The Trans-Pacific Partnership Agreement, the environment and climate change

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INTRODUCTION

The trade and environment relationship is complex and presents both challenges and opportunities. For instance, trade can lead to increased economic efficiency, productivity and growth. But economic growth can result in increased consumption of non-renewable resources and greater environmental harms, such as increasing air pollution and worsening water quality. On the other hand, increased economic growth can generate the resources to address environmental damage and provide a pathway for countries to transition out of polluting industries into more service-oriented ones that are less polluting and damaging to the environment. Trade agreements can also strengthen the capacity for governments to respond to environmental concerns. For instance, reducing trade barriers on environmental goods can reduce the costs of green technologies, thereby supporting efforts to address global challenges such as climate change.

International trade can also be a pathway for the transmission of weaker environmental policies from one country to another. For instance, a country's lax environmental standards that fail to internalise the social costs of environmental harms, such as pollution from the production of goods, can provide an unfair competitive advantage to its exports, raising concerns that this

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will create economic and political pressures in the importing country to also lower their environmental standards. Additionally, a number of environmental harms, such as illegal logging and overfishing, can be magnified by international trade, which expands the market for these goods. Yet trade agreements can be used to reinforce existing rules prohibiting trade in these products, thereby strengthening conservation efforts. Trade agreements also raise concerns that a government's capacity to respond to environmental harms in ways that restrict trade will become constrained by trade rules that are enforced by legally binding dispute settlement procedures with penalties such as trade sanctions. Finding an appropriate balance between trade rules that promote liberalised trade and maintaining policy space for governments to respond to environmental concerns is another challenge.

As a twenty-first-century trade agreement, the Trans-Pacific Partnership Agreement (TPP) presents an important opportunity to address a range of environmental issues, from illegal logging to climate change and to craft rules that strike an appropriate balance between supporting open trade and ensuring governments can respond to pressing environmental issues. Moreover, the ambition of the TPP parties is for the TPP to become the building block for a Free Trade Area of the Asia-Pacific (FTAAP).[1] Accordingly, the rules that are agreed in the TPP could set the rules for trade and investment in the broader Asia-Pacific region for years to come.

The TPP is currently being negotiated by 12 countries, namely: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (US),

[1] 2010 Asia-Pacific Economic Cooperation Leaders Declaration, *Yokohama Declaration — The Yokohama Vision — Bogor and Beyond* (13–14 November 2010) The 18th APEC Economic Leaders' Meeting, <http://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm.aspx>; see also Carlos Kuriyama, 'The Mutual Usefulness between APEC and TPP' (APEC#211-SE-01.5, APEC Policy Support Unit, October 2011).

and Vietnam (TPP12). In March 2013 Japan announced its interest in joining the TPP and, following consultations between the US Administration and Congress, Japan joined the TPP negotiations in July. . The total gross domestic product (GDP) of the current TPP parties is approximately $27.5 trillion, comprises 40 percent of global GDP and one third of world trade. Of this amount, the United States accounts for approximately $15.5 trillion, or almost 60 per cent of TPP GDP.[2] The United States' economic size and strategic importance for other TPP parties means that its approach to the TPP will be the starting point for the negotiations and will significantly influence the outcome.

The first part of this chapter provides an overview of the US approach to the environment in its most recent free trade agreements (FTAs) in order to understand the most likely US approach to environmental issues in the TPP. The second part of this chapter considers a range of environmental issues that have yet to be addressed comprehensively in FTAs but which could be addressed in the TPP, including climate change.

I HOW THE UNITED STATES ADDRESSES ENVIRONMENTAL ISSUES IN ITS FREE TRADE AGREEMENTS

A The Power to Negotiate Trade Agreements

Under the US Constitution, Article 1 Section 8 gives Congress the 'power to regulate commerce with foreign nations…', and Article II gives the President exclusive authority to negotiate treaties. Pursuant to legislation – referred to as Trade Promotion Authority (TPA) – Congress

[2] *Direction of Trade Statistics* and *World Economic Outlook*, International Monetary Fund (August 2013) <http://www.imf.org/external/data.htm>.

delegates trade negotiating authority to the President (which is exercised by the United States Trade Representative (USTR)) and maintains its authority over trade policy by defining the negotiating objectives. Congress also agrees to vote on trade agreements in an expedited manner and to refrain from seeking amendments to treaties negotiated by the USTR. In return, the President is required to consult with Congress during the negotiations and notify Congress 90 days prior to signing an agreement.[3] TPA was most recently granted in 2002 by the Trade Act, which expired in 2007.[4] Notwithstanding this, the USTR continues to follow the terms of this Act in the TPP negotiations.[5] Additionally, the negotiating objectives in the 2002 Trade Act were updated by the so-called 2007 Bipartisan Trade Deal, which on environmental issues envisions US FTAs including a list of multilateral environmental treaties that the FTA parties must enforce and which are subject to the FTA's dispute settlement mechanism. Moreover, some senators have urged the USTR to go beyond the Bipartisan Trade Deal and address other issues, such as the sustainability of trade in natural resources and wildlife.[6]

As discussed below, the TPP also presents an opportunity to address a range of climate change issues. Climate change was not part of the 2002 Trade Act or the Bipartisan Trade Deal and is a source of significant political division in Congress. Much of the resistance in Congress

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[3] J.F. Hornbeck and William Cooper, 'Trade Promotion Authority and the Role of Congress in Trade Policy' (CRS Report for Congress No RL33743, Congressional Research Service, 9 August 2012) <http://www.fas.org/sgp/crs/misc/RL33743.pdf>.

[4] HR 3009 Trade Act of 2002 (the 'Trade Act').

[5] Hornbeck and Cooper, above n 3.

[6] Letter from Senators R. Wyden, J.F. Kerry, J.A. Merkley, K.E. Millibrand, B. Cardin, O. Snowe, B. Boxer, S. Brown, S. Whitehouse and T. Udall to United States Trade Representative Ron Kirk, 17 October 2012.

to addressing climate change, and in particular pricing carbon, has arisen from concern about the economic impacts on the US economy. In contrast, the TPP could include a number of provisions addressing climate change that would benefit the US economy, such as requiring reductions in trade barriers on environmental goods and services.

