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International Trade Bulletin

March 2016

CLEANING UP ON TRADE

TPP and the Environment

The Trans-Pacific Partnership ("TPP") is a trade liberalization agreement signed by twelve countries on February 4, 2016. The signatories are: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Included in the TPP is a chapter relating to trade and the environment. This is not the first time that environmental protection has been ascribed as a goal of a bilateral or multilateral trade agreement. The TPP is different, however, in that it incorporates an enforcement mechanism that shows more teeth than seen in previous trade agreements.

Multilateral agreements have traditionally favored trade over environmental concerns. The General Agreement on Tariffs and Trade ("GATT") did allow that countries may legitimately undertake certain environmental measures as long as they did not result in unjustifiable discrimination on trade between countries or act as disguised restrictions on international trade. Article XX of the GATT accepts that legitimate measures may be undertaken as necessary to protect human, animal or plant life or health; or to conserve exhaustible natural resources. Similar measures were adopted in the General Agreement on Trade in Services ("GATS"). The WTO Agreement on the Application of Sanitary and Phytosanitary Measures expanded the scope for health-related environmental controls, but once again, subject to the limiting rules set out in Article XX of the GATT.

The North American Free Trade Agreement ("*NAFTA*") appended an environmental side agreement, the North American Agreement on Environmental Cooperation ("*NAAEC*"), with the aim of ensuring that lax enforcement of existing environmental laws would not be used by parties to obtain trade advantages. The *NAAEC* did allow for consultations, and if those failed, an arbitral panel to recommend the means of resolution. If such resolution could not be found, the Panel had the right to impose monetary penalties. To date, no arbitral panel under the *NAAEC* has ever been convened.

The TPP goes further than previous trade agreements in establishing a range of positive environmental obligations on member countries, and for the enforcement of these obligations through consultation and arbitral panels.

In addition to the usual bromides about public awareness, accountability and transparency, the TPP specifies obligations related to:

- combating illegal fishing, logging and wild life trade; and

- affirming commitments to multilateral environment agreements that have been ratified by the member states.

The multilateral environment agreements ("MEAs") cited include the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of the Pollution from Ships, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Certain environmental commentators have expressed concerns that "climate change" has not been expressly addressed in the TPP; though arguably, the Paris Agreement would constitute an MEA, such that member states would be bound by the obligations they made once the Agreement is ratified.

In the event of a breach of responsibilities under the Environment Chapter of the TPP, there is a process for consultations between members. In the event that consultations are not sufficient to resolve the issue, the matter can be sent to an arbitral panel in accordance with rules relating to the broader TPP dispute resolution mechanism. Panel resolutions made pursuant to Article 28.18 of the TPP are enforceable by means of suspension of benefits accruing to the responding Party under the TPP, or payment of a monetary assessment.

Appendix A provides an overview of the major provisions of the TPP Environment Chapter on an article-by-article basis.

Conclusions

While the TPP is a trade agreement, it represents an evolution in the understanding of a need to balance trade liberalization with recognition that there are issues of environmental concerns that affect all of humanity, and that should not be sacrificed to the goal of trade liberalization.

APPENDIX A – TPP ENVIRONMENT PROVISIONS

Scope and General Commitments

1. Definition of Environmental Law

Article 20.1 defines "environmental law" as legislation with the primary purpose of protecting the environment or preventing danger to human life or health. Specifically, statutes or regulations related to (a) preventing, abating or controlling pollutants or environmental contaminants; (b) controlling environmentally hazardous or toxic chemicals, substances, materials or waste; or (c) protecting or conserving wild flora and fauna, including biodiversity.

2. Chapter Objectives

Article 20.2 provides that the objectives of the Chapter are "to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues". The objectives focus on strengthening environmental governance and promoting sustainable development through enhanced cooperation between Parties while acknowledging that national priorities and circumstances will need to be considered. Article 20.2 also cautions against the use of environmental laws or measures, which would constitute a disguised restriction on trade or investment.

