



The Estey Centre Journal of **International Law and Trade Policy**

Environmental Provisions in Recent Regional Trade Agreements (2008 & 2009)

Dale Colyer

Professor Emeritus of Agriculture and Resource Economics, West Virginia University

Despite a failure to achieve closure on the Doha Round of WTO negotiations, regional and bilateral trade agreements involving a variety of countries have continued to be negotiated, signed and implemented. Most of the recent trade agreements have contained some environmental provisions, ranging from a pledge to protect the environment to very extensive environmental requirements. These results appear to reflect a recognition that trade has environmental consequences and that trade agreements can be constructed to help mitigate such effects.

Keywords: environment, environmental provisions, free trade, trade agreements

Introduction

Environmental issues are included in the provisions being negotiated in the Doha Round of the World Trade Organization (WTO, 2001). These, like many of the other aspects of the negotiations, have proven to be contentious, and despite a vigorous approach little has been achieved toward the consensus needed to conclude the round (see, e.g., Colyer, 2008; ICSTD, 2009). Negotiations on the environmental issues have largely lapsed in recent years as little progress was being made in the agricultural and non-agricultural goods negotiations, although they were a topic of discussion at the November 2009 WTO Ministerial Conference, and more attention is being given to climate change issues (Bouët and Laborde, 2009; ICSTD, 2009).¹ However, regional and bilateral trade agreements have continued to be negotiated, signed and implemented. The WTO Regional Trade Agreements (RTA) Database indicates that some 26 RTAs entered into force in 2008 and 2009 (WTO, 2009a).^{2, 3} The majority (23 of 26) of these recent RTAs had one or more environmental provisions, with several devoting considerable attention to environmental issues and concerns.⁴

This article examines these recent agreements to determine the extent and importance of their environmental provisions. Not all types of provisions are fully covered here, as they have been analyzed previously by Colyer (2003, 2004, 2006, 2008) and OECD (2007). Instead, the focus will be on the particular provisions of the 2008-09 agreements, some innovations in the newer agreements and their importance for environmental protection.

Summary of Major Environmental Provisions

A summary of the major provisions of the more recent agreements is presented in table 1. This table is not complete, that is, it does not reflect all of the environmental provisions contained in the several trade agreements. Instead, it indicates the presence in the agreement (with an X) of the more common provisions, together with a couple of innovations contained in a few of the agreements. The order of the RTAs is based on date of entry into force, with the last being in the first row of the table. The following is a brief summary of the types of measures included under each of the column headings:⁵

Preamble: Most RTAs contain a preamble that sets out the reasons for and purposes of the agreement. Many of these recognize the importance of the environment and the need to take account of or protect it in implementing the trade agreement.

Chapter: Some RTAs contain a separate chapter on the environment. These agreements tend to have more environmental provisions than those that do not have a separate chapter.

Exception: Article XX of the 1994 (and previous) General Agreement on Tariffs and Trade (GATT) allows exceptions to the prohibition of laws/regulations that constrain trade for a number of health and safety issues, including protection of the environment. Several RTAs include similar language in a chapter/article on exceptions (or elsewhere) or refer to incorporating Article XX as part of the RTA.

Table 1 Environmental Provisions of RTAs Entering into Force in 2008-2009

<u>RTA name</u>	<u>Preamble</u>	<u>Chapter</u>	<u>Exception</u>	<u>Invest</u>	<u>Coop/ consult</u>
EC - Cameroon	X			X	
Japan - Viet Nam					
Japan - Switzerland	X			X	
Canada - Peru	X	X	X	X	X
Peru - Singapore			X		
Canada - EFTA	X		X		
Chile - Colombia					
Australia - Chile	X		X		
US - Peru	X	X	X	X	X
China - Singapore					
EC - Côte d'Ivoire	X		X		X
US - Oman					
Japan - Philippines			X		X
Panama - Central America	X		X	X	
EC - CARIFORUM States	X	X	X	X	X
Turkey - Georgia			X		
China - New Zealand	X		X		X
Brunei Darussalam - Japan				X	X
EC - Bosnia and Herzegovina					
Japan - Indonesia				X	X
EFTA - SACU				X	X
Turkey - Albania			X		

