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TPP environmental commitments: Combining the US legalistic and the EU sectoral approaches

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Jean-Frédéric Morin, Guillaume Beaumier



How ambitious are the TPP's environment provisions when compared to other regional trade agreements?

The US government [argues](#) that the Trans-Pacific Partnership (TPP), concluded last October with 11 other Pacific Rim countries, “includes the most robust enforceable environment commitments of any trade agreement in history.” But is this really the case? The TPP undoubtedly goes well beyond multilateral trade rules found in the WTO's General Agreement on Trade and Tariffs (GATT-1994) that treats environmental protection merely as legitimate grounds for exceptions to trade liberalisation. In the last decade, however, several other bilateral and regional trade agreements have been signed containing stringent and comprehensive environmental commitments. To what extent is the TPP really ground breaking when compared with these?

Insights from a novel dataset

We have scrutinised 660 trade deals signed after 1948. [Ref 1] Among these, we identified 310 different categories of environmental provisions, with some extremely common and others found in only two or three agreements. As indicated by Figure 1 the most recent trade deals tend to include the highest number of environmental provisions.

Figure 1: Increasing average number of environmental provisions per agreement

Source: Authors' own.

The TPP is not an exception to this trend. It includes 94 different environmental provisions, as defined and categorised in our dataset, making it quantitatively one of the most environmentally-friendly agreements ever negotiated. In terms of the number of environmental provisions, the TPP is outstripped only by eight existing deals. [Ref 2]

Yet very few of TPP's environmental provisions are genuine legal innovations. More than 90 percent of the TPP's environmental provisions can be found in other US trade deals. The rest are largely inspired by other Pacific Rim country trade agreements and those struck by the EU. The resulting mix may nevertheless prove a promising formula.

From American lineage

The TPP heavily relies on the US legalistic approach to environmental protection. This was first established by the Clinton Administration with the 1993 North American Free Trade Agreement (NAFTA) side agreement on the environment in response to fears around "environmental dumping" as expressed by US environmental groups. Since then, every US trade agreement includes a commitment to provide high levels of environmental protection in domestic legislation, and effective enforcement of such laws. Every US trade agreement, including the TPP, also provides that signatories must ensure access to private remedies for violations of environmental laws and consider violations brought to their attention by the public. These guarantees aim at levelling the playing field with trade partners suspected of lousy law enforcement.

The US penchant for a legalistic and adversarial approach to environmental protection was further developed through a 2007 bi-partisan deal known as the “May 10th Agreement” that required the inclusion of labour and environmental provisions in four pending trade agreements with Colombia, Panama, Peru, and Korea. For the first time, these provisions would be fully enforceable through the each deal’s dispute settlement mechanism. The four deals also required complete implementation of a set of multilateral environmental agreements, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the Montreal Protocol on Substances that Deplete the Ozone Layer. The combined effect of these measures, reproduced in every US trade agreement concluded since, is the extension of trade law’s strong legal teeth to multilateral environmental agreements that are better known for a soft management of nonconformity. Failure to fulfil the environmental obligations of a trade agreement in a manner affecting trade can now give rise to the suspension of trade benefits. [Ref 3] According to a leaked document dated from November 2013, the US was the only country in the TPP negotiations to support making a list of multilateral environmental agreements subject to the general dispute settlement mechanism, a proposal initially rejected by all other delegations. But Washington’s position finally prevailed, and it will undoubtedly become one of the TPP’s defining features, although it is not original to it.

Following practice established in earlier US agreements, the TPP also provides that each party has the sovereign right to establish its own levels of domestic environmental protection, and to exercise discretion on prosecutorial and enforcement matters. More specific safeguards and exceptions, also modelled on earlier US deals, can be found in various TPP chapters. For example, a provision in the public procurement chapter states that parties retain the right to require environmental specifications in their tendering process, while an annex to the investment chapter specifies that non-discriminatory actions taken in order to protect the environment should not be considered as indirect expropriations.

Under the TPP, each party must also promote public awareness of its environmental laws, encourage the use of voluntary measures and market-based incentives, address barriers to trade in environmental goods and services, cooperate through the exchange of information and joint scientific activities, build the capacity of developing countries, and facilitate public participation in the development of environmental measures. These measures are relatively common in recent trade deals and, while not specific to US agreements, are present in many of the most recent.