3. General Chapter Commitments

Article 20.3 identifies the general commitments of Parties with respect to the Chapter. The Article attempts to strike a balance between the need for mutually supportive trade and environmental policies and practices and "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" [20.03(2), (7)].

Parties "shall strive" to ensure that environmental laws encourage high levels of environmental protection [20.03(3)]. In addition, Parties "shall not" waive or derogate from their environmental laws in order to encourage trade or investment between the Parties, where the effect would weaken the level of environmental protection [20.03(6)].

Moreover, "no Party shall fail to effectively enforce its environmental laws" through a course of action or inaction in a manner affecting trade or investment between the Parties [20.03(4)]. To meet the standard of effective enforcement, Parties are to "reasonably exercise their discretion" regarding environmental enforcement and compliance. For example, by way of *bona fide* decisions regarding the allocation of enforcement resources in accordance with national priorities for enforcement of environmental laws [20.03(5)].

Article 20.4 affirms each Party's commitment to implement the multilateral environmental agreements to which it is a party [20.4(1)], and recognizes the need for dialogue between

the Parties on trade and environmental issues of mutual interest in order "to enhance the mutual supportiveness between trade and environmental law and policies" [20.4(2)].

Procedure and Public Participation

Article 20.19 requires that each Party designate and notify a contact point from its relevant authorities within 90 days of the date of entry into force of this Agreement [20.19(1)].

Further, the Parties are to establish an Environment Committee composed of senior government representatives from the relevant trade and environment national authorities [20.19(2)]. The Committee is to meet within one year of the date of entry into force of this Agreement, and every two years thereafter (unless agreed otherwise). The chair and venue will rotate between the Parties [20.19(4)].

The general purpose of the Committee is overseeing the implementation of this Chapter. Specifically its functions shall be to:

(a) provide a forum to discuss and review the implementation of this Chapter;

(b) provide periodic reports to the Commission[1] regarding the implementation of this Chapter;

(c) provide a forum to discuss and review cooperative activities under this Chapter;

(d) consider and endeavour to resolve matters referred to it under Article 20.21 (Senior Representative Consultations);

(e) coordinate with other committees established under this Agreement as appropriate; and

(f) perform any other functions as the Parties may decide [20.19(3)].

The Committee shall also review and report on the implementation and operation of this Chapter to both the Parties and the Commission during the fifth year after the date of entry into force of this Agreement [20.19(7)].

The decisions and reports of the Committee shall be made by consensus and shall be made public (unless agreed otherwise) [20.19(5), (6)]. Further, the Committee shall provide for public input on the Committee's work, as appropriate, and shall hold a public session at each meeting [20.19(8)].

Articles 20.7, 20.8 and 20.9 require that Parties promote public awareness and access of its environmental laws and policies, including enforcement and compliance procedures.

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[1] The Trans-Pacific Partnership Commission established under Article 27.1.

Article 20.7 provides a mechanism for "an interested person residing or established" in a Party's territory to request an investigation into alleged violations of the Party's environmental laws. Each party must ensure "that the competent authorities give those requests due consideration, in accordance with the Party's law" [20.7(2)]. Parties must also ensure there are "judicial, quasi-judicial or administrative proceedings" in place for the enforcement of its environmental laws. These proceedings must be "fair, equitable, transparent and comply with due process of law", open to the public, and must provide "appropriate access" to persons with a "recognized interest" in the matter [20.7(3), (4)].

In support of these enforcement proceedings, each Party must develop "appropriate sanctions or remedies for violations of its environmental laws for the effective enforcement of those laws". There are no specific requirements for the sanctions or remedies, the only direction to Party's is to take "appropriate account of relevant factors", such as the nature and gravity of the violation, damage to the environment and any economic benefit the violator derived from the violation" [20.7((5), 6)].

Article 20.8 requires that Parties accommodate requests for information regarding implementation of this Chapter [20.8(1)]. Further, each Party is to seek views on matters related to implementation by making use of existing, or establish new, consultative mechanism [20.8(2)].