B Environment Chapters in US Free Trade Agreements: Implications for the TPP

The US has FTAs with six of the TPP countries, and each one includes an environment chapter. However, as these FTAs were finalised prior to the 2007 Bipartisan Trade Deal, their environmental provisions are less instructive for the TPP process. For instance, in the Australia-US FTA, the parties merely agreed to enforce their environmental laws and various transparency provisions, none of which are subject to the FTA's dispute settlement mechanism.[7]

The Korea-US FTA (KORUS), signed in 2010 and passed by the US Congress in 2011, entered into effect on 15 March 2012 and is the most recent FTA the US has completed. As an FTA with a country in the Asia-Pacific and potential future TPP member,[8] KORUS provides the most relevant insight into how the US has implemented the terms of the 2002 Trade Act and the Bipartisan Trade Deal and what types of environmental rules the US will likely seek in the TPP. As in previous US FTAs, KORUS includes a dedicated environment chapter. Consistent with the Bipartisan Trade Deal, a key element of this chapter is the commitment by the parties to adopt, maintain and implement laws and regulations to fulfil their obligations under seven Multilateral

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[7] *Australia–United States Free Trade Agreement*, signed August 2004 (entered into force 1 January 2005), ch19.

[8] Jeffrey Schott, Barbara Kotschwar and Julia Muir, *Understanding the Trans-Pacific Partnership* (Peterson Institute for International Economics, 2013) 45.

Environmental Agreements (MEAs) listed in an annex to the chapter.[9] Not all TPP parties are party to these MEAs, and the US will likely expect their eventual participation as part of a final agreement.

One of the main benefits of including these MEAs in the TPP will be access to the agreement's dispute settlement procedures to enforce compliance with these MEAs. But giving a panel under the TPP dispute settlement mechanism the authority to decide whether a party has failed to implement an MEA raises concerns about whether such panelists have the expertise to interpret MEAs and how this affects the development of international environmental law – particularly when MEAs lack similar types of judicial processes that can interpret MEAs.

The parties to KORUS were sensitive to this issue and agreed that a panel established to adjudicate a breach of an MEA commitment should consult with any entity with responsibility for addressing non-compliance with the MEA – such as the Permanent Court of Arbitration under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)[10] – and to defer to any interpretative guidance this entity provides on the issue.[11] KORUS also addresses how the parties should respond to any inconsistency between a commitment in an MEA and in KORUS by balancing their obligations under both agreements. KORUS does not preclude a party from taking a measure to comply with an MEA provided that

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[9] *United States–Korea Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012) (KORUS) ch 20, annex 20-A.

[10] *The Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed 3 March 1973 (entered into force 1 July 1975) (CITES) art XVIII.

[11] KORUS arts 20.9.3(a)–(b), 20.9.6(a)–(c).

'the primary purpose of the measure is not to impose a disguised restriction on trade'.[12] The parties to KORUS have also committed to enhance the mutual supportiveness of MEAs and trade agreements to which they are both parties.[13] This commitment complements work in the World Trade Organization (WTO) Doha Round addressing the relationship between the WTO and MEAs.[14] Including similar provisions in the TPP would strike a balance between using the more effective dispute settlement procedures that will be part of the TPP to ensure compliance with these MEAs while providing opportunity for international environmental law and the decisions of other competent institutions to be considered by a panel under KORUS.

KORUS also recognises that enforcing commitments under MEAs takes resources, and the question of how to allocate scarce resources amongst often competing environmental priorities remains a prerogative of the parties.[15] Including such flexibilities in the TPP will be particularly important for developing countries, which face greater resource constraints and will want to retain the ability to make decisions over which environmental challenges to resource. The parties to KORUS also agreed that 'it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in its environmental laws'.[16] In order to fulfil this goal, KORUS requires the parties to refrain from derogating from their laws in ways that weaken

[12] Ibid., art 20.10.3.

[13] Ibid., art 20.10.1.

[14] *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted 14 November 2001) [31(i)].

[15] KORUS art 20.3.1(b).

[16] Ibid., art 20.3.2.

environmental protection and affect trade and investment between the parties.[17] This outcome is consistent with the Bipartisan Trade Deal and will be part of US demands for the TPP.

This non-derogation commitment responds to concerns that trade agreements lead to a race to the bottom. The concern is that liberalised trade with countries with lower environmental standards provides a competitive edge to imports from these countries, leading domestic businesses to seek lower environmental standards in order to compete. There is limited evidence that FTAs lead to a regulatory race to the bottom.[18] One reason is that environmental regulations are often a small cost compared with other larger determinants affecting competitiveness, such as labour, material and capital costs and exchange rates.[19] Additionally, to the extent that businesses do seek lower environmental standards, they have to contend with consumer and environmental groups mobilising in support of stronger environmental standards, and it is not necessarily the case that businesses always win.

From a developing country perspective, lower levels of environmental protection might be viewed as a competitive advantage that provides an opportunity to attract increased levels of foreign direct investment. As an empirical matter, there is little support for the view that weaker environmental laws affect patterns of investment.[20] Moreover, tolerating environmental

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[17] Ibid., art 20.3.2.

[18] Daniel W. Drezner, 'Globalization and Policy Convergence' (2001) 3(1) *International Studies Review* 53, 75.

[19] Gene Grossman and Alan Krueger, 'Environmental Impact of a North American Free Trade Agreement' (Working Paper No 3914, National Bureau of Economic Research, 1991).

