

## USTR'S STANCE REFLECTED IN CPTPP ENVIRONMENT CHAPTER

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### CPTPP AS A LANDMARK “21<sup>ST</sup> CENTURY” AGREEMENT

The negotiations for the Trans-Pacific Partnership (TPP) started in 2010, and the agreement was signed by twelve countries in 2016. However, in 2017, U.S. President Donald Trump signed an executive order withdrawing the U.S. from the deal, rendering the TPP ineffective. Trade negotiators of the remaining eleven countries, namely Japan, Australia, New Zealand, Canada, Mexico, Chile, Peru, Malaysia, Singapore, Vietnam, and Brunei, then conducted repeated talks with the aim of securing the original agreement in principle, which culminated in the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or commonly known as TPP11) in March 2018. TPP11 is expected to enter into effect in early 2019.

The CPTPP is a “21<sup>st</sup> century<sup>1</sup>” free trade agreement, as the original TPP was called. A FTA is a treaty between two or more countries to liberalize trade in effectively all goods and services. The CPTPP is called a “21st century” FTA because it has established advanced trading rules (Chart 1) which are not necessarily included in other FTAs (about 300 worldwide) or the WTO agreements, in many areas. We particularly note that the “environment” section strongly reflects what the Office of the United States Trade Representative (USTR) advocated at that time of the TPP negotiations.

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### ENVIRONMENT CHAPTER REFLECTS USTR'S STANCE

#### “Mutual Supportiveness of Trade and Environment”

The content of the Environment Chapter reflects the USTR's intention to include its stance on trade and environmental protection at that time of the TPP negotiations – protection of the environment and facilitation of trade are mutually supportive – in trading rules. In November 2011, in the early stage of the TPP negotiations and before the US announced its withdrawal from the TPP, the leaders of the countries involved released a document titled “The Outlines of the Trans-Pacific Partnership Agreement” which covers the key features and scope of the TPP. Under the heading Legal Texts, “environment” was listed as one of the issues under negotiation, with a summary of progress, indicating that environment was one of the areas to be incorporated in the TPP agreement from the early stage of the negotiations. The document also stated that the agreement “enhances the mutual supportiveness of trade and environment”.

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<sup>1</sup> The Trans-Pacific Partnership (TPP) Task Force of the Prime Minister's Office stated in its report on an overview of the TPP agreement dated October 2018, 2015 that the TPP will set the standards for the 21st century world in a wide range of areas including intellectual property, e-commerce, disciplines on state-owned enterprises, and the environment.

## **Chart 1: Advanced Trading Rules in CPTPP**

### **Customs Administration and Trade Facilitation (Chapter 5)**

- Provide for express shipments to be released within six hours after submission of the necessary customs documents

### **Cross-Border Trade in Services (Chapter 10)**

- This Chapter adopts a negative-list approach (i.e., all services are subject to obligations such as national treatment, most-favoured nation treatment, and market access, except for those listed in the Annexes).

### **Electronic Commerce (Chapter 14)**

- No Party shall impose customs duties on electronic transmissions between a person of one Party and a person of another Party.
- No Party shall accord less favourable treatment to digital products (computer programs, etc.) created/produced/published in the territory of another Party
- Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.
- No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
- No Party shall require the transfer of, or access to, source code of software owned by a person of another Party.

### **State-Owned Enterprises and Designated Monopolies (Chapter 17)**

- Each Party shall ensure that each of its state-owned enterprises or designated monopolies, when engaging in commercial activities, acts in accordance with commercial considerations in its purchase or sale of a good or service, and gives an enterprise of another Party treatment no less favourable than it accords to enterprises of the Party. No Party shall cause adverse effects to the interests of another Party through the use of non-commercial assistance (in the form of grants, loans, loan guarantees or other types of financing on terms more favourable than those commercially available to that enterprise) that it provides to any of its state-owned enterprises.

### **Environment (Chapter 20)**

- The Parties recognize the importance of mutually supportive trade and environmental policies and practices.
- The Parties shall take concerted international action to address important problems such as protection of marine species, biodiversity, and the shift to a low-emission economy.
- Some fisheries subsidies are prohibited.
- If any party violates obligations stipulated in this chapter, the other parties may use dispute settlement procedures in Chapter 28.

Source: Compiled by MGSSI based on a report on the overview of the TPP agreement released by the Trans-Pacific Partnership (TPP) Task Force at the Prime Minister's Office on October 5, 2015.