Article 20.9 requires that Parties accept and respond, in a timely manner, to written submissions regarding its implementation of this Chapter. Procedures for the receipt and consideration of written submissions are to be "readily accessible and publicly available" and response are to be made public [20.9(1), (2)]. Each Party must designate an entity responsible for receiving and responding to any written submissions and must notify the other Parties within 180 days of the date of entry into force of this Agreement [20.9(3)].

Where a submission asserts a failure to effectively enforce environmental laws, any Party may request a review of both the submission and the response by the Committee on Environment [20.9(4)]. The procedures for discussing these submissions and responses are to be established at first meeting of the Committee [20.9(5)].

The Committee will also prepare a written report on the implementation of this Article. In support of this report, each Party is required to submit a written summary regarding its implementation activities [20.9(6)].

Article 20.11 addresses mechanisms to enhance environmental performance (e.g., reporting requirements, market incentives, information sharing) [20.11(1)]. Parties are to encourage the use and development of flexible and voluntary performance mechanisms and evaluation criteria to protect natural resources and the environment and measure environmental performance [20.11(2)].

With respect to environmental quality and product promotion, Parties are to encourage the use and development of measures that:

(a) are truthful, are not misleading and take into account scientific and technical information;

(b) if applicable and available, are based on relevant international standards, recommendations or guidelines, and best practices;

(c) promote competition and innovation; and

(d) do not treat a product less favorably on the basis of origin [20.11(3)].

Cooperation

Article 20.12 provides the framework for developing cooperation mechanisms to facilitate with implementing the commitments under the Chapter [20.12(1)]. Where possible, Parties are to build upon existing cooperation mechanisms, including those of regional and international organizations [20.12(4)]. Each Party must designate a national contact point for the purpose of proposing cooperation activities and sharing priorities and objectives for that cooperation. Each Party must provide written notice, within 90 days from the date of entry into force of this Agreement, of its contact point [20.12(3)].

The Article requires that Parties cooperate, in cases where cooperation would be mutually beneficial, to address matters of joint or common interest [20.12(2)] and that they promote public participation in the development and implementation of cooperative activities, as appropriate [20.12(8)]. The manner and means by which this cooperation takes place remains up to the parties. For example, the cooperation "may be carried out on a bilateral or plurilateral basis between Parties" or "may include non-governmental bodies or organizations and non-Parties to this Agreement" [20.12(2), (5), (10)].

Parties must identify and share performance measures and indicators to be used when examining and evaluating the efficiency, effectiveness and progress of specific cooperative activities, and to share the outcome of any such evaluation [20.12(6)]. Examination and review of activities under this Article are to take place "periodically" through the contact points, with findings being reported to the Environment Committee for the purpose of their Chapter-wide review of cooperation activities [20.12(7)].

The Article also provides a method by which discussion between Parties concerning implementation of environmental laws by sub-central levels of government can take place [20.12(9)].

Specific Commitments

1. Protection of Ozone Layer

Article 20.5 requires that Parties take measures to control the production and consumption of, and trade in, substances that "deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment". Specifically, those substances controlled by the *Montreal Protocol on Substances that Deplete the Ozone Layer*. Canada shall be deemed in compliance with this commitment by virtue of the *Ozone-depleting Substances Regulations, 1998* of the *Canadian Environmental Protection Act, 1999* (implementing legislation for the Montreal Protocol). Should the *Ozone-depleting Substances Regulations* be repealed or replaced, Canada can remain compliant as

long as any subsequent legislation provides an equivalent or higher level of environmental protection [20.5(1), Annex 20-A].

Parties must also make public appropriate information about the development and implementation of its programs and activities concerning the protection of the ozone layer [20.5(2)]. Further, Parties shall "cooperate to address matters of mutual interest" related to ozone-depleting substances, including environmentally friendly alternatives to ozone-depleting substances, refrigerant management, stratospheric ozone measurements, and combating illegal trade in ozone-depleting substances [20.5(3)].