[20] R.J.R. Elliot and K. Shimamoto, 'Are ASEAN Countries Havens for Japanese Pollution-Intensive Industries?' (2008) 31 *World Economy* 236; G.S. Eskeland and A.E. Harrison, 'Moving to greener pastures? Multinationals and the pollution haven hypothesis' (2003) 70 *Journal of Development Economics* 1.

degradation of natural capital such as water and air quality and the related human health effects may not accurately account for the long run costs, such as from a less healthy population.[21] Additionally, there is evidence that tighter environmental regulations can act as incentives for firms to adopt the latest technologies, improve their efficiency and productivity and act as a spur towards greater environmental innovation.[22] Moreover, increased trade liberalisation – a key driver of technology diffusion and adoption – could magnify the impact of stricter environmental standards on the uptake by domestic firms of environmental technologies.

The KORUS environment chapter also includes transparency and due process provisions that have important implications for environmental regulation. For instance, each party has agreed that judicial or administrative proceedings will be available to sanction and provide remedies for violations of its environmental laws and these proceedings will be impartial and independent.[23] Moreover, persons with a legal interest in a matter relating to human health or the environment will be able to sue for damages and have access to a range of remedies including injunctive relief, monetary penalties and the ability to request a party to take appropriate action to enforce its environmental laws.[24] Additionally, KORUS requires the parties to promote public awareness of their environmental laws, including ways that interested persons can enforce compliance with these laws.[25] Public participation in the implementation of the KORUS

[21] Brian Copeland, 'International Trade and Green Growth' (Policy Research Working Paper No 6235, World Bank, October 2012) 9.

[22] M. Porter and C. van der Linde, 'Toward a New Conception of the Environment-Competitiveness Relationship' (1995) 9 *Journal of Economic Perspectives* 97.

[23] KORUS art 20.4.

[24] Ibid.

[25] Ibid., art 20.7.

environmental chapter is also encouraged by persons from the other party.[26] These provisions are in addition to the KORUS Transparency Chapter, which includes commitments to publish in advance any laws, regulations, and so on, affecting the agreement in order to provide opportunities for interested persons to comment on the proposed measures,[27] and a commitment to address substantive comments received and to explain any substantive revisions made to the proposed regulation.[28]

The US will demand similar transparency and due process commitments in the TPP environment chapter. Such a position will likely be supported by those TPP parties who have already made similar commitments in their FTAs with the United States. Once a country has agreed to follow particular procedures for making and implementing laws and to provide access to independent and impartial judicial proceedings, these procedures are usually applied to all laws and not just those required by the FTA, as it is often too difficult to apply transparency and due process requirements to some laws only. In this sense, transparency commitments in FTAs are de facto multilateral commitments. This should lead Australia and Chile, which have made similar commitments on transparency and due process in previous FTAs with the US, to support similar rules in all future trade agreements.

Encouraging increased transparency in governments' development of laws and regulations and providing access to impartial and independent judicial systems that operate according to generally accepted norms of due process will provide additional legitimacy to environmental laws and regulations and to the balance struck in these laws between free trade

[26] Ibid., art 20.7.2.

[27] Ibid., art 21.1.

[28] Ibid., art 21.1(4)(c).

and environmental protection. Additionally, environmental laws in particular are often viewed as reflecting a trade-off between businesses concerned about their costs and environmental and consumer groups, who are focused on the human and environmental health effects. Requiring governments to make the public aware of new environmental laws and provide opportunities to comment and reasons for substantive changes to these laws should explicate and make transparent where these trade-offs are being made and for what reasons. This will make back-room deals that produce outcomes that cannot be readily explained less easy to accomplish. It should also lead to greater public acceptance of environmental laws.

The role and impact of stakeholder participation in strengthening environmental laws is reflected in the environmental Kuznets curve, an inverted U-shaped curve that describes how developing countries initially focus on poverty reduction at the expense of environmental health, such as clean air and water.[29] As wealth increases, citizens demand a cleaner environment, leading to improved environmental standards and an upwards sloping Kuznets curve. For instance, Kruger and Grossman have estimated that emissions of sulfur dioxide increase until a country's population achieves an average per capita income of US$4,000–$5,000, declining thereafter.[30] Others have argued that the empirical evidence for the claim that environmental health improves with economic growth is limited.[31]

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[29] World Bank, *World Development Report 1992: Development and the Environment* (Oxford University Press, 1992).

[30] Gene Grossman and Alan Krueger, 'Economic Growth and the Environment' (1994) 110(2) *Quarterly Journal of Economics* 353, 367.

[31] Willam Harbaugh, Arik Levinson and David Molloy Wilson, 'Reexamining the Empirical Evidence for Environmental Kuznets Curve' (2002) 84(3) *The Review of Economics and Statistics* 541.

From a political economy perspective, one of the criticisms of the environmental Kuznets curve is that people may not adequately account for the benefits of access to clean air and water.[32] Moreover, promoting development at the expense of environmental health may not reflect an accurate accounting of the costs and benefits. For instance, the health of the poorest citizens might not be accurately reflected in a decision to promote a particular development, especially where opportunities for input into the decision-making process are limited. Moreover, addressing environmental degradation only after a certain stage of development will be ineffective for environmental damage that is irreversible, such as loss of biodiversity or the extinction of species. In fact, there is evidence that there is no economic advantage to tolerating environmental damage as a byproduct of economic growth.[33]

Including the KORUS transparency and due process provisions in the TPP should go some way towards clarifying the costs and benefits of development. For instance, requiring TPP governments to make public any proposed environmental laws and provide opportunities for all citizens to contribute to the decision-making process will give greater voice to those communities whose interests would otherwise not be heard. It will also provide TPP governments with more information about the impact of proposed laws, which should allow for a more accurate accounting of their costs and benefits. This could also lead the TPP parties to grow their economies with lower levels of environmental degradation.[34]

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[32] Stephane Hallegatte et al., 'From Growth to Green Growth: A Framework' (Policy Research Paper No 5872, World Bank, November 2011).

[33] Susmita Dasgupta, Hua Wang and David Wheeler, 'Surviving Success: Policy Reform and the Future of Industrial Pollution in China' (Policy Research Working Paper No 1856, World Bank, 1997).

