

## NEWS FEATURE:

## Freeing fossil fuels

Free trade agreements are becoming greener, and yet encouraging fossil fuel business.

Elisabeth Jeffries

Far from the Paris COP21 talks, a separate agreement was also reached in 2015. It contains provisions for environmental protection. It contains the promise of economic growth. It will make a significant impact on business as well as on the climate. It is the Trans-Pacific Partnership (TPP), a plurilateral free trade agreement between the US and eleven Pacific Rim countries working separately from the World Trade Organization (WTO).

Nonetheless, in a masterful case of double bind, the TPP was barely mentioned in the global press as the COP21 talks ended — and neither was its US–EU companion, the Transatlantic Trade and Investment Partnership (TTIP). Yet both are major international agreements, and the effect of TPP on the environment is likely to be far-reaching. As their economies grow, middle-income countries in the agreements will breed new generations of consumers in a world that has hardly begun to solve the conundrum of decarbonized growth.

At the same time, free trade agreements could encourage further fossil fuel business in developing countries — which is a major criticism sometimes levelled against them. They function within an incoherent international free trade policy regime crisscrossing with sustainability instruments such as national emissions goals or low-carbon legislation. This can provide an opportunity to undermine policy. “We have seen some non-aligned objectives between trade and climate regimes... these regimes do need to have more alignment,” comments Achim Steiner, executive director of the United Nations Environment Programme (UNEP), alluding to a case against China.

In 2012, both the European Union and US launched anti-dumping investigations against Chinese solar panel imports. Both claimed that China was selling products abroad at prices below fair value. Not long afterwards, China sealed an agreement with the US on climate in 2014, but the trade dispute is still raging.

Thus, international agreements have in the past failed to resolve important overlapping environmental matters, leading to a set of

complex and contradictory rulings. In 2009, UNEP described the relationship between the trade and climate regimes as “often [...] characterized by mutual avoidance rather than mutual supportiveness”. Climate negotiators, it indicated, had typically avoided issues relating to trade, preferring to defer these to the WTO.

Meanwhile, the WTO had been very cautious in addressing climate change, often highlighting that such issues are more suitably decided within the climate change regime<sup>1</sup>. In 2010, the International Centre for Trade and Sustainable Development (ICTSD) examined and confirmed the existence of conflicting rules and clashing courts within the WTO, multilateral environmental agreements and free trade agreements<sup>2</sup>.

A second criticism levelled against free trade agreements is their potential for encouraging big business to sue governments under an investor–state dispute settlement system (ISDS). In one cause célèbre, the Swedish utility company Vattenfall launched a claim against Germany for at least €700 million as compensation for the closure of its plants. Civil society groups worry that self-interested fossil fuel companies could wield extensive and undemocratic power against individual countries. ISDS, they argue, opens the door to environmentally toxic international trade development.

Governance experts, environmental lawyers and NGOs draw attention to the potential ‘regulatory chill’ from these investor litigation powers against the state. “ISDS can have a negative impact on environmental objectives, for example if considering implementing a stricter emissions standard on coal power covered by a free trade agreement. It could be used to potentially restrict renewable energy investment,” notes Christian Downie, a research fellow at the University of New South Wales, Australia, and a former negotiator on international energy trade.

Of equal concern is action against local technology procurement conditions for feed-in tariffs in developing countries. In 2015, for example, a WTO panel decided that India’s federal solar programme violated global trade



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rules because of local purchase requirements. According to several NGOs, agreements such as TPP only make weak environmental provisions, and due to stronger trade interests, penalize countries trying to set up new renewables industries competing with established fossil fuel plants. “There is a lack of any enforceable environmental measures in comparison with an enforceable investment chapter,” states Sam Cossar-Gilbert, program coordinator in Economic Justice for Friends of the Earth International.

Yet in more recent years a counterpoint has emerged. Trade agreements are beginning to promote environmental considerations. “If you look at these treaties over time, you can see that free trade was the overriding objective and that the environment was treated as external to trade in the 1980s and 1990s. Environmental issues are now part of the DNA of free trade agreements,” comments Achim Steiner.

By contrast, climate negotiations have been hamstrung by the interests of fossil fuel or transport companies operating behind the scenes. For example, the shipping industry is omitted from the December 2015 UNFCCC climate change agreement. Yet, as the NGO Carbon War Room has observed: “Shipping contributes approximately the same amount of CO<sub>2</sub> as Germany in terms of global

emissions. Yet, while Germany is targeting an 80% emissions reduction by 2050 [...] shipping is on course to increase emissions by 50–250% by the same year.”

At the same time, a bridge is being built between environmental and trade policy. Experts observe that the breadth of the multilateral environmental agreement linkages within EU free trade agreements has widened considerably compared to a few years ago. Meanwhile, they note that “the depth of American environmental provisions has increased dramatically in recent years by creating multilateral environmental agreement linkages that meddle much more deeply than the EU does with domestic environmental policy abroad”<sup>3</sup>.

