TPP does not provide for any cross-cutting S&DT for developing nation participants in this area, with the exception of technical cooperation and a two year extension granted to Vietnam for the transition period to remove inconsistent subsidies.

The TPP also recognises the importance of concerted action against IUU fishing and requires parties to improve international cooperation in this regard including through competent international organisations. Parties should cooperate with each other to build capacity to support the implementation of the article on IUU. More specifically, parties must support monitoring, control and surveillance of IUU fishing and adopt measures to deter vessels flying its flag from engaging in IUU; address transshipments at sea; implement port state measures; and strive to act consistently with RFMOs conservation and management measures even if not a member.

All these obligations are based in the 2001 FAO IUU Fishing Plan of Action and other relevant FAO conventions and instruments. It might also prepare the entry into force of the FAO Port State Measures Agreement (2009) once the required numbers of ratifications are reached. Moreover, the commitments

can contribute to mainstreaming cooperation on fighting illegal fishing and transfers obligations to a more enforceable level, especially with regard to policies set by RFMOs. The main challenge for developing countries in the TPP will be having the necessary resources and technical capacity to fulfil these obligations. The level of risk when looking at the potential IUU fishing activities, capacity to implement effectively combative polices, and to monitor Economic Exclusive Zones (EEZs) greatly varies among nations, some being in better position than others to fulfil international, regional, or unilateral IUU standards. Many stakeholders are also concerned about diversity in national schemes to combat IUU and the trade effects over non-cooperative countries. The TPP includes a provision that may go some way towards helping assuage this issue by requiring parties, to the extent possible, to provide other parties with the opportunity to comment on proposed measures that are designed to prevent trade in fisheries products that result from IUU fishing.

Biodiversity and genetic resources

The TPP's environment chapter requires in general terms that parties promote and encourage the conservation and sustainable use of biodiversity and recognises the important of respecting and preserving traditional knowledge (TK). It also recognises that some parties require prior informed consent (PIC) and mutually agreed terms (MATs) for accessing genetic resources, including with respect to sharing the benefits from the use of such genetic resources between users and providers, but does not establish any further specific obligations. Such arrangements are covered at the multilateral level by the CBD and the Nagoya Protocol.

In many respects the TPP can be said to be quite weak on biodiversity. It only requires that each party make public information on their laws and measures concerning conservation and cooperation programmes related to the conservation and sustainable use of biodiversity. Exchange of information and experiences between TPP parties regarding conservation and sustainable use of biological resources, protection of ecosystems, and access to genetic resources and benefit-sharing (ABS) is also included. Clauses on cooperation and experience sharing are unlikely to have a strong effect on compared to efforts under the CBD and through the Nagoya Protocol.

The [intellectual property](#) chapter, however, does contain some useful defensive measures regarding the protection of TK. First, it calls for increased cooperation among IP officers to enhance understanding of issues connected with traditional knowledge associated with genetic resources. Second, it contains a specific provision seeking to improve patent quality examination to a certain extent by requiring the use relevant publicly available documented information related to TK associated with genetic resources in prior art determination; allowing an opportunity to third parties to cite in writing to the examining authority any prior art disclosures related to TK associated with genetic resources; making use of databases or digital libraries containing information relevant to TK associated with genetic resources; and training patent examiners on patent applications related to TK associated with genetic resources. These measures could help to avoid granting low quality patents directly based on TK or known properties of genetic resources. It does not, however, resolve problems relevant to illegal access to TK or genetic resources.

Possible implications for developing countries

The TPP's environment chapter will likely have mixed implications for developing country parties and non-parties. On the one hand, it raises the environmental regulatory bar, which may be welcomed in the constituencies of many developing countries and places a stronger focus on effective implementation and enforcement. The inclusion of an independent but also interlinked dispute settlement makes strengthens this emphasis. It will also have implications in terms of institutional, administrative, enforcement and, and legal defence terms and cost.

The type of MEAs covered is important, given the contribution developing economies can make to preserving biodiversity, species conservation, and ecosystem protection, as well as maintaining certain

public goods such as air or ocean quality. However, the absence of the UNFCCC, the CBD, and the Nagoya Protocol are notable. The offensive interests of many developing countries are important in these, particularly as relates to trade in biodiversity-based products and services. It can be frustrating for these nations when MEAs providing potential benefits or responding to their concerns become “controversial” in RTA negotiations. This is one aspect that needs to change in trade and environmental negotiations if more developed parties want to have real partnerships in the quest toward sustainable development.

Advances on prohibiting certain harmful fisheries subsidies and on measures to combat IUU fishing offers a significant precedent to the WTO and can contribute to the conservation of fish stocks in the Pacific Ocean with positive effects on TPP parties and non-parties. Obligations on the establishment or improvement of fish management systems are also a welcomed development. Lack of technical and financial capacity nevertheless remains unaddressed. The environment chapter has a special article on cooperation but subject to the availability of funds. Stronger links between obligations and technical cooperation and capacity building by developed parties in the TPP, especially in the form of a special cooperation funds, would have made the implementation task less complex and more effective.

MEAs and environmental regulations are now becoming a pillar of RTAs. It is possible that further FTA negotiations will increasingly seek to influence or shape national regulations. The negotiators seem somehow taking the role of "parliamentarians" but with less accountability as FTAs are increasingly taking regulatory functions among Parties. While most FTAs are finally approved by national legislatures, their capacity to influence outcomes is considered rather limited by some commentators. Finalised trade deals can often be presented in a “take it or leave it” format. The lack of transparency and inclusiveness of civil society stakeholders has been also criticised in the TPP process. Moreover, while RTAs can provide an avenue for regulatory convergence, this may not always go in the direction countries outside the agreement want to take. Balancing the interests of those participating in mega-regionals with the coherence of the trade system as a whole is certainly one challenge ahead in the emerging landscape.

S&DT did not make it into the TPP environment chapter. Lack of compliance is not always an issue of political will but of lack of capacity. Using the model of linking compliance with effective delivery of technical cooperation and capacity building as included in the WTO Trade Facilitation Agreement (TFA) would have been a more constructive approach. Policy space has also arguably been limited in certain cases such as the use of technology-related performance requirements. The new standards set by the TPP will not be easy to achieve. Most competitive sectors may survive and even prosper. Nevertheless, for smaller and weaker firms, fierce competition is expected and the capacity for states to assist these may be lessened. Whether or not this will result in net positive results, remains to be seen.