[34] Susmita Dasgupta, Benoit Laplante, Hua Wang and David Wheeler, "Confronting the Environmental Kuznets Curve," Journal of Economic Perspectives, 16:1 Winter 2002, p. 152

KORUS also establishes a framework and commitment for future cooperation on environmental issues between the US and Korea. In this regard, KORUS references the US–Korea environmental cooperation agreement (ECA) that was negotiated in parallel with KORUS. The ECA provides a comprehensive framework for US–Korea cooperation on environmental issues, such as combating illegal logging,[35] protecting, conserving and managing ecosystems and wildlife,[36] reducing air and water pollution[37] and developing cleaner energy sources.[38]

There are, however, limits to the ECA. In particular, the KORUS dispute settlement mechanism is not available should either government fail to fulfil its commitments under the ECA. The USTR appears interested in addressing this by including in the TPP environment chapter commitments on trade in wildlife and illegally harvested timber and fisheries subsidies.[39]

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[35] *Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation*, signed 23 January 2012 (entered into force 15 March 2012) (*US–Korea Environmental Cooperation Agreement*) art 2(2)(f).

[36] *US–Korea Environmental Cooperation Agreement* art 2(2)(e).

[37] Ibid., art 2(2)(g).

[38] Ibid., art 2(2)(i).

[39] 'USTR Green Paper on Conservation and the Trans-Pacific Partnership', (December 2011) Office of the United States Trade Representative, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership>.

II ADDITIONAL ENVIRONMENTAL CONCERNS FOR THE TPP ENVIRONMENT CHAPTER

A Trade in Illegally Harvested Timber

The TPP presents an important opportunity to develop rules that support efforts to conserve forests and prevent trade in illegal logs in a region that is responsible for 'the most intense deforestation in the world, with devastating and irreparable effects on its, and the world's forests and ecosystems'.[40]

US policy on combating trade in illegally harvested timber is based on the 2008 Lacey Act Amendments, which extended the Act's original prohibition on trade in wildlife and plants native to the US that have been illegally taken and listed in CITES, to include timber illegally harvested in other countries and imported into the US.[41] Whether timber has been illegally harvested is determined according to the laws of the country of harvest. Under the Lacey Act Amendments, the importer is required to declare the value and quantity of the timber, the plant's name, and its country of origin.

The Lacey Act Amendments are a novel approach to addressing trade in illegally harvested timber products as they rely on the laws in the country of origin as determining whether an illegal harvest has occurred. And requiring TPP parties to fulfil their obligations under these MEAs, which include CITES, uses this treaty's internationally agreed understanding of which species of flora are endangered as a common starting point amongst TPP parties for

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[40] Vanda Felbab-Brown, 'Not As Easy as Falling Off a Log: The Illegal Logging Trade in the Asia-Pacific Region and Possible Mitigation Strategies' (Foreign Policy Working Paper No 5, Brookings Institution, March 2011) 2.

[41] The Lacey Act 16 U.S.C. δδ 337-3378.

determining which timber should be protected.[42] Moreover, placing responsibility on the importer to declare to US customs the wood type and country of export, alongside criminal penalties for knowingly making a false declaration, creates a strong incentive for the importer to source their wood from legally harvested timber products.

Reducing the access of illegally harvested wood to the US market should reduce the commercial incentive for illegal logging. The Lacey Act also implicitly recognises that the challenge to addressing illegal logging is less about the need for better conservation laws and more about the effective enforcement by wood-exporting countries of their current laws. In fact, efforts to regulate logging since the 1980s have led to increased illegal logging in TPP countries, such as Malaysia.[43] Consistent with this policy, the US has pursued international cooperation with other countries that emphasises exchanging information about trade in illegal logs and enhancing the capacity of law enforcement agencies in these countries. For instance, the US and Indonesia have a memorandum of understanding (MOU) under which their customs authorities have agreed to share information on trade in timber products and to cooperate in enforcing laws affecting trade in timber products.[44]

In 2009, this approach to international cooperation was expanded to an Asia-Pacific Initiative on Illegal Logging and Trade, which includes all the TPP countries in the Asia-Pacific region (except for New Zealand) and those TPP countries in the Western Hemisphere.

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[42] CITES appendices 1, II, III.

[43] Vanda Felbab-Brown, above n 40, vi.

[44] *Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Indonesia on Combating Illegal Logging and Associated Trade*, signed 17 November 2006 (entered into force on the date of signing).

Additionally, in 2011, Asia-Pacific Economic Cooperation (APEC) Trade Ministers directed their officials to find ways to address trade in illegally harvested timber products, leading APEC to create an Experts Group on Illegal Logging and Associated Trade tasked with developing ways to achieve this goal.[45] This work has set the scene for including the type of information-sharing and law enforcement cooperation outlined above in the TPP and would continue an approach that all TPP parties have become engaged with in other fora. The most controversial element to date has been the US insistence that the commitments are mandatory and subject to dispute settlement, which is a step further than the voluntary nature of APEC and the US-Indonesia MOU, which does not have a binding dispute settlement mechanism.[46]

B Fisheries Subsidies

According to a report by the World Bank and the Food and Agriculture Organization, 75 per cent of fish stocks are underperforming at a cost of $50 billion annually.[47] Addressing the unsustainable exploitation of fish stocks from fisheries subsidies is part of the WTO Doha Round.[48] Moreover, at the 2005 Hong Kong Ministerial Conference, WTO Members agreed to 'strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of

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[45] APEC, *Experts Group on Illegal Logging and Associated Trade* <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Illegal-Logging-and-Associated-Trade.aspx>.

[46] 'USTR Acknowledges Objections on Enforceability in TPP Environment Talks' (29 June 2012) 30 (26) *Inside US Trade* (online).

[47] Ragnar Arnason, Kieran Kelleher and Rolf Willmann, *The Sunken Billions: The Economic Justification for Fisheries Reform* (World Bank, 2009), p xvii (executive summary).