Panama - Chile	X		X		
EC - Montenegro			X		
Nicaragua - Taiwan	X	X	X	X	X

Source: WTO Regional Trade Agreements Database
(<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>)

Table 1 (continued)

RTA Name	Energy	E goods	Enforce	Committee
EC - Cameroon				
Japan - Viet Nam				
Japan - Switzerland		X		
Canada - Peru			X	X
Peru - Singapore				
Canada - EFTA				
Chile - Colombia				
Australia - Chile				
US - Peru			X	X
China - Singapore				
EC - Côte d'Ivoire				
US - Oman				
Japan - Philippines				
Panama - Central America				
EC - CARIFORUM States EPA			X	X
Turkey - Georgia				
China - New Zealand				
Brunei Darussalam - Japan	X			
EC - Bosnia and Herzegovina				
Japan - Indonesia	X			X
EFTA - SACU				
Turkey - Albania				
Panama - Chile				
EC - Montenegro				
Nicaragua and Taiwan			K	X

Invest: These are investment-related activities that have associated environmental measures. The most common is to agree not to relax environmental requirements to attract investment, but this category may also include other provisions such as requiring that foreign investors practise sound stewardship and utilize technologies that are environmentally friendly, or declaring that laws or regulations to protect the environment cannot be considered to be expropriations.⁶

Energy: A few RTAs that have energy and other natural resource-related measures require that procedures to be used take into consideration their impacts on the environment and/or minimize unfavorable impacts.

Cooperation/consultation: Several of the recent RTAs have provisions for cooperation and/or consultation with respect to their environmental provisions. These might include exchanges of information, technical or other assistance for environmental activities, or other forms of cooperation.

Environmental goods: Reducing or eliminating barriers to trade in environmental goods is one of the measures being negotiated in the Doha Round and is included in at least one recent RTA.

Enforce: A few RTAs have provisions that the signatory parties will enforce their environmental laws and regulations.

Committee: Some RTAs have provisions for setting up a committee, commission or other body to implement, monitor and/or encourage environmental activities called for in the agreement.

Additional environmental provisions are included in some RTAs. These include specification of the relationship of the RTA to multilateral environmental agreements (MEAs); the recognition that each party to the agreement has the sovereign right to develop and enforce its own environmental laws but also a responsibility to preserve and protect the environment; and promotion of awareness and involvement of the public in environmental protection, including the right to challenge agencies that are not carrying out their environmental mandates. With respect to relationships to the MEAs, some RTAs recognize and give priority to the MEA in the case of conflict and/or they call on the parties to carry out the provisions of the MEA. An RTA might refer to specific MEAs or make a general reference to multilateral agreements.

Environmental Chapters

Four of the recent agreements (Canada-Peru, US-Peru, EC-Cariforum States, Nicaragua-Taiwan⁷) have separate chapters concerning the environment. These

go well beyond the other RTAs with environmental provisions, although some of those have rather extensive provisions. The US-Peru agreement has been analyzed elsewhere and so will not be covered more extensively here (Colyer, 2008). However, it should be noted that a major innovation in that agreement was the importance given to forestry and protection of forest resources, especially in Peru. The other three agreements will be discussed.

Nicaragua-Taiwan

The agreement between Nicaragua and Taiwan entered into force January 1, 2008 and is one of two of the recent agreements with environmental chapters that do not involve either Canada or the United States. In addition to the environmental chapter (Chapter 19), environmental issues are covered in a number of other sections, including the preamble and chapters on initial conditions, sanitary and phytosanitary provisions, technical barriers to trade, investment and labour. The gist of most of these provisions is that nothing in the chapters should preclude the parties from taking appropriate measures to protect the environment (also the lives and health of persons, animals and plants), so long as the provisions are not arbitrary or discriminatory.