2. Protection of the Marine Environment from Ship Pollution

Article 20.6 requires the Parties take measures to prevent the pollution of the marine environment from ships. In particular, pollution regulated by the *International Convention for the Prevention of Pollution from Ship*, as amended [20.6(1)]. Canada shall be deemed in compliance with this commitment by virtue of the *Canada Shipping Act, 2001* and its related regulations (implementing legislation of *International Convention for the Prevention of Pollution from Ship*). Should the *Canada Shipping Act, 2001* be repealed or replaced, Canada can remain compliant as long as any subsequent legislation provides an equivalent or higher level of environmental protection [20.6(1), Annex 20-B].

Parties must also make public appropriate information about the development and implementation of its programs and activities concerning the prevention of pollution of the marine environment from ships [20.6(2)]. Further, Parties shall "cooperate to address matters of mutual interest" with respect to pollution of the marine environment from ships including accidental, operational and deliberate pollution from ships, technologies to minimize ship-generated waste and protection and enforcement activities [20.6(3)].

3. Corporate Social Responsibility

Article 20.10 supports the voluntary adoption of corporate social responsibility principles related to the environment "consistent with internationally recognized standards and guidelines that have been endorsed or are supported by that Party". Parties are to "encourage" such adoption by enterprises operating within their jurisdiction [20.10].

4. Trade and Biodiversity

Article 20.13 requires that Parties **"**promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy" [20.13(2)]. Otherwise, the Article merely acknowledges that Parties "recognize" the importance of local communities' knowledge and practices embodying traditional lifestyle [20.13(3)], and the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with international obligations [20.13(4)].

Parties must also make public appropriate information about the development and implementation of its programs and activities concerning the conservation and sustainable use of biological diversity [20.13(5)]. Further, Parties shall "cooperate to address matters of mutual interest" with respect to the conservation and sustainable use of biological diversity

including protecting ecosystem and ecosystem services and access to genetic resources [20.13(6)].

5. Invasive Alien Species

Article 20.14 recognizes the environmental and economic harm that stems from terrestrial and aquatic invasive alien species moving along trade-related pathways. The Committee is therefore required to coordinate with the Committee on Sanitary and Phytosanitary Measures established under Article 7.5 to identify "cooperative opportunities to share information and management experiences on the movement, prevention, detection, control and eradication of invasive alien species" [20.14(1), (2)].

6. Transition to a Low Emissions and Resilient Economy

Article 20.15 acknowledges that transitioning to low emission economies will require collective action, and while it recognizes that each Party's course of action should reflect domestic circumstances and capabilities, it provides that each Party shall cooperate to address matters of joint or common interest [20.15(1), (2)]. Examples of areas of cooperation include: 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 non-market mechanisms; low-emissions, resilient development and sharing of information and experiences in addressing this issue" [20.15(2)].

7. Marine Capture Fisheries (not aquaculture)

Article 20.16 acknowledges the importance of conservation and sustainable management of fisheries and recognizes the need for action to address overfishing and overcapacity, and illegal, unreported and unregulated (IUU) fishing [20.16(1), (2)]. Parties shall seek to operate fisheries management systems "based on the best scientific evidence available and on internationally recognized best practices for fisheries management and conservation". The goal being to regulate marine wild capture fishing by preventing overfishing and overcapacity, reducing unintended by-catch and promoting recovering of overfished stocks [20.16(3)], through "the control, reduction and eventual elimination of all subsidies[2] that contribute to overfishing and overcapacity". In particular, no Party shall grant subsidies for fishing that negatively affect overfished fish stocks or for any fishing vessel listed for IUU fishing [20.16(5)].

Any such subsidies in existence before the date of entry into force of this Agreement shall be brought into conformity "as soon as possible and no later than three years of the date of entry into force of this Agreement for that Party" [20.16(6)]. Each Party shall also make best efforts to refrain from introducing new, or extending or enhancing existing subsidies,

[2] Within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement.

even if not prohibited under this Chapter, that contribute to overfishing or overcapacity [20.16(7)].