[48] *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted 14 November 2001).

certain forms of fisheries subsidies that contribute to overcapacity and over-fishing'.[49] The Hong Kong Declaration also states that 'appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns'.[50] Following this mandate, WTO Members have focused on developing a set of specific rules for fisheries subsidies. Some progress has been made, though significant differences remain. The Chair of the WTO Rules Negotiating Group circulated a draft text in November 2007 that included a prohibition on subsidies affecting fish stocks already over-fished with exceptions linked to fisheries management and special and differential treatment for the least developed WTO Members.[51]

All of the key issues in the WTO Round fisheries subsidies negotiations are likely to play out in the TPP negotiations, which include a mix of developed and developing countries with various interests in this issue. For instance, for those countries with effective fish management regimes and where fishing is not a significant economic issue, the focus is on sustainability and conservation. In contrast, some developing countries are concerned that subsidies rules could constrain their ability to support what is often an important source of food, employment and economic growth.[52] For instance, a key sticking point in the current TPP negotiations is over some developing country demands for a carve-out that would allow subsidies for small-scale

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[49] *Doha Work Programme: Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC (22 December 2005) (adopted 18 December 2005), annex D [9]–[11].

[50] Ibid., annex D [9].

[51] *Informal Open-Ended Meeting with Senior Officials*, WTO Doc TN/RL/W/246 (27 November 2009).

[52] *Statement by the Chairman*, WTO Doc TN/RL/W/246 (27 November 2009) 6.

fisheries.[53] That said, this issue does not necessarily split along developed/developing country lines. For instance, in the WTO, the US is part of a negotiating group referred to as 'Friends of Fish', which includes both developed and developing TPP parties – namely, Australia, Chile, New Zealand and Peru, who are supportive of strong disciplines on fisheries subsidies with appropriately tailored exceptions.[54] In contrast, Korea, often with the support of Japan, has generally opposed WTO efforts to reach an ambitious agreement limiting fisheries subsidies.[55]

III ADDRESSING CLIMATE CHANGE AND OTHER ENVIRONMENTAL CHALLENGES IN THE TPP: BEYOND THE ENVIRONMENT CHAPTER

The commitments countries make under the TPP's environment chapter will not be the only way that the TPP could affect environmental health. In fact, liberalised trade combined with new TPP rules could reinforce and help achieve a range of environmental goals.

As outlined in the introduction, the impact of trade liberalisation on environmental health will depend on the type of economic growth that follows. Where liberalised trade provides increased access to and competition amongst services providers, this can underpin a shift in the FTA party's economy away from heavy industry and towards less environmentally harmful service industries and lead to more efficient and environmentally friendly production processes.[56]

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[53] 'Why Japan is lagging on the TPP' (30 May 2012) *East Asia Forum* <http://www.eastasiaforum.org/2012/05/30/why-japan-is-lagging-on-the-tpp>.

[54] *Fisheries Subsidies: Communication from Argentina, Australia, Chile, Colombia, the United States, New Zealand, Norway, Iceland, Peru and Pakistan*, WTO Doc TN/RL/W/243 (7 October 2009).

[55] *Framework of the Disciplines on Fisheries Subsidies: Communication from the Republic of Korea*, WTO Doc TN/RL/W/245 (24 November 2009).

[56] Grossman and Krueger, above n 19, 4.

FTAs can also lead to increased access to green technologies at lower cost, which increases the capacity of an FTA party to address environmental issues such as air and water pollution. The TPP can also support efforts by TPP parties to reduce their greenhouse gas (GHG) emissions. Similar to the way the TPP can help countries improve a broad range of environmental challenges by shifting their economies into cleaner, less polluting industries, the TPP can assist countries' transition on to low-carbon pathways by providing access to pertinent goods, services and investment.

A Environmental Goods

Reduced tariffs on environmental goods can support domestic efforts towards environmental conservation and reducing GHG emissions. In particular, for TPP developing economies whose average bound tariffs are higher than developed economies, the environmental gains from reducing tariffs on environmental goods are potentially significant.[57] As developed country tariffs on environmental goods are already low, reducing these tariffs further is unlikely to provide much incentive for business in these countries to increase their levels of environmental conservation.[58]

At the 2011 APEC meeting in Honolulu, the TPP parties released an outline of the key goals for the TPP, which include eliminating tariffs and other barriers to trade in goods and

[57] Veena Jha, 'Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods' (Issue Paper No 10, International Centre for Trade and Sustainable Development, December 2009) 13.

[58] Robert Howse and Petrus van Bork, 'Options for Liberalising Trade in Environmental Goods in the Doha Round' (Issue Paper No 2, International Centre for Trade and Sustainable Development, July 2006) 5.

services.[59] Reducing tariffs on all goods to zero would overcome the need to develop a separate list of environmental goods. However, in the event that the TPP parties do not reach this goal or agree instead to phase out tariffs on goods, then ensuring trade barriers are eliminated on an appropriate list of environmental goods should remain a priority.

Reducing tariffs on environmental goods has been an ongoing element of the WTO Doha negotiations, though progress has been frustrated by the challenge of agreeing a list of environmental goods. At the APEC Summit in Vladivostok in 2012, the APEC economies agreed on a list of 54 environmental goods on which they would cut tariffs to 5 per cent or less by the end of 2015.[60] Agreeing on this list of environmental goods is a good start but it is a limited list compared with lists of environmental goods developed by APEC and the World Bank; it could be expanded upon in the TPP.[61]

There are, moreover, limits to developing lists that largely define an environmental good based on its end-use.[62] This is particularly the case in the climate change context, where the way in which goods are produced and disposed of largely determines their GHG emissions lifecycle.

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[59] *Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of the Trans-Pacific Partnership Agreement* (12 November 2011) Office of the United States Trade Representative <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

[60] 2012 Leaders' Declaration, *Vladivostok Declaration – Integrate to Grow, Innovate to Prosper* (8–9 September 2012) <http://apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm.aspx> annex C.

[61] See generally Ronald Steenblik, 'Environmental Goods: A Comparison of the APEC and OECD Lists' (Trade and Environment Working Paper No 2005-04, Organisation for Economic Co-operation and Development, 29 November 2005).

[62] Howse and van Bork, above n 58, 18.