The chapter on the environment contains provisions similar to those found in such chapters in other RTAs, including the following:

Article 19.01 Levels of Protection: This article recognizes that each party has the right to establish its own environmental laws, but also establishes that each shall “encourage and provide for high levels of environmental protection.”

Article 19.02 Enforcement of Environmental Laws: Each party agrees to enforce its environmental laws but recognizes that each “retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters” A second provision of this article is that the parties agree not to weaken their environmental protection to attract investment and, finally, that neither has the power to intervene to enforce the other’s environmental laws.

Article 19.03 Procedural Matters: This section requires that each country ensure that appropriate judicial and/or administrative procedures are available to apply and sanction violations of its environmental laws; it also requires that those procedures be fair and equitable. Remedies can include “penalties, fines, injunctions, suspension of activities, and requirements to take remedial action or pay for damages to the environment.” In addition, the section mandates that each party assure that interested persons can request that authorities investigate alleged violations of its environmental laws and that the authorities give due consideration to such requests. It also requires that affected parties be permitted to sue for damages or other appropriate remedies.

Article 19.04 Voluntary Mechanisms to Enhance Environmental Performance: Each party to the agreement is required to encourage the development of voluntary mechanisms to enhance protection of the environment such as partnerships of private business, governmental units, scientific organizations and non-government organizations; development of voluntary guidelines; sharing of information and expertise among authorities, interested parties and the public; and the use of incentives to encourage conservation, protection and restoration of natural resources and the environment.

Article 19.05 Principles of Corporate Stewardship: To help achieve the objectives of protecting the environment "... each Party should encourage enterprises operating within its territory or jurisdiction to voluntarily incorporate sound principles of corporate stewardship in their internal policies"

Article 19.06 Environmental Affairs Committee: Each party to the agreement is to establish an environmental committee consisting of cabinet level officials (or their designees). Its purpose is to oversee and monitor the progress of the agreement and to encourage public participation in its work.

Article 19.07 Opportunities for Public Participation: Each party to the agreement is to encourage the public to participate in its activities, is to seek public input including views on implementation of the environmental chapter, and is to establish and/or convene a national advisory committee with members from the public and business and environmental organizations. Each of the two signatory countries is to inform the other about its actions to involve the public and its response to public inquiries/requests.

Article 19.08 Environmental Cooperation: In this section the two parties recognized the importance of and committed themselves to cooperative efforts to enhance their goals and objectives to protect and improve the environment. In an annex to the section they established an Environmental Cooperation Mechanism (ECM). The ECM uses the environmental affairs committees of the two parties to establish priorities, develop a program of work, examine and evaluate cooperative activities, make recommendations for future activities and undertake other activities on which they might agree. The ECM is also to develop benchmarks or other performance measures and consider methods for financing the activities. A final provision of the annex is to facilitate duty-free entry of goods and services related to these activities.

Article 19.09 Environmental Consultations: Either party may request consultation with the other with regard to any matter arising as a result of the agreement. These requests are to be handled promptly and every effort is to be made to resolve the issues.

Article 19.10 Relationship to Environmental Agreements: This article recognizes the importance of MEAs to which the two countries are members and seeks to enhance the mutual supportiveness of the MEAs and trade agreements to which they are parties. It further stipulates that nothing in the agreements affects existing rights under either MEAs or other trade agreements to which they are parties.

Article 19.11 Definitions: This, the final article in the chapter, defines what is meant by environmental laws, to wit: “environmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health” It specifically notes that environmental laws do not include those concerned with the commercial exploitation of natural resources.

*European Union-Cariforum States*⁸

There is a very strong emphasis on the environment in the agreement between the European Union and the Cariforum States, including a commitment to sustainable development in the Caribbean region. The preamble and Title I of the agreement set out the objectives of the agreement, including environmental protection and sustainable development. In addition to a chapter on the environment (Chapter 4 in Title IV, Trade Related Issues), there are numerous references to the environment in the other titles of the agreement. In addition to many of the same ones as in the Nicaragua-Taiwan agreement, environmental provisions are included in the chapters on agriculture and tourism.

