

The Environmental Struggle Within the Trans-Pacific Partnership

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It has been almost 20 years since the continuing tension between free trade and environmental protection flared following the creation of the World Trade Organization (WTO) and the ratification during the Clinton Administration of the North American Free Trade Agreement (NAFTA). That tension—between economists, investors and manufacturers favoring the elimination of most constraints on international trade and environmentalists (and labor advocates) fearful of a “race to the bottom” by countries competing for new factories—has once again taken center stage in a struggle that is threatening to derail the proposed Trans-Pacific Partnership (TPP) agreement.

The TPP, a proposed free trade and investment agreement among the United States and 11 other Pacific countries from Asia and the Americas, is the Obama administration’s most significant international economic initiative and the centerpiece of its so-called “pivot to Asia.” This column reviews the principal environmental issues in dispute concerning the TPP and suggests possible approaches to resolving those issues.

Background

Despite the misgivings of some environmentalists and the active opposition of the Sierra Club, the U.S. ratified the WTO agreements because they were the culmination of many years of planning and cajoling by U.S. policymakers to reduce barriers to international trade, with the prospect of both expanded markets for U.S. manufacturers (and consumers) and increased prosperity for developing countries. Moreover, the WTO included, in Article XX of the General Agreement on Tariffs and Trade (GATT), specific protection for environmental measures designed to protect public health, exhaustible natural resources and threatened species.

NAFTA offered environmentalists a more discrete target because it was new, involved only three countries (the U.S., Canada and Mexico) and appeared likely to accelerate an environmental “race to the bottom” as U.S. and other manufacturing firms flocked to Mexico’s lax environmental regime in order to escape more rigorous U.S. environmental regulations.

Mexico responded successfully to these concerns by enacting legislation closely resembling U.S. environmental laws and by agreeing to an environmental side agreement that established the North American Commission on Environmental Cooperation (NACEC), which was intended to investigate and report on any systematic failure of the three NAFTA countries to enforce their respective environmental laws. The theory underlying the NACEC was that such sunshine on environmental enforcement would be sufficient to coerce, or at least shame, Mexico into enforcing its nominal environmental regulations.

In practice, however, the NACEC has become a largely invisible body, with only modest support from the U.S. and active opposition from Canada and, to a lesser degree, Mexico. At the same time, other NAFTA provisions intended to protect U.S. and Canadian investors against confiscatory actions by Mexican authorities have been exploited to call into question legitimate Mexican, U.S. and Canadian environmental laws

whose legality is decided by trade-related arbitral panels with little or no familiarity with the environmental conditions that led to passage of those laws and virtually no public transparency or accountability.

2007 Bipartisan Consensus

In response to these concerns, in May 2007 Congress reached what was called a “Bipartisan Trade Deal” with the Bush administration that was described, in the press statement released by U.S. Trade Representative Susan Schwab, as providing “a clear and reasonable path forward” for congressional consideration of trade agreements then pending with Peru, Colombia, Panama and Korea and a “new trade policy template” for the kind of “fast track” trade agreement authority now sought by President Barack Obama for the TPP.

The 2007 bipartisan consensus called on the president to include in future bilateral or multilateral trade agreements commitments by all parties to enforce basic internationally recognized labor rights, protect intellectual property and limit foreign investors’ rights for compensation for regulatory actions that do not violate international law.

With respect to the environment, the bipartisan consensus incorporated requirements for all parties to future trade agreements (including the U.S.) to comply with a list of multilateral environmental agreements (MEAs) which includes the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on Ozone Depleting Substances, the Convention on Marine Pollution, the Inter-American Tropical Tuna Convention, the Ramsar Convention on Wetlands, the International Whaling Convention and the Convention on Conservation of Antarctic Marine Living Resources. (The list could not, unfortunately, include either the U.N. Convention on the Law of the Sea (UNCLOS) or the Kyoto Protocol, neither of which the U.S. has ratified.)

In addition, the bipartisan consensus contemplated that parties to future trade agreements would not derogate their national environmental laws and that all environmental obligations under such trade agreements would be enforced in the same manner as the commercial terms of such agreements, including the use of trade sanctions against a party failing to enact, enforce or carry out its environmental obligations where trade or investment are affected by that failure.

Draft Environmental Chapter

In January 2014, WikiLeaks published a then-current confidential draft of the environmental chapter of the proposed TPP, which is still being negotiated by the U.S. and 11 other Pacific Rim countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) that, together with the U.S., represent approximately 40 percent of the global economy. What is apparent from this draft is that the United States, which in most bilateral trade negotiations has overwhelming leverage, has a far more difficult task insisting on environmental commitments in multilateral agreements that impact other parties’ trade or economic policies.

