SCIENCE IN THE TPP

Professor Jacqueline Peel, Melbourne Law School

Abstract of presentation

In a globalized world of transnational, pervasive and often ‘invisible’ threats to health and the environment, science is essential to our understanding and treatment of risk. Since the conclusion of the Sanitary and Phytosanitary (SPS) Measures Agreement under the World Trade Organization (WTO), international trade and investment agreements have looked to science as a touchstone for determining ‘real’ risks that can form the basis of ‘legitimate’ regulatory measures. The Trans-Pacific Partnership (TPP) continues this trend, placing science and risk analysis at the centre of the agreement’s SPS disciplines. However, the role of science in the TPP is unlikely to be limited simply to SPS measures; there is also potential for science-based understandings of risk and legitimate regulation to extend into other areas of the TPP, such as the mechanisms on investor-state dispute settlement. Drawing on prior research on the use of science under the WTO SPS Agreement and in investor-state environmental arbitrations, this presentation will consider the role and understanding of science envisaged by the TPP, and potential consequences for the regulatory autonomy of TPP parties.

Scope for science-based decision-making in the TPP

Chapter 7 – Sanitary and Phytosanitary Measures

Equivalence determination – Article 7.8

6. The importing Party shall recognise the equivalence of a sanitary or phytosanitary measure if the exporting Party objectively demonstrates to the importing Party that the exporting Party’s measure:
(a) achieves the same level of protection as the importing Party’s measure; or
(b) has the same effect in achieving the objective as the importing Party’s measure.

[No party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for this subparagraph.]

Science and Risk Analysis – Article 7.9

2. Each Party shall ensure that its sanitary and phytosanitary measures either conform to the relevant international standards, guidelines or recommendations or, if its sanitary and phytosanitary measures do not conform to international standards, guidelines or recommendations, that they are based on documented and objective scientific evidence that is rationally related to the measures, while recognising the Parties’ obligations regarding assessment of risk under Article 5 of the SPS Agreement. [No party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for this paragraph.]

5. Each Party shall ensure that each risk assessment it conducts is appropriate to the circumstances of the risk at issue and takes into account reasonably available and relevant scientific data, including qualitative and quantitative information.
Emergency Measures – Article 7.14

1. If a Party adopts an emergency measure that is necessary for the protection of human, animal or plant life or health, the Party shall promptly notify the other Parties of that measure through the primary representative and the relevant contact point referred to in Article 7.6 (Competent Authorities and Contact Points). The Party that adopts the emergency measure shall take into consideration any information provided by other Parties in response to the notification.
2. If a Party adopts an emergency measure, it shall review the scientific basis of that measure within six months and make available the results of the review to any Party on request. If the emergency measure is maintained after the review, because the reason for its adoption remains, the Party should review the measure periodically.

An ‘emergency measure’ means a sanitary or phytosanitary measure that is applied by an importing Party to another Party to address an urgent problem of human, animal or plant life or health protection that arises or threatens to arise in the Party applying the measure.

Dispute Settlement – Article 7.18

2. In a dispute under this Chapter that involves scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the Parties involved in the dispute. To this end, the panel may, if it deems appropriate, establish an advisory technical experts group, or consult the relevant international standard setting organisations, at the request of either Party to the dispute or on its own initiative.

Chapter 9 – Investment

National Treatment/MFN – Articles 9.4 and 9.5: ‘like circumstances’

Minimum Standard of Treatment – Article 9.6: ‘fair and equitable treatment’

Expropriation and Compensation – Article 9.8

1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:
   (a) for a public purpose;
   (b) in a non-discriminatory manner;
   (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and
   (d) in accordance with due process of law.

Performance Requirements – Article 9.10

Exception to prohibition on domestic content requirements:
(d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; [GATT Art. XX(d)]
(ii) necessary to protect human, animal or plant life or health; or[GATT Art. XX(b)]
(iii) related to the conservation of living or non-living exhaustible natural resources. [GATT Art. XX(g)]

Investment and Environmental, Health and other Regulatory Objectives – Article 9.16

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Outline of presentation

Drawing on previous research on the use of science in (a) WTO SPS dispute settlement and (b) investor-state international environmental arbitrations [see attached materials], this presentation will address:

- the place of science in the TPP’s SPS Measures chapter;
- the potential for science-based understandings of risk and legitimate regulation to extend to other areas of the TPP, particularly under the Investment chapter; and
- different models for the use of science in dispute settlement under the TPP and their potential consequences for the regulatory autonomy of TPP parties.