Objectives relating to the oceans are one example, concerning pollution, species protection and sustainable fisheries. US international trade lawyer Amy Porges observes major progress on environmental matters in TPP: “I have never seen anything like the point on the marine environment in any previous agreement,” she states.

Another aim of the agreement, which has yet to pass through the US Congress, is to secure commitments to effectively enforce domestic environmental laws. These include laws that implement multilateral environmental agreements such as the Montreal Protocol. “Ratifying countries are obliged to control trade in substances that deplete the ozone layer and are violating the agreement if they do not,” explains Porges. For some developing countries, this might mean the introduction of new policy.

TPP also includes commitments to not waive or derogate from the protections afforded in environmental laws for the purpose of encouraging trade or investment. Countries engaged also commit to cooperate on issues such as energy efficiency; the development of cost-effective, green technologies and alternative, clean and renewable energy sources.

On investor–state disputes, Porges comments: “The zenith of ISDS was back in the early 1990s during the administration of George Bush Sr.” Investor rules in TPP, she notes, “are more modest than those in the North American Free Trade Agreement. It contains procedural safeguards. For example, it includes a provision that lets a government say there is no case.”

Most significantly, perhaps, negotiators and activists have succeeded in altering the course of controversial components of free trade agreements such as ISDS. Investor–state disputes have been transformed during the course of discussions on TTIP, whose agreement is further behind than TPP.

In a new proposal, only real judges (and not any arbitrators) can apply international

rules — thereby increasing the independence of the judges. An appeal court operates, which was not available under ISDS, and all governments retain the right to regulate.

“In the old system, you could claim both on investments made and on future profits. Under the new system, known as the Investment Court System (ICS), you can only claim on investments already made. This is a big difference, especially since the chosen approach can function as a template for future trade agreements. While this is speculative, this change will reduce the amount that companies can claim and is therefore likely to reduce the risk of regulatory chill,” point out Joachim Schellekens, environmental consultant, and Stephanie Bouman, trade consultant at consultancy Ecorys. The company has been engaged by the European Commission to conduct the impact assessment of expected changes arising from TTIP.

A strong knowledge base, they explain, can reduce the ‘regulatory chill’, and the provision of clear examples on when legislation is discriminative and when it is not is likely to help policymakers. “ISDS was a closed system, but ICS is now an open court. If a government implemented discriminatory legislation, an affected company could sue a government in a closed court under ISDS; under ICS there will be more transparency,” they say.

Negotiators have already made the proposals to the US, but no discussions have yet taken place during the official negotiation rounds. However, the Ecorys consultants indicate that the changes could be influential: “It is expected that the chosen system will be seen more in future agreements,” they note. “ICS is seen as an improvement from the previous system. The main reason is that ICS is more in line with public needs.”

Free trade agreements, then, are becoming greener, as illustrated by TPP, although criticized by NGOs for omitting any mention of climate change. It does not forbid the elimination of polluting substances. As Amy Porges remarks, “if a government in TPP wants to ban a substance, that is OK.”

But a number of unproven approaches to environmental policies underpin free trade agreements. Among them is the market-based approach to carbon pricing, such as an emissions trading scheme, often considered to be a dysfunctional alternative to stringent industrial standards or carbon taxes. Less direct than a carbon tax, market-based carbon pricing can also be easier to manipulate, as shown by previous experience in Europe. The trend towards carbon markets originates from Kyoto Protocol negotiations, when a group of non-EU countries alongside the US successfully

rejected EU trade-restrictive proposals for a binding list of policies and measures and their mandatory coordination.

After the adoption of the Kyoto Protocol in 1997, decisions under the UNFCCC avoided major trade-restrictive methods and, eventually, the EU itself became a major advocate of market-based climate governance mechanisms<sup>4</sup>.

Trade liberalization, of course, will help to develop low-carbon business alongside fossil fuels. “Trade will increase the volume of renewable energy; it allows large-scale investment. Take China, whose development of renewable energy initially played a significant impact on bringing down prices in the global market. We’ll probably see a net positive effect to renewable energy from free trade,” comments Achim Steiner.

But the question of how to restrict the development of coal, oil and gas remains. According to some studies, they are more favourably subsidized than renewable energy in many countries. A report by the investment activist Carbon Tracker found mines on government land designated for coal mining in the Powder River Basin, Montana, USA, to be heavily subsidized through licences and royalties. This made coal much cheaper. The organization’s research on the Galilee basin in Australia also found that the coal would not have been viable but for subsidies<sup>5</sup>. Both subsidies for fossil fuel and renewable energy are allowed in international trade rules, so long as they do not discriminate against importers or foreign investors.

However, a G20 consortium known as the Energy and Sustainability Working Group aims to resolve this question. “They are trying to reduce fossil fuel subsidies in the G20 countries. This could have a partial spillover on climate negotiations; it can bring momentum,” says Christian Downie.

Thus, free trade agreements expand the fossil fuel business, but it is likely that only the actions of the braver politicians acting within their own domains will bring it under control. As Downie points out, “what they agree to internationally, they have to be able to do domestically — what matters is domestic politics when they get home.” □

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