Parties are to notify the other Parties of any subsidy they grant or maintain to persons engaged in fishing or fishing related activities within one year of the date of entry into force of this Agreement for it and every two years thereafter [20.16(9), (10)]. Parties shall also provide, "to the extent possible" information on fisheries subsidies not covered by paragraph 5 of Article 20.16, in particular fuel subsidies [20.16(11)]. A notifying Party shall respond as quickly as possible and comprehensively to requests for additional information [20.16(12)].

Each Party shall also promote and support:

1. Implementation and effective enforcement of conservation management measure for the long-term conservation of sharks, marine turtles seabirds and marine mammals [20.16(4)]; and

2. Implementation of measures designed to prevent trade in fisheries products that results from IUU fishing [20.16(14), (15)].

8. Conservation and Trade

Article 20.17 addresses the illegal taking of, and illegal trade in, wild fauna and flora, including illegal logging, and requires that Parties adopt measures to fulfill their obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) [20.17(2), (3)]. Each party further commits to, take appropriate measures to protect and conserve at-risk wild fauna and flora, enhance government and institutional frameworks around sustainable forest management and wild fauna and flora conservation, and strengthen cooperation and consultation with interested non-governmental institutions [20.17(4)].

Parties must also adopt enforcement and compliance measures to deter the trade of wild fauna and flora that, based on credible evidence, were illegally taken or traded [20.17(5)]. However, each Party retains the right to exercise administrative, investigatory and enforcement discretion in implementing these measures and allocating resources thereto [20.17(6)]. Parties shall also "endeavour to identify opportunities" for enforcement cooperation and information sharing, including the development of law enforcement networks [20.17(7)].

9. Environmental Goods and Services

Article 20.18 recognizes the value of trade and investment in environmental goods and services for both "improving environmental and economic performance and addressing global environmental challenges" [20.18(1), (2)]. As such, Parties, working through and with the Committee, shall endeavor to identify and address any potential non-tariff barriers to trade in environmental goods and services [20.18(3)].

Resolving Matters of Interpretation and Application

1. Consultations

Article 20.20 requires that Parties "endeavor to agree on the interpretation and application of this Chapter" and "make every effort through dialogue, consultation, exchange of information and, if appropriate, cooperation" to address any matters that may arise thereunder [20.20(1)]. To initiate a consultation with another Party a written request is submitted to the responding Party's contact point and circulated to the other Parties. This written request should identify both the matter at issue and the legal basis for the request [20.20(2)]. Other parties feeling they have a substantial interest in the matter may join the consultations as a participating Party, by delivering written notice of its substantial interest to the contact points of the consulting Parties no later than seven days after the initial date of circulation [20.20(3)].

Consultations shall begin "promptly" and no later than 30 days after the date of receipt by the responding Party of the request (unless agreed otherwise) [20.20(4)]. The consulting parties are required to "make every effort to arrive at a mutually satisfactory resolution to the matter", and may seek advice or assistance from any person or body they deem appropriate [20.20(5)].

Article 20.21 provides a process for further consideration by the Committee representatives from the consulting Parties where the matter could not be resolved through consultation under Article 20.20 [20.21(1)]. Upon receiving the request from a consulting Party, the Committee shall promptly convene and seek to resolve the matter. Relying upon, where appropriate, the use of relevant scientific and technical information from governmental or non-governmental experts [20.21(2)]. Committee representatives from any other Party with substantial interest in the matter may also participate.

Article 20.22 allows a consulting Party to refer a matter not resolved under Article 20.21 (Senior Representative Consultations), to the relevant Ministers of the consulting Parties [20.22(1)].

All consultations pursuant to Article 20.20 (Environmental Consultations), Article 20.21 (Senior Representative Consultations) and Article 20.22 (Ministerial Consultations) are to be confidential, and held without prejudice to the rights of any Party in any future proceedings. They can be held in person or by technological means, when held in person the venue for the consultation is the capital of the responding Party (unless agreed otherwise) [20.22(2), (3)].

