Climate Change in the TPP

James Munro (World Trade Organization / Melbourne Law School) and Elizabeth Sheargold (Melbourne Law School)
Overview

• Climate-specific obligations in the TPP
  – ‘Low emissions and Resilient Economy’
  – Specific sectors of GHG emissions

• General environmental obligations in the TPP:
  – Not ‘weaken / derogate’ from existing standards;
  – Enforcement of environmental laws;
  – Multilateral environmental agreements.

• Environmental Goods and Services.
TPP Article 20.15: Transition to a Low Emissions and Resilient Economy:
1. The Parties acknowledge that transition to a low emissions economy requires collective action.
2. The Parties recognise that each Party’s actions to transition to a low emissions economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperation Frameworks), Parties shall cooperate to address matters of joint or common interest. Areas of cooperation may include, but are not limited to: energy efficiency; development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and nonmarket mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue. Further, the Parties shall, as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy.
Comparable Provisions (1)

EU – Korea FTA (2010), art 13.5.3:
The Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol. They commit to cooperating on the development of the future international climate change framework in accordance with the Bali Action Plan.

EU – Peru-Colombia FTA (2012):
• The parties ‘reaffirm their commitment to effectively implement in their laws and practices...the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997’ (art 270.2);
• Are ‘resolved to enhance their efforts regarding climate change’ (art 275.2);
• But also notes that efforts regarding climate change ‘...are led by developed countries... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, and taking particularly into account the needs, circumstances, and high vulnerability to the adverse effects of climate change of those Parties which are developing countries’ (art 275.2).
Comparable Provisions (2)

CETA Article 24.12.1(e)-(f): Commitment to cooperate on, *inter alia,*
...[T]rade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low carbon and other climate-friendly technologies...

...[T]rade and investment in environmental goods and services, including environmental and green technologies and practices, renewable energy, energy efficiency and water use, conservation and treatment...
Specific Sectors of GHG Emissions

Ozone depleting substances:
• TPP Article 20.5 requires parties to ‘take measures to control the production and consumption of, and trade in,’ ozone depleting substances.
  • Applies to substances regulated by the *Montreal Protocol*, many of which are also greenhouse gases that contribute to climate change (e.g. chlorofluorocarbons or CFCs).

Emissions from Maritime Transport:
• TPP Article 20.6 requires that ‘each Party shall take measures to prevent the pollution of the marine environment from ships’.
  • Applies to pollution covered by the MARPOL Convention.
  • Annex VI of the MARPOL Convention, which was added by a Protocol signed in 1997, covers air pollution from ships, including energy efficiency measures designed to reduce greenhouse gas emissions, as well as more detailed rules relating to emissions of sulphur oxides, nitrogen oxides, particulate matter and ozone depleting substances.
General Environmental Provisions (1)

• ‘Environmental laws’ are defined as statutes or regulations ‘the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health’, through various means, including ‘the prevention, abatement or control of: the release, discharge or emission of pollutants’. (TPP art 20.1 (definition of ‘environmental laws’))

• TPP intends to ‘promote high levels of environmental protection and effective enforcement of environmental laws’ (TPP art 20.2.1);

• But also TPP states that ‘it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties’ (TPP art 20.2.3);

• And yet, TPP recognises ‘the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.’ (TPP art 20.3.2).
TPP Article 20.3:
6. Without prejudice to [Article 20.3.2], the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.
Comparable Provisions

- **P4 Agreement** – ‘relax’ environmental laws to encourage trade or investment;

- **United States Peru - FTA** – shall not weaken / derogate, ‘in a manner affecting trade or investment’;

- **CETA** – very similar to the TPP, but without any reference to the relationship between this provision and the sovereign right of states to establish, adopt or modify environmental laws.
General Environmental Provisions (3)

Enforcement of environmental laws – TPP Article 20.3:
4. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties...
5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.
TPP Article 20.23 provides that:

• Before a party can bring a dispute alleging breach of Article 20.3.4 or 20.3.6, they ‘shall consider whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute.’
Obligations Regarding MEAs

TPP Article 20.4.1:
The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.
UNFCCC and the Paris Agreement

UNFCCC Article 4.1(b):
...[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change... and measures to facilitate adequate adaptation to climate change.

Paris Agreement, Article 4:
1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.
2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.
Trade in Environmental Goods /
Services

Article 20.18: Environmental Goods and Services
1. The Parties recognise the importance of trade and investment in environmental goods and services as a means of improving environmental and economic performance and addressing global environmental challenges.
2. The Parties further recognise the importance of this Agreement to promoting trade and investment in environmental goods and services in the free trade area.
3. Accordingly, the Committee shall consider issues identified by a Party or Parties related to trade in environmental goods and services, including issues identified as potential non-tariff barriers to that trade. The Parties shall endeavour to address any potential barriers to trade in environmental goods and services that may be identified by a Party, including by working through the Committee and in conjunction with other relevant committees established under this Agreement, as appropriate.
4. The Parties may develop bilateral and plurilateral cooperative projects on environmental goods and services to address current and future global trade-related environmental challenges.
Thank you for your attention!

James Munro and Elizabeth Sheargold
Melbourne Law School | The University of Melbourne
elizabeth.sheargold@unimelb.edu.au