This has proven particularly true for the TPP parties, many of which are engaged in either importing or exporting illegally harvested timber, marine life or endangered species—three environmental concerns that were less central to the economies of earlier trade agreements and that have grown increasingly urgent as climate change has emphasized the central role of forests in absorbing carbon dioxide, global fishstocks have declined through overfishing and the slaughter of rhinos and elephants has accelerated in response to Asian market demands.

It is ironic that the United States has emerged in the TPP negotiations as the champion of multilateral commitments on these issues after many years of refusing to ratify the world’s most important multilateral environmental agreements (UNCLOS and Kyoto) and human rights conventions such as the International Criminal Court or even to comply with its obligations under the Convention Against Torture. There can be little doubt that, apart from the inherent difficulty of the TPP issues, the United States’ failure to adhere to such nearly universal accords makes its insistence on multilateral acceptance of environmental commitments in the TPP far more difficult.

The principal environmental differences between the U.S. and other TPP parties were summarized in another WikiLeaks document from the closed-door negotiations—a confidential “chairs’ report” dated Nov. 24, 2013, from the chairs of the working group drafting the TPP’s environmental chapter. Although it is likely that some of the open issues identified in the chairs’ report have been narrowed in the past year, four issues in particular (compliance with MEAs, dispute resolution, fisheries and endangered species) have drawn the ire of the Natural Resources Defense Council (NRDC), the Sierra Club and the World Wildlife Fund, which issued a joint statement in January 2014 condemning the draft TPP chapter as an abandonment of the commitments made by the Bush administration in the 2007 bipartisan trade consensus. In addition, at least two other important issues, climate change and corporate conduct, are in my view dealt with inadequately in the draft TPP chapter.

1. Compliance with MEAs: One shortcoming of many MEAs is that, while they contain agreed-upon environmental goals and obligations, they rarely include any enforcement mechanism or even a specific obligation on the signatories to enact and implement domestic laws and regulations to implement the MEA obligations. Environmentalists have long sought to use the leverage of trade preferences (or the promised removal of trade barriers) as an alternative vehicle for enforcing MEA obligations relating to marine pollution, wildlife preservation and other global concerns.

The 2007 trade consensus promised precisely that, and yet the draft TPP provision on MEAs simply calls on the parties to “implement” their respective MEAs, rather than promising, as the Bush administration agreed, to “adopt, maintain and implement” the necessary domestic laws and regulations to fulfill those obligations. Although the United States has, according to the chairs’ report, sought to remedy this defect, it appears that virtually all other TPP parties, except Malaysia, oppose the U.S. position.

2. Dispute Resolution and Remedies: Beyond its failure to fill the gap left in many MEAs, the TPP draft fails in its fundamental commitment to subject TPP environmental commitments to the same enforcement procedures and remedies as commercial trade violations, for which countervailing tariffs and other economic sanctions are available to an injured party.

Instead, alleged violations of TPP environmental commitments are subject to a lengthy three-stage consultation process as specified in draft Article SS.12, a process virtually guaranteed to require several years of negotiations which, if unsuccessful, lead to arbitration before a specially constituted arbitral panel whose only power, at the end of that undoubtedly lengthy additional proceeding, is to issue a report determining whether the alleged violation has occurred and, if so, to require the disputing parties to “endeavor to agree...on a mutually satisfactory action” to implement the “recommendations” of the arbitral panel. As the NRDC statement noted, this lengthy, expensive and ultimately toothless process is exactly what the 2007 trade consensus sought to avoid.

3. Fisheries Protection: The draft TPP attempts to address the global problems of overfishing and illegal fishing through a detailed Article SS.16, which includes numerous commitments relating to wild fishstocks, marine mammals, ocean pollution and shipbuilding subsidies. These are all critical issues for a world population facing increasing food insecurity and for the overall health of our planet’s oceans. In that sense, even its critics acknowledge that the TPP is breaking new ground by including these provisions in a multilateral trade agreement.

Nevertheless, draft Article SS.16 suffers not only from the ineffective enforcement provisions contained in Article SS.12, but also from its own drafting deficiencies. In particular, environmentalists have criticized the absence of an outright ban on shark finning (killing sharks for their fins, a frequent practice, and commercial trade, in some TPP countries) and particularly weak language on domestic fishing subsidies, which as currently drafted prohibits only subsidies that are specifically targeted at overfished species, rather than all vessel and related subsidies that contribute to overfishing and declining fishstocks globally.

