Centre for International
Governance Innovation

CIGI Papers No. 148 — October 2017

Environmental Gems in Trade Agreements

Little-known Clauses for Progressive Trade Agreements

Jean-Frédéric Morin and Rosalie Gauthier Nadeau

Centre for International
Governance Innovation

CIGI Papers No. 148 — October 2017

Environmental Gems in Trade Agreements

Little-known Clauses for Progressive Trade Agreements

Jean-Frédéric Morin and Rosalie Gauthier Nadeau

CIGI Masthead

Printed in Canada on paper containing 10% post-consumer fibre and certified by the Forest Stewardship Council® and the Sustainable Forestry Initiative.

Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Table of Contents

About the Author

Jean-Frédéric Morin is a senior fellow with CIGI's International Law Research Program (ILRP), effective May 2016. He is also associate professor at Laval University, where he holds the Canada Research Chair in International Political Economy.

At CIGI, Jean-Frédéric is contributing to the ILRP's research themes on international intellectual property, and environmental and economic laws by building a large database, sponsored by the Canadian Foundation for Innovation, CIGI and Laval University. This database will document institutional interactions among trade, investment and environmental institutions. It will enable Jean-Frédéric and other CIGI researchers to study the emergence, variation, diffusion, implementation and effectiveness of hundreds of different provisions found in thousands of multilateral, regional and bilateral agreements.

Before being invited to hold the Canada Research Chair in International Political Economy, Jean-Frédéric was a professor at Université libre de Bruxelles from 2008 to 2014, and a post-doctoral researcher at McGill University from 2006 to 2008.

Jean-Frédéric has an interdisciplinary training in law and political science, and has taught in law programs as well as in political science programs. He is currently conducting research in the fields of trade policy, investment law, global environmental politics and international intellectual property law, with a particular interest in studying how transnational networks shape the interactions of international institutions.

Rosalie Gauthier Nadeau has been a research assistant at the Canada Research Chair in International Political Economy since 2016. She is a double diploma candidate for the M.Sc. in international relations at Laval University's Institute for Advanced International Studies and the M.Sc. in international politics at the Bordeaux Institute of Political Studies. She holds a bachelor's degree with honours in public affairs and international relations from Laval University. Through her studies, she has developed a specialization in international environmental law, with a particular interest in the interplay between trade and environmental agreements.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

Trade agreements contain an increasing number of environmental provisions. Some of these provisions now relate to precise environmental issues, such as biodiversity or hazardous waste management. Certain trade agreements even devote entire chapters to environmental protection. However, the rate of innovative environmental clauses per agreement has declined over the years. This paper draws attention to some of the lesser-known provisions encountered in five agreements or fewer. These "legal one-hit wonders" do not often reach the billboard, despite their uniqueness and creativity. The objective of this paper is to put the spotlight on them in the hope of contributing to the diffusion of best practices, providing negotiators with ideas to emulate in future trade agreements. It also reveals some of the weak spots in the interplay between trade and environment.

Introduction

This paper puts the spotlight on some little-known environmental provisions in trade agreements. Most trade agreements do not include such rare gems. They merely duplicate the content of some earlier agreements.[1] A recent study on boiler-plating in trade negotiations found that negotiators increasingly resort to "copy-and-paste."[2] Even trade agreements that are supposedly the greenest ever negotiated, such as the Trans-Pacific Partnership (TPP), include very few "legal innovations," i.e., provisions that were not first introduced in some earlier agreement.[3] Actually, even though trade agreements contain an increasing number of environmental provisions, the rate of legal innovation per agreement has declined over the years.[4]

To be sure, some of the widely diffused and well-known environmental clauses are of fundamental importance. Exceptions for the protection of animal or plant life and for the conservation of natural resources are at the core of the global trade regime. Since their introduction in the General Agreement on Tariffs and Trade (GATT) in 1947, they have been reproduced in more than 300 different trade agreements and have been at the centre of several trade disputes.[5] More recent provisions, such as article 114 of the North American Free Trade Agreement (NAFTA), stating that a party should not relax its environmental measures to encourage foreign investment, remain crucial in contemporary debates over free trade.[6]

This paper, however, focuses on lesser-known provisions that deserve greater attention. Although the trade regime is fragmented into hundreds of bilateral and