Provisions outside the Environmental Chapter

The first mention of the environment is in the preamble and is unique in promoting protection of the environment “in line with the 2002 Johannesburg Declaration.” In Part 1, Article 3 deals with sustainable development and requires that environmental best interest be accounted for in the process of development while Article 8(v) is to enhance Cariforum capabilities in meeting international environmental standards. The section on agriculture and fisheries considers environmental development strategies while Article 8 promises cooperation in relation to environmentally sound agriculture and encompasses organic and genetically modified products. The section on technical barriers to trade aims to facilitate trade while protecting the environment and requires notification when a measure prohibiting importations is taken for such a purpose. The part dealing with investment contains a provision prohibiting lowering environmental standards to attract foreign direct investment and commits the parties to assuring that investors adhere to procedures to protect the environment. The services section (Article 83) allows the entry of environmental services suppliers. Article 116 states

that the Cariforum States should conform to environmental standards with respect to tourism services. It also indicates that they should participate in relevant international organizations that set standards with respect to tourism. The agreement also envisions cooperation on innovation and renewable energy.

Environmental Chapter

This chapter consists of eight articles, of which some repeat provisions from other parts of the agreement, for example, the requirement (Article 188) that the parties not relax or alter their environmental standards to attract investment (a provision that is also in the chapter on investment). The chapter also cites the Cotonou Agreement, which has similar provisions on the environment. An objective of the chapter reaffirms that the “principles of sustainable management of natural resources and the environment are to be applied and integrated at every level of the partnership” Other objectives include conserving, protecting and improving the environment through trade agreements, and promoting trade in ways that encourage sustainable management of the environment.

Other provisions in the chapter include the right of each country to develop and implement its own environmental laws/regulations while recognizing the special needs of the Cariforum states (generally small, less developed island economies). However, any measures that affect trade and that are taken to protect the environment must not be arbitrary or discriminatory. Article 185 provides that in the absence of appropriate standards, international standards should be used. Measures to protect the environment (and public health) should be adopted following appropriate science, the precautionary principle and relevant international standards and guidelines; further, the measures should be transparent (Article 187). Other provisions address consulting and monitoring with respect to environmental measures and disagreements over their implementation. In the case where consultations do not resolve an issue, either party can request the appointment of an expert committee to examine and make recommendations for resolution of the disagreement. A final article (190) in the chapter sets out areas in which cooperation should be used in attaining the agreement’s environmental provisions. These include “(a) technical assistance to producers in meeting relevant product and other standards applicable in markets of the EC Party; (b) promotion and facilitation of private and public voluntary and market-based schemes including relevant labeling and accreditation schemes; (c) technical assistance and capacity building, in particular to the public sector, in the implementation and enforcement of multilateral environmental agreements, including with respect to trade-related aspects; (d) facilitation of trade between the Parties in natural resources, including timber and wood products, from legal and sustainable

sources; (e) assistance to producers to develop and/or improve production of goods and services, which the Parties consider to be beneficial to the environment; and (f) promotion and facilitation of public awareness and education programs in respect of environmental goods and services in order to foster trade in such products between the Parties.”

Canada-Peru Agreement

The chapter on the environment (17) in this agreement is relatively short, but it recognizes that it complements a separate Agreement on the Environment. In addition, and as for the other agreements discussed in this part of the article, the Canada-Peru Agreement has environmental provisions in a number of other parts, including the preamble and initial conditions as well as the chapters on technical barriers to trade (TBT) and investment. In Chapter 1, the relationship to other agreements is covered with a provision that this agreement generally should prevail in the case of inconsistencies. The chapter on TBT requires transparency in prohibitions based on protection of the environment. The investment chapter (8) has a number of provisions, including requiring investors to use “generally applicable” standards for environmental protection, the usual prohibition on lowering standards to attract investment, the use of expert reports in case of disputes and, in an annex, a statement that regulations to protect the environment cannot be considered expropriation.