2. Dispute Resolution

Article 20.23 allows Parties who have failed to resolve the matter through consultations to initiate the dispute settlement process under Chapter 28 of Agreement within 60 days of the date of receipt of a request under Article 20.20 (Environmental Consultations).

For disputes arising under Article 20.3(4) or Article 20.3(6) (General Commitments), the Party initiating the dispute settlement process, or requesting the consultation shall first

consider whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute [20.23(3), (4)].

For disputes arising under Article 20.17(2) (Conservation and Trade), notwithstanding Article 28.15 (Role of Experts), a panel convened shall:

(a) seek technical advice or assistance, if appropriate, from an entity authorized under *Convention on International Trade in Endangered Species of Wild Fauna and Flora* to address the particular matter, and provide the consulting Parties with an opportunity to comment on any such technical advice or assistance received; and

(b) provide due consideration to any interpretive guidance received pursuant to subparagraph (a) on the matter to the extent appropriate in light of its nature and status in making its findings and determinations under Article 28.17(4) (Initial Report).

Application of Dispute Settlement under Chapter 28

If consultations under Chapter 20 are unsuccessful, the Parties may move to initiate further dispute settlement proceedings under chapter 28 *Dispute Settlement*, namely, through Article 28.5 Consultations or Article 28.7 Establishment of a Panel.

Where the final report of a panel established under Article 28.7 indicates that "the measure at issue is inconsistent with a Party's obligations under this Agreement" [Article 28.19(2)(a)], "a Party has otherwise failed to carry out is obligations under this Agreement" [Article 28.19(2)(b)], or "a Party's measure is causing nullification or impairment" of a benefit reasonably expected to accrue to another Party under chapters 2, 3, 4, 5, 8, 10 and 15 of the Agreement [Article 28.19(2)(c)/Article 28.3(1)(c)], the responding Party "shall, whenever possible, eliminate the non-conformity or the nullification or impairment", within a reasonable period of time, if it is not practicable to comply immediately [Article 28.19(2),(3)].

Should the responding Party notify the complaining party that it does not intend to the eliminate non-conformity or the nullification or impairment, or following the expiry of "the reasonable period of time", should there be a disagreement between the Parties as to whether the non-conformity, or the nullification or impairment has been eliminated, the party shall, upon the request of the complaining parties, enter into consultations "with a view to developing mutually acceptable compensation" [Article 28.20(1)].

If the parties are unable to agree on compensation with the required time, or if the parties have agreed on compensation but the complaining Party considers that the responding Party has failed to observe the terms of their agreement, the complaining Party, upon written notice, may suspend benefits accruing to the responding Party under the Agreement, "the suspension of which the complaining Party considers will have an effect equivalent to that of the non-conformity, or the nullification or impairment determined to exists by the panel in its final report" [Article 28.20(2)].

In lieu of a suspension of benefits, the responding Party may elect to pay a monetary assessment for a maximum of 12 months. If the parties are unable to agree on the amount of the assessment, the amount shall be set in US currency as a "level equal to 50 percent of the level of the benefits the panel has determined under paragraph 5 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2" [Article 28.20(7)-(11)].

Compensation and the suspension of benefits and the payment of a monetary assessment shall be temporary measures, to remain in effect only until such time as the responding Party has eliminated the non-conformity, or the nullification or impairment, or until a "mutually satisfactory solution is reached" [Article 28.20(15)]. The responding Party may request that the panel reconvene to consider whether the level of benefits proposed to be suspended is "manifestly excessive" or whether the complaining Party has failed to follow the required principles and procedures for suspending benefits [Article 28.20(5)(a)]. The responding Party may also request that the panel reconvene to consider whether the non-conformity, or the nullification or impairment has in fact been eliminated, such that the suspension on benefits should lifted [Article 28.20(5)(b)/Article 28.21].

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a cautionary note