The statement apparently reflects the USTR's stance, as the USTR published the USTR Green Paper on Conservation and the Trans-Pacific Partnership in December 2011, just two weeks after the release of the aforementioned document. In the Green Paper, it is clearly stated that the United States believes a TPP Environment chapter can facilitate increased regional trade while supporting and enhancing existing conservation efforts associated with natural resources and protecting and conserving biodiversity in the Asia-Pacific region," clearly expressing that protection of the environment and facilitation of trade are mutually supportive. Then, the US made proposals on endangered wildlife, IUU (illegal, unreported, and unregulated) fishing, illegal logging, as well as trade, in the TPP negotiations, which materialized in the legal texts of the agreement. That stance was included in the Environment Chapter (Chapter 20), which reflects the USTR's intention to have its stance fully adopted in the TPP.

### **First "Environment Chapter" for Japan, but Existing Policy for US**

All free trade agreements (FTAs) that the US has concluded since 2004, including bilateral FTAs with TPP member countries Chile, Singapore, Australia, and Peru, have an environment chapter. Meanwhile, the North American Free Trade Agreement, which was signed by the US, Canada, and Mexico (the latter two are TPP member countries) in 1994, does not have an environment chapter, but it incorporates a supplemental agreement on the environment. In concluding FTAs with an environmental chapter, the USTR, mainly the Office

of Environment and Natural Resources, negotiated in accordance with the congressionally established trade negotiating objectives set forth in the current Trade Promotion Authority (TPA)<sup>2</sup>, including environmental protection. Against this background, the USTR joined the TPP talks, so the inclusion of the environment chapter in the TPP agreement was nothing new for the US.

Chile, Singapore, Australia, and Peru have signed bilateral FTAs with the US, which have an environment chapter, while Canada and Mexico have concluded a supplement agreement on the environment. As such, these countries apparently did not feel uncomfortable with including the environment chapter in the TPP. The USTR also emphasized the outcome of the previous FTAs containing an environment chapter. For example, Chile exports about 3 million gallons of olive oil every year. The US and Chilean governments, as well as olive oil producer organizations in Chile, made concerted efforts based on the cooperation obligations set forth in the environmental chapter of the FTA between the two countries, resulting in the saving of 4.87 billion kWh of electricity, 1.20 million gallons of water, 2,314 gallons of fuel, etc., every year in the manufacturing process and contributing to the environment protection<sup>3</sup>.

Meanwhile, TPP member countries which have not concluded a bilateral FTA with the US, namely, Japan, Malaysia, Vietnam, and Brunei, did not focus on the environment in their existing FTAs. For these countries, this is the first time to include an environment chapter in their FTAs with a third party. That said, Japan has already implemented a high level of environment protection measures, and it was willing to include the environment chapter, because the TPP agreement obliges other countries to maintain a high degree of discipline, leading to a level-playing field and sound competition<sup>4</sup>. Malaysia, Vietnam, and Brunei seem to have been cautious about including the environment chapter in the TPP, but they finally accepted it after considering both the advantages and disadvantages of the agreement. As described later in this article, the enforcement and revision of environmental laws are not obligatory, and exports are expected to surge as the US and other countries reduce tariffs.

### **Articles of the Environment Chapter Spread the USTR's Stance**

The environment chapter in the original TPP, which consists of 23 articles (Chart 2) and many provisions, remains almost intact in the CPTPP<sup>5</sup>. Although the Trump administration decided to exit from the TPP based on his "America First" policies, the CPTPP was signed, without the US, as a unique FTA that reflects the USTR's opinion in the environment chapter.

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<sup>2</sup> Trade promotion authority (TPA) refers to legislation that enables the President to negotiate trade agreements with foreign countries, and then to submit those agreements to Congress for approval under special, expedited procedures, for a limited period of time.

<sup>3</sup> "Standing Up for the Environment –Trade for a Greener World" issued by Office of the United States Trade Representative and the United States Department of State in May 2015

<sup>4</sup> "Summary of the Trans-Pacific Partnership (TPP) Agreement" issued by TPP Task Force at the Prime Minister's Office on October 5, 2015

<sup>5</sup> The phrase "or another applicable law" in Paragraph 5 of Article 20.17 (Conservation and Trade) has been suspended.

**Chart 2: All 23 Articles of Environment Chapter**

Article 20.1: Definitions (Definitions of environmental law, etc.)
Article 20.2: Objectives (Mutual supportiveness of trade and environment)
Article 20.3: General Commitments (Obligation to make efforts to enforce environmental laws)
Article 20.4: Multilateral Environmental Agreements (Importance of multilateral agreements, etc.)
Article 20.5: Protection of the Ozone Layer
Article 20.6: Protection of the Marine Environment from Ship Pollution
Article 20.7: Procedural Matters (Ensuring that relevant information is available to the public)
Article 20.8: Opportunities for Public Participation
Article 20.9: Public Submissions
Article 20.10: Corporate Social Responsibility
Article 20.11: Voluntary Mechanisms to Enhance Environmental Performance
Article 20.12 : Cooperation Frameworks
Article 20.13: Trade and Biodiversity
Article 20.14: Invasive Alien Species
Article 20.15: Transition to a Low Emissions and Resilient Economy
Article 20.16: Marine Capture Fisheries
Article 20.17: Conservation and Trade (Combatting the illegal take of, and illegal trade in, wild fauna and flora)
Article 20.18: Environmental Goods and Services
Article 20.19: Environment Committee and Contact Points
Article 20.20: Environment Consultations
Article 20.21: Senior Representative Consultations
Article 20.: Ministerial Consultations
Article 20.23: Dispute Resolution

Source: Abstract from TPP Agreement posted on Cabinet Secretariat's website (Comments in parenthesis added by the author).