Borrowing the European sectorial approach

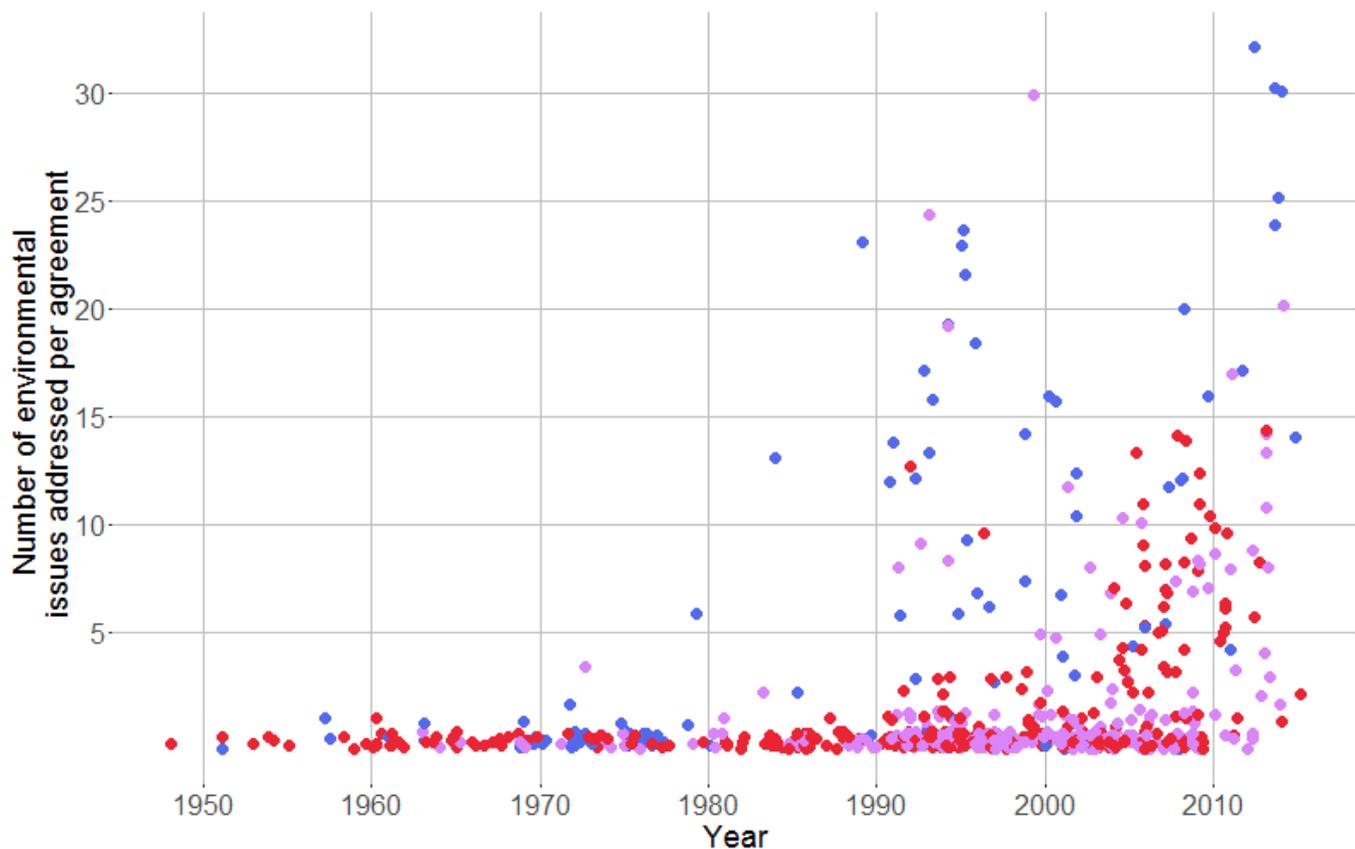
The TPP contains several articles on specific environmental matters, such as ozone depletion, ship pollution, invasive alien species, automobile emissions, and fisheries. The number and the specificity of these sectoral provisions is unprecedented in US trade agreements.

This sectoral approach to environmental protection, however, is relatively common in European deals. Since the early 1990s, European negotiators have often included specific and detailed environmental provisions in trade agreements, usually tailored to the particular ecological context

of their trade partners. For example, a 1991 agreement with Hungary has specific articles on forest, flora and fauna, the 1995 agreement with Lithuania includes environmental clauses on fisheries and energy, the 2002 agreement with Lebanon addresses desertification and forest pasture among other specific environmental issues, a 2008 agreement with the Caribbean Forum has articles on sustainable tourism and green energy, and the 2014 agreement with Moldova has chapters on mining, fisheries, transport, energy and climate action.