The chapter on the environment refers to the complementarity of the separate Agreement on the Environment and the trade agreement and lists the following aspects of that agreement as relevant:

- (a) conservation, protection and improvement of the environment in the territory of each Party for the well-being of present and future generations;
- (b) derogation from domestic environmental laws in order to encourage trade or investment;
- (c) conservation and sustainable use of biological diversity and protection and preservation of traditional knowledge;
- (d) development of, compliance with and enforcement of environmental laws;
- (e) transparency and public participation on environmental matters; and
- (f) cooperation between the Parties on the advancement of environmental issues of common interest.

These are the types of provisions commonly included in environmental chapters in the bilateral and regional trade agreements discussed in the preceding section of this article.

Innovations in Recent Agreements

Two innovations in some recent trade agreements are attention to environmental goods and attention to energy. The Japan-Switzerland agreement contains a provision to facilitate trade in environmental goods and services “such as improved sanitation, pollution prevention, sustainable promotion of renewable energy and climate-change-related goals.” This provision may have resulted from the ongoing Doha Round environmental negotiations, where reducing or eliminating tariffs on environmental goods is one of the areas included.

Two recent Japanese agreements (with Indonesia and Brunei) take explicit notice of environmental aspects in the development of energy and natural resources. In the agreement with Indonesia, the parties agree to take account of the environment in policies for development of energy and mineral resources, encourage dissemination of technologies that contribute to protection of the environment, and promote public awareness of impacts of such development on the environment as well as with respect to the costs of abatement of such effects. The Brunei agreement has an article on the environment in its energy chapter (7). The article requires the parties to minimize environmental impacts of energy development in a cost efficient manner and, as in the Indonesian agreement, to consider environmental impacts in its energy policies, encourage transfer and dissemination of technology to enhance the environment, and promote public awareness of the issues. The Japan-Switzerland and EU-Cariforum agreements also have provisions to encourage development of renewable energy sources.

Conclusions

Environmental provisions have become common elements in many recent regional and bilateral trade agreements. Emphasis on the environment has increased, and very few of the recent agreements make no mention of the environment, although several have relatively few provisions. The more common references to the environment are in the preamble, where protection of the environment while expanding trade is given as a purpose for the agreement, the investment provisions, where it is recognized as being inappropriate to weaken environmental standards to attract investment, and the exemptions provision, where protection of the environment (plus health and safety) is allowed as an exception to the general prohibition on barriers to trade in accordance with Article XX of the 1994 and previous GATT agreements. Several of the agreements, however, have extensive provisions aimed at protecting and enhancing the environment, including cooperation and/or assistance to

improve or mitigate impacts on the environment that might result from the effort to expand trade and promote development. Thus, it appears the movement to include environmental provisions in trade agreements has been expanded in the first decade of the new century as more and more countries have incorporated such provisions in their trade agreements. Some recent agreements have included innovations in the environmental area or have provisions to prevent undesirable effects included in some previous agreements, for example, specifying that environmental regulations cannot be considered as confiscations of property.