For instance, in the US, the electricity sector produces 40 per cent of GHG emissions and the commercial and industrial sectors produce approximately 20 per cent.[63] This has led countries to regulate goods' GHG lifecycle.[64] For instance, the US Renewable Fuel Standard, which requires fuel sold and imported into the US to have a specific quantity of renewable fuel, identifies four categories of renewable fuels based on their GHG lifecycle. European Union (EU) countries, such as Germany and the United Kingdom, have also adopted laws that regulate renewable energy and transportation fuels based on their GHG emissions lifecycle.[65]

The TPP parties should therefore consider defining environmental goods by their lifecycle or production process. Providing a tariff cut for such goods would create the strongest incentive for industry to use less carbon-intensive production processes and thereby contribute the most to reducing GHG emissions.[66]

It is also the case that more stringent environmental regulation will be required in order for reduced trade barriers on environmental goods to lead to better environmental outcomes.[67] This is because, in a perfectly competitive market, firms do not have an incentive to go beyond

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[63] United States Energy Information Administration, *Emissions of Greenhouse Gases in the United States 2009*, (United States Department of Energy, March 2011).

[64] Edvokia Moise and Ronald Steenblik, 'Trade-Related Measures Based on Processes and Production Methods in the Context of Climate-Change Mitigation' (Trade and Environment Working Paper No 2011/04, Organisation for Economic Co-operation and Development, 3 August 2011).

[65] Ibid., 18–21.

[66] Howse and van Bork, above n 58, 12; Joshua Meltzer and Kathy Sierra, 'Trade and Climate Change: A Mutually Supportive Policy', *Harvard International Review*, 7 December 2011, <http://hir.harvard.edu/disease/trade-and-climate-change>.

[67] Howse and van Bork, above n 58, 5.

what the law requires them to do. However, to the extent that lower tariffs reduce the cost of complying with environmental or climate change laws, this could create political space for the adoption of even more stringent regulations.[68] Reducing the costs of green technologies should also provide opportunities for business to demonstrate corporate social responsibility by doing more to reduce their GHG emissions.

B Non-tariff Barriers to Trade in Environmental Goods

Non-tariff barriers are an increasingly important obstacle to reducing costs and increasing access to environmental goods.[69] Some of the key non-tariff barriers include technology-specific regulations and standards that manufacturers must meet as well as different testing and conformity assessment requirements.[70]

In the energy sector, for instance, energy-efficiency labels applied to all manner of goods, from washing machines to computers, have become a key means of informing consumers and incentivising industry to produce more energy-efficient products.[71] Countries have already taken

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[68] Mary Lovely and David Popp, 'Trade, Technology, and the Environment: Does Access to Technology Promote Environmental Regulation?' (2011) 61 *Journal of Environmental Economics and Management* 16.

[69] *Market Access for Environmental Goods: Communication from Canada, European Communities, New Zealand, Norway, Singapore, Switzerland, and the United States*, WTO Doc TN/MA/W/70 (9 May 2006) 3.

[70] Barbara Fliess and Joy Kim, 'Non-tariff Barriers Facing Trade in Selected Environmental Goods and Associated Services' (2008) 42(3) *Journal of World Trade* 535; Ronald Steenbilk and Joy Aree Kim, 'Facilitating Trade in Selected Climate Change Mitigation Technologies in the Energy Supply, Building, and Industry Sectors' (Trade and Environment Working Paper No 2009-02, Organisation for Economic Co-operation and Development, 4 May 2009).

[71] Rod Janssen, 'Harmonising Energy Efficiency Requirements – Building Foundations for Co-operative Action' (Issue Paper No 14, International Centre for Trade and Sustainable Development, November 2010).

steps towards harmonising their labelling schemes. For instance, TPP countries such as Australia and Canada base their energy-efficiency labels on the US Energy Star program. However, this is not the case for other developing country parties to the TPP, and developed country differences remain in areas such as the stringency of standards and the use of different energy test procedures. This suggests that there is considerable scope for the harmonisation of standards to increase efficiencies and reduce costs.[72] The environmental benefits will also be greatest where harmonisation is to the highest standard.

Including commitments in the TPP that parties will use common standards and labels that inform consumers of the environmental benefits of particular goods would reduce costs and should increase trade in those goods. Moreover, in the event that the TPP parties were to consider providing tariff preferences to goods produced using low-carbon production processes, labelling is one way that customs officials and consumers could identify these goods.[73] There are also more general non-tariff barriers such as inadequate protection of intellectual property rights and slow and costly customs procedures that affect trade in environmental goods, and these issues are being addressed in the Doha Round.[74] Good progress has been made on customs (otherwise known as trade facilitation) issues.[75] The TPP provides an opportunity to build on

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[72] Paul Waide et al., 'What Is To Be Expected and Gained from International Harmonization of Equipment Energy Efficiency Requirements?' (Summer Study on Energy Efficiency in Buildings, American Council for an Energy-Efficient Economy, 2010) 8-376.

[73] Joshua Meltzer and Kathy Sierra, 'Trade and Climate Change' (7 December 2011) *Harvard International Review* (online).

[74] Peter Yu, 'TRIPS Enforcement and Developing Countries' (2011) 26 *American University International Law Review*, 727.

[75] *Draft Consolidated Negotiating Text*, WTO Doc TN/TF/W/165/Rev.14 (17 December 2012) 24.

progress so far in the Doha Round by including commitments that reduce the time it takes to release goods through customs and increasing the transparency and efficiency of customs processes, such as by publishing customs procedures on the internet.

In addition to the TPP parties reaffirming their commitments under the WTO's *Agreement on Technical Barriers to Trade* (TBT Agreement),[76] the TPP should include additional commitments that encourage cooperation amongst the TPP parties' standards-setting bodies with the aim of developing common approaches to issues such as energy efficiency and the methodology for determining a good's GHG lifecycle. Additionally, enhanced processes for mutual recognition of the results of the conformity assessment procedures would reduce costs by avoiding the need for duplicate testing of products in each TPP market.