As indicated by Figure 2 an increasing number of countries, especially those with an EU trade agreement, have reproduced this sectorial approach in deals with third parties. Among these, Peru could have been one of the transmission belts into the TPP, as its recent trade agreements frequently cover specific environmental issues. In fact, the US-Peru Free Trade Agreement was one of the first American trade deals to include detailed provisions on specific environmental issues, including a copious eight-page annex on forest governance and a side understanding on biodiversity.

Figure 2: Diffusion of the European sectoral approach



Legend: Blue: Agreements signed by at least one European country; Purple: Agreements signed by a country, which has previously signed an agreement with a European country; Red: Other agreements

Source: Authors' own.

The TPP cumulates a greater number of sectoral provisions than any other agreement, addressing a total of 17 different environmental issue-areas. Several of these provisions are more detailed and stringent than earlier iterations. Some were duplicated from other agreements concluded by

TPP countries, such as restrictions on fisheries for bycatch of non-target species that can be found in a previous Australian deal, and cooperative measures on invasive alien species that are already present several US arrangements. A few other provisions are genuine regulatory innovations including, for example, the new disciplines on fisheries subsidies.

Promoting further best practices

The NAFTA side agreement on the environment and the deals stemming from the US' May 10th Agreement were two breakthroughs in the trade and environment nexus. The TPP represents another major leap forward, but less so for its innovations, and more for its combinations. By mixing a US legalistic and adversarial style with a sectorial approach more commonly found in European treaties, the TPP is the most elaborated environment chapter ever concluded. It is substantially more detailed and specific than any other US agreement, but legally more enforceable than any European deal. [Ref 4]

The TPP illustrates that breaking ground on environmental protection can either come from regulatory innovation or regulatory imitation. The TPP did miss several opportunities, however, to copy other progressive environmental measures found in some existing trade agreements. It notably makes no explicit reference to climate change, only to cooperation around moving to a "low carbon economy," as opposed to the Peru-Korea agreement or the EU-Moldova agreement, among others. Nor does it mention the Convention on Biological Diversity (CBD)'s Nagoya Protocol on access and benefit-sharing around genetic resources, as seen in a 2013 trade deal between Colombia and Korea. Likewise, the TPP's investment chapter does not include a provision stating that measures requiring the use of specific environmental technology should not be considered as prohibited performance requirements, although this is found in several agreements signed by TPP parties such as Canada, Chile, Mexico, and Peru. Considering the rapid degradation of coral reefs in the Pacific region, it is disappointing that TPP does not duplicate provisions from earlier US agreements with Jordan and Australia regarding the protection of coral reefs. The TPP makes no reference to key principles found in recent European treaties, such as the prevention principle, the precautionary principle, and the polluters pay principle. Even though the TPP remains one of the most environmentally friendly trade agreements to date – assuming that is not an oxymoron – this short list of examples suggests that there is still room to enhance future deals simply by combining the most progressive provisions of earlier agreements.

Jean-Frédéric Morin, Chair Holder of the Canada Research Chair in International Political Economy

Guillaume Beaumier, Researcher, Canada Research Chair in International Political Economy

[Ref 1] As basis for this analysis, we used the agreements compiled by the DESTA database (<http://www.designoftradeagreements.org/>) to which we apply our own coding frame. Each of the 660 trade agreements has been independently analysed by two encoders. Discrepancies were arbitrated by a third person.

[Ref 2] In order, those treaties are the 2012 agreement between the EU and Central America (132 environmental provisions), the 2014 agreement between the EU and Ukraine (116), the 2014

agreement between the EU and Moldova (114), the agreement yet to come in force between the EU and Canada (106), the 2014 agreement between the EU and Georgia (101), the 1993 NAFTA agreement (99), the 2012 agreement between the EU, Colombia, and Peru (98), and the 2010 agreement between Canada and Panama (95).

[Ref 3] Jinnah, Sikina. "Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance." *The Journal of Environment & Development* 20.2 (2011): 191-215.

[Ref 4] It should be noted that the TPP environment chapter also borrows from other countries. For example, the encouragement to recognise organic standards could have been derived from treaties signed by Chile or Mexico, which regularly ask for standards recognition.

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