Indeed, there are many provisions in the CPTPP environment chapter which were originally designed to spread the USTR's stance that trade and environment are mutually supportive into the governments and societies of the CPTPP member countries, as well as companies operating in those countries and companies based in other countries but trading with companies based in the CPTPP member countries. More specifically, the environment chapter stipulates that the parties "recognise the importance" of mutually supportive trade and environmental policies and practices, and that "no party shall fail to effectively enforce its environmental laws".

Following the general commitments are articles on key environmental issues such as "Protection of the Ozone Layer", "Protection of the Marine Environment from Ship Pollution", "Trade and Biodiversity", and "Transition to a Low Emissions and Resilient Economy", including promotion of mutually supportive trade and environmental policies. For example, "Protection of the Ozone Layer" stipulates that "The Parties recognise that emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment" and that "the Parties shall cooperate to address, in areas related to environmentally friendly alternatives to ozone-depleting substances". With the details of cooperation not specified, the Parties may cooperate in development/production of, and promotion of trade in, such eco-friendly alternatives.

Similar language was contained in other articles, which address the other key issues mentioned above. Each Party shall recognize the importance of "Protection of the Marine Environment from Ship Pollution", "Trade and Biodiversity", and "Transition to a Low Emissions and Resilient Economy", and cooperate to address matters of mutual interest with respect to those challenges.

Of note, "trade" referred to in the environmental chapter includes not only trade in goods but also trade in services. For example, establishing a local corporation and engaging in retail or distribution business in another CPTPP member country is considered as trade in services. This suggests that the member countries recognize that environment protection and promotion of trade in services are mutually supportive.

**Environment Chapter as a Symbol of "21st century" Free Trade Agreement**

Even if the CPTPP including the environment chapter takes effect, the member countries do not necessarily have to enact/enforce new environmental laws. Paragraph 3 of Article 20.3 stipulates that "Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection". In other words, the member countries have no obligation to enact/enforce environmental laws and regulations, but shall make their

utmost effort to do so. This seems to be a major reason why the CPTPP parties agreed to include the environment chapter as it was originally written, despite the withdrawal of the US. Even so, the member countries “recognise the importance” of promoting mutually supportive trade and environmental policies and practices, as mentioned above, so the environment chapter can be seen as a symbol of the “21st century” CPTPP. In addition, as the member countries are obliged to effectively enforce existing environmental laws and cooperate to address specific key issues, our eyes will be on changes in environmental policies in each country after the CPTPP enters into force.

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## IMPLICATIONS FOR JAPANESE COMPANIES

Companies operating in two or more CPTPP member countries will be impacted by such changes in environmental policies. Regardless of industries, all players at each step of the supply chain, from upstream to downstream, will possibly be affected. Japan has helped Asian countries, including CPTPP member countries Vietnam and Malaysia, strengthen their institutional framework to promote environment policies. For example, in March 2018, Japan agreed to cooperate with Vietnam in the latter’s efforts to revise its environmental protection law. Japan has also supported Malaysia to reinforce the administrative capabilities of its Ministry of Water, Land and Natural Resources. As one of the objectives of the CPTPP’s environment chapter is to “enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation,” Japan’s cooperation with these countries will likely further enhance after the CPTPP comes into effect.

In addition to the cooperation mentioned above, the Japanese government is interested in exporting environmental goods, which Japanese companies are strong at, as well as transferring environmental technology, to other CPTPP member countries, including Vietnam and Malaysia. On this front, we see meaningful business opportunities for Japanese companies in the CPTPP member countries. For example, retailers and distributors can develop/introduce eco-friendly products such as simple packaging and resource-saving products, avoid throwing away unsold foods, use energy-saving refrigerators/freezers and lights in stores, or introduce energy-saving trucks, on the back of an increasing number of convenience stores, including Japanese-affiliated ones. Manufacturers can save energy at factories by visualizing/streamlining production lines using IoT and AI, or develop/manufacture environment-friendly products. In infrastructure building, port facilities can be operated more efficiently by using IoT, and air pollution can be reduced by easing traffic congestions with the utilization of AI.