Lack of transparency about non-tariff barriers is another troubling issue and includes difficulties determining their existence and how they are applied.[77] These barriers are also particularly acute for small and medium enterprises, which have less capacity to absorb these costs and to hire lawyers or agents in the importing country to try and navigate these issues.

Greater transparency in the development of standards and technical regulations, and opportunities for interested parties in each TPP country to provide comments, should also help TPP parties avoid developing regulations that are discriminatory and create unnecessary barriers

[76] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (*Marrakesh Agreement*) annex 1A.

[77] Steenblik and Kim, above n 70, 11.

to trade.[78] In this respect, KORUS includes a range of transparency commitments that go beyond the TBT Agreement, which could be usefully included in the TPP Agreement. These include requirements to allow persons from other TPP parties to participate in the standard-setting process and to provide electronic notice of the proposed new standards and regulations, including an explanation of the regulation's objective.[79]

C Environmental Services

Services are increasingly a key part of the shift to a greener and low-carbon economy. Renewable energy from wind farms and solar facilities requires engineers to design and run these facilities, and the downstream end of the supply chain for renewable energy is heavily services-driven. For instance, wind power facilities require persons with expertise in marketing, sales, financing, transportation and logistics as well as wind park operations and maintenance.[80]

Moreover, the types of technologies that can be used to address environmental issues such as climate change are changing rapidly. Governments around the world are supporting research and development into a range of new technologies that will also require new skill-sets to implement and operate. The deployment of environmental and GHG mitigation technologies will

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[78] Aaron Cosbey, *Lessons Learned on Trade and Sustainable Development: Distilling Six Years of Research from the Trade Knowledge Framework* (International Institute for Sustainable Development and International Committee for Trade and Sustainable Development, 2004) 18.

[79] See KORUS ch 9.

[80] Jacob Funk Kirkegaard, Thilo Hanemann and Lutz Weischer, 'It Should be a Breeze: Harnessing the Potential of Open Trade and Investment Flows in the Wind Energy Industry' (Working Paper No 09-14, Peterson Institute for International Economics, December 2009) 39.

rely on a broad range of services not directly related to the environmental sector.[81] For instance, the development of a wind farm will require access to consulting, telecommunications, transportation/logistics and financial services for the design, financing and execution of the project. This points to the need for the TPP to broadly reduce barriers to services trade. Additionally, scheduling services commitments in the TPP using a negative list approach means that new services will be automatically bound, ensuring that the TPP services commitments remain relevant in a rapidly changing market for green technologies.

D Energy and Climate Change Subsidies

Developing low-carbon energy sources such as from renewables and nuclear power will be key to decoupling economic growth from GHG emissions. TPP parties have adopted a range of renewable energy subsidies. For instance, 29 US states have renewable portfolio standards,[82] and Australia has a renewable energy target of generating 20 per cent of electricity from renewable energy by 2020, in addition to government support for the development of renewable energy such as solar power and carbon capture and storage.[83] The TPP parties also subsidise research and development into green energy. For instance, the 2009 American Recovery and

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[81] Ronald Steenblik and Massimo Geloso Grosso, 'Trade in Services Related to Climate Change: An Exploratory Analysis' (Trade and Environment Working Paper No 2011/03, Organisation for Economic Co-operation and Development, 26 May 2011) 7.

[82] Galen Barbose, 'Renewables Portfolio Standards in the United States: A Status Update' (Paper presented at 2012 National Summit on RPS, Washington, DC, 3 December 2012) <http://www.cleanenergystates.org/assets/2012-Files/RPS/RPS-SummitDec2012Barbose.pdf>.

[83] *Renewable Energy Target*, Australian Government, Department of Climate Change and Energy Efficiency <http://www.climatechange.gov.au/government/initiatives/renewable-target.aspx>.

Reinvestment Act (ARRA) in 2009 increased spending on developing clean energy from $17.895 billion in 2007 to $37.160 billion in 2010.[84]

Subsidies to support climate change efforts raise concerns about their trade impact and WTO consistency. The WTO *Agreement on Subsidies and Countervailing Measures* (SCM Agreement)[85] disciplines WTO Members' use of subsidies. The SCM Agreement prohibits subsidies conditional on export and the use of domestic content. There are also actionable subsidies where it can be demonstrated that there is a subsidy (that is, it entails a financial contribution such as government assistance to firms), that it confers a benefit on an enterprise and the subsidy is de facto or de jure specific.

Any analysis of the implications of such subsidies on trade needs to be done in the context of a market that already includes significant fossil fuel subsidies, which the International Energy Agency estimates were worth over $400 billion in 2010 and, without reform, will increase to $660 billion by 2020.[86] Government action to encourage clean energy is therefore not an intervention into an otherwise perfect market but should be understood as an attempt to offset existing market distortions. The G20 agreement to phase out inefficient fossil fuel subsidies should also be understood in this light.[87] Additionally, Joseph Stiglitz has argued that the fossil

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[84] Joshua Meltzer, *A Carbon Tax as an Incentive for Green Innovation and the Implications for International Trade* (November 2012) Alliance21 <http://alliance21.org.au/site/assets/media/docs/1211_Meltzer_Paper.pdf>.

[85] *Marrakesh Agreement* annex 1A.

[86] International Energy Agency, 'World Energy Outlook 2010' <http://www.worldenergyoutlook.org/media/weo2010.pdf>.

[87] *G20 Leaders' Statement: The Pittsburgh Summit* (24–25 September 2009) G20 Information Centre, University of Toronto <http://www.g20.utoronto.ca/2009/2009communique0925.html>.

fuel sector is also a recipient of a negative subsidy stemming from the failure to correctly price carbon emissions to reflect their climate change impacts.[88]

The trade law impacts of government assistance for a range of energy sources played out in the recent WTO *Canada – Renewable Energy* case, where the panel found that the complainants had failed to establish a 'benefit' under the SCM Agreement because they could not point to a wholesale electricity market unaffected by government policy that could be used as a benchmark to assess the effects of Canada's feed-in-tariff (FIT) program.[89]

This analysis suggests that, from a climate change perspective, not all energy subsidies are harmful, and some are necessary to overcome the path dependency created by technology lock-in – the dominance of a market by an inferior technology – such as coal-fired power stations.[90] Additionally, subsidies are often required to encourage an optimal level of research and development.[91]

The issue of climate subsidies also arises when governments offset the impact of a domestic carbon price on so-called energy-intensive trade-exposed industries to address the competitiveness and carbon leakage concerns that arise as a result of imports from countries not pricing carbon. For instance, the EU has offset the impact of its cap and trade system on these

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[88] Joseph Stiglitz, 'A New Agenda for Global Warming' (July 2006) *Economists' Voice* (online).