References

- Bouët, A., and D. Laborde. 2009. Eight Years of DOHA Trade Talks. IFPRI Issue Brief 61. Washington: International Food Policy Research Institute, November.
- Büthe, T., and H. V. Milner. 2008. The politics of foreign direct investment into developing countries: Increasing FDI through international trade agreements. *American Journal of Political Science* 52(4, October): 741-762.
- Colyer, D. 2003. Agriculture and environmental issues in free trade agreements. *The Estey Centre Journal of International Law and Trade Policy* 4(2):123-143.
- Colyer, D. 2004. Environmental Provisions in Trade Agreements. Paper presented at the Short Course Trade and the Environment: Dealing with Pollution and Natural Resource Management in a Globalizing World. World Bank Short Course, Washington, December 8.
- Colyer, D. 2006. Agriculturally Related Environmental Issues in Free Trade Agreements. Poster paper at the 26th Conference of the International Association of Agricultural Economists, Gold Coast, Australia, August 12-18 (http://agecon.lib.mn.edu/cgi_bin/view.p/).
- Colyer, D. 2008. Green Trade Agreements: Comparison of Canada, U.S. and WTO. Paper presented at the Joint Annual Meeting of the Canadian Agricultural Economics Society and the Northeastern Agricultural and Resource Economics Association, Quebec, June 29-July 1, 2008 (<http://ageconsearch.umn.edu/handle/37329>).
- ICSTD. 2009. Day 2: Members Exchange Views. (ICSTD Daily Briefing on Ministerial Conference), December 2 (<http://ictsd.org/i/wto/geneva/daily-updates-2009/geneva-2009-bridges-daily-updates/63433/>).
- OECD. 2007. *Regional Trade Agreements and Environment*. Paris: Organization for Economic Co-operation and Development (online version dated March 12).
- World Trade Organization (WTO). 2001. *Ministerial Declaration*. Adopted 14 November 2001. WT/MIN(01)/DEC/1, Doha, November 20.
- World Trade Organization (WTO). 2009a. *RTA Database*. (<http://rtais.wto.org/UI/Public/MaintainRTAHome.aspx>).
- World Trade Organization (WTO). 2009b. *Regional Trade Agreements: Facts and Figures* (http://www.wto.org/english/tratop_e/region_e/regfac_e.htm).

Endnotes

1. The possibility of liberalizing trade in environmental goods and services outside the Doha framework was raised at the Ministerial Conference as members continued to disagree on what should be included in environmental goods with, e.g., Brazil insisting that ethanol be included (ICSTD, 2009).
2. The database lists 27 as entering into force in 2008-2009, but two are the same agreement –Panama-Costa Rica (Central America) and Panama-Honduras (Central America). They are listed as Panama-Central America in table 1. The agreement is between Panama and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. It was notified to the WTO by Costa Rica on April 7, 2009 and Honduras on December 16, 2009. The basic agreement was negotiated and signed in 2002, but separate protocols have been signed between Panama and each of the Central American countries. However, these do not affect the environmental provisions. Costa Rica and Honduras completed these and notified the WTO, and they entered into effect, completing the process for all five countries (the protocols for El Salvador, Guatemala and Nicaragua had been signed previously).
3. The WTO treats all bilateral and regional trade agreements as regional trade agreements in their database. Thus, the term regional trade agreement (RTA) will include all agreements except the multilateral WTO.
4. The WTO's RTA Database includes 195 RTAs. However, a WTO web page indicates that some 450 RTAs have been notified, 174 prior to 1994 and 300 since then, i.e., since the WTO was initiated (WTO, 2009b).
5. Information on these agreements is taken from the texts of the agreements, which are available through the WTO's RTA Database (WTO, 2009a). Thus, references will not be listed for specific information in the text. Note: agreements for nations in the Americas can also be found in the Organization of the American States (OAS) SICE database.
6. Despite restrictions such as those contained in recent RTAs, the opening up of investment due to GATT/WTO and regional/bilateral trade agreements has resulted in substantial increases in foreign direct investment (FDI). See Büthe and Milner (2008) for an analysis of the impacts of trade agreements on investment.
7. The official title of this agreement is Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, but it will be referred to as Nicaragua-Taiwan for brevity.
8. The WTO Database refers to the EU as the EC (European Community), an older name for the Union, but EU will be used in this article. The Cariforum States are Antigua and Barbuda, The Commonwealth of the Bahamas, Barbados, Belize, The Commonwealth of Dominica, The Dominican Republic, Grenada, The Republic of Guyana, The Republic of Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, The Republic of Suriname, and The Republic of Trinidad and Tobago.

The views expressed in this article are those of the author(s) and not necessarily those of the Estey Centre Journal of International Law and Trade Policy nor the Estey Centre for Law and Economics in International Trade. © The Estey Centre for Law and Economics in International Trade. ISSN: 1496-5208