The related problem of so-called “illegal, unreported and unregulated” (IUU) fish is similarly described (a useful start) but not subjected to any specific and enforceable commitments, either through individual country actions or through compliance with regional fisheries management agreements. Unfortunately, the chairs’ report indicates that even these loosely drafted commitments are objectionable to some of the TPP

parties, as are several other draft provisions intended to prevent pollution of the marine environment through compliance with the MARPOL Protocol and annexes to the Convention for the Prevention of Pollution from Ships.

4. Endangered Species: The TPP also attempts, very weakly, to deal with the urgent widespread taking, shipping and trade of challenge of illegal trade in threatened marine and terrestrial wildlife. Chapter SS.17 provides that the TPP parties affirm their commitments to carry out existing treaty obligations under the Convention on International Trade in Endangered Species by promoting conservation, combatting the illegal “take” of, and trade in, wild fauna and flora, exchanging information and undertaking joint activities “of mutual interest,” conserving the integrity of their protected natural areas and “endeavoring ” to strengthen cooperation with interested non-governmental organizations.

Draft Article SS.17 also calls on the parties to adopt measures to prohibit trade or transshipment within their territories of illegally taken wildlife, subject to each party’s enforcement discretion and resource allocation decisions. These ostensible commitments may provide necessary window-dressing for political consumption, but they are unlikely to deter the widespread trade in threatened and endangered species within some of the TPP parties. Again, however, all of the TPP parties other than the U.S., Canada and New Zealand are, according to the chairs’ report, opposed to even the pending language.

5. Climate Change: The draft TPP Article SS.15 on trade and climate change is even weaker than Article SS.17, or at least was prior to Obama’s recent joint announcement with China of a more aggressive U.S. climate mitigation agenda. The November 2013 draft released by WikiLeaks last January notes that climate change actions should “reflect domestic circumstances and capabilities” (which in the U.S. means no foreseeable federal legislation) and “recognizes” that the parties have a range of options available to address climate change, including “sharing information and experiences,” and that they have made a range of commitments in other fora to rationalize or eventually phase out “inefficient fossil fuel subsidies that encourage wasteful consumption, while recognizing the importance of providing those in need with essential energy services.” Here too, the U.S.’s ability to insist on stronger commitments to phase out fossil fuel subsidies is severely undercut by its own continuing fossil fuel subsidies, for which the principal beneficiaries are major corporate suppliers and only incidentally those in need of “essential energy services.”

6. Corporate Conduct: Governmental action to protect (or to cease degrading) the environment should, as contemplated by the 2007 trade consensus, be an essential part of any “21st century trade agreement.” However, in many countries it is the actions of large domestic or transnational corporations that actually affect their environments—and the global environment—more directly than government. In the briefest recognition of this, Article SS.8 of the draft TPP provides, in its entirety, that each TPP party “should encourage enterprises operating its territory or jurisdiction to adopt voluntarily, into their policies and practices, principles of corporate social responsibility related to the environment, consistent with internationally recognized standards and guidelines that have been endorsed or are supported by that [p]arty.”

This is a major lost opportunity for the U.S., which should insist that the TPP parties comply with the recently adopted OECD Guidelines on Corporate Conduct, which the United States, as the leading OECD (Organisation for Economic Co-operation and Development) country, endorsed in May 2011 (see “International Standards for Corporate Conduct,” NYLJ, April 30, 2012). Those guidelines, which establish international standards related to environmental (as well as labor, consumer and human rights) conduct by major corporations, have a direct bearing on many of the environmental threats to air, water, marine, forest, wildlife and other natural resources affected directly or indirectly by global trade.

While the OECD Guidelines are voluntary at this stage, they are part of a broader global movement to hold corporations responsible for the environmental impacts of their actions, and any effort as broad as the TPP to create a level playing field for global trade should require the TPP parties, and the corporations that benefit from that agreement, to commit to the provisions of the OECD Guidelines in their international trade practices.

Conclusion

The TPP can offer very substantial trade benefits to its signatories, but those benefits should be accompanied by, and conditioned on, adherence by the parties to stronger environmental commitments than are in the last publicly accessible draft of that agreement. For the U.S. to successfully insist on such stronger provisions, as it has so far failed to do, it should demonstrate its own commitment to the elimination of fossil fuel subsidies, meaningful climate change measures (whether through legislative or regulatory action), recognition of the OECD Guidelines for corporate conduct, submission of all TPP-related disputes to binding arbitration and, in the near future, ratification of UNCLOS.

While the prospect of increased trade with the U.S. may make it possible to produce a satisfactory short-term TPP without those changes in the U.S.'s own conduct, a genuine 21st century multilateral trade agreement requires the world's leading economies to commit to the broader environmental improvements in the TPP outlined above.

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