[89] Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc WT/DS412/R (circulated 19 December 2012) [7.293]–[7.298].

[90] Mark Dutz and Siddharth Sharma, 'Green Growth, Technology and Innovation' (Policy Research Working Paper No 5932, World Bank, January 2012) 13.

[91] Ibid.

industries by providing a free allocation of permits.[92] Australia also mitigates the impact of its carbon price for its energy-intensive trade-exposed industry.[93]

A number of these subsidies might fall foul of the SCM Agreement. For instance, the *Canada – Renewable Energy* case demonstrates the instability of the electricity market as a benchmark for determining whether a 'benefit' exists, and China has requested WTO consultations with the EU over Germany's FIT program.[94] Moreover, allocating free allowances to offset a domestic carbon price on energy-intensive trade-exposed industry could constitute a financial benefit under the SCM Agreement, as the government has provided a right to emit carbon for free.[95]

The limits to the WTO subsidies rules as they apply to climate change and energy subsidies should be addressed in the TPP. This would not address the application of WTO rules, but action should be undertaken with an eye to expanding TPP membership to all APEC economies. Agreement reached here could build a foundation for reform of the WTO subsidies rules.

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[92] *Climate Action: The EU Emissions Trading System* (4 January 2013) European Commission <http://ec.europa.eu/clima/policies/ets/index_en.htm>.

[93] Economist Intelligence Unit, *Cleaning Up: Australia's Readiness for a Low Carbon Future: A report from the Economist Intelligence Unit* (*The Economist*, May 2011).

[94] See *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc WT/DS452/1 (7 November 2012) (Request for Consultations by China).

[95] Robert Howse, 'Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (International Institute for Sustainable Development, May 2010) 9; see also Gary Hufbauer, Steve Charnovitz and Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute for International Economics, 2009) 62–64.

One approach the TPP could take would be to develop a list of subsidies that would be non-actionable. The WTO SCM Agreement Article 8 (now expired) contains a list of non-actionable subsidies, including subsidies for research and development and assistance to adapt to new environmental requirements. Rob Howse has proposed that any list of non-actionable subsidies be defined in terms of policies listed in the Kyoto Protocol and require that they be consistent with WTO norms of non-discrimination and transparency.[96] Another approach would be to allow countries to justify subsidies under Article XX of the *General Agreement on Tariffs and Trade 1994*,[97] which includes an exception that would cover measures to reduce GHG emissions.[98]

Increasing the transparency of subsidies would also be an important step and would give TPP parties information on subsidies programs that are often difficult to identify. The WTO SCM Agreement requires WTO Members to report their subsidies to the WTO, but such reporting has been low, largely due to a lack of sanctions for non-compliance.[99] The TPP parties

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[96] Howse, above n 95, 21.

[97] *General Agreement on Tariffs and Trade*, GATT Doc LT/UR/A-1/A/1/GATT/2, signed 30 October 1947, as incorporated in the *Marrakesh Agreement*, annex 1A.

[98] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (adopted 17 December 2007) [151].

[99] Sadeq Bigdeli, 'Will the "Friends of Climate" Emerge in the WTO? The Prospects of Applying the "Fisheries Subsidies" Model to Energy Subsidies' (2008) 1 *Climate Change Law Review* 78, 85.

could begin to address this by requiring subsidies to be reported to all other TPP parties in a standard format, with sanctions for breach.[100]

CONCLUSION

International trade both reflects and facilitates economic connectedness. In so doing, it has the potential to underpin economic growth and raise living standards globally. International trade can also lead to more rapid rates of environmental depletion, as access to new markets encourages efficiencies and production at scale. But providing access to the goods and services used to develop economies in more efficient ways will reduce the environmental costs of growth. Additionally, greater trade can increase exposure to new technologies and ideas, which could increase innovation and be a catalyst for developing breakthrough green technologies.

International trade rules also reflect decisions that governments take about how to balance the growth-promoting aspects of international trade with the need for resource conservation. And as new environmental challenges have arisen, particularly climate change, new bargains need to be struck about how trade rules should be used to support efforts to address this challenge.

As a twenty-first-century trade agreement, the TPP is currently the best opportunity to address current environmental challenges. The TPP is also the first major plurilateral trade negotiation post the WTO Doha Round where both the impacts of climate change and the inability to make significant progress in the United Nations climate change negotiations are

[100] See Ronald Steenblik and Juan Simon, 'A New Template for Notifying Subsidies to the WTO' (International Institute for Sustainable Development, May 2011).

clear. This highlights the importance of using the TPP to develop new international trade rules that can enable countries to develop their economies in an environmentally sustainable manner.

Whether it is depleting fisheries, declining biodiversity or reduced space in the atmosphere for GHG emissions, the underlying issue is resource scarcity. And in a world where an additional 3 billion people are expected to enter the middle class over the next 15 years, countries need to find new and creative ways to cooperate in order to satisfy the legitimate needs of their population for growth and opportunity while using resources in a manner that is sustainable for current and future generations.[101] The TPP parties already represent a diverse range of developed and developing countries. Should the TPP become a free trade agreement of the Asia-Pacific region, it will include the main developed and developing countries and will be a strong basis for building a global consensus on these trade and environmental issues.

[101] Homi Kharas, 'The Emerging Middle Class in Developing Countries' (Working Paper No 285, Organisation for Economic Co-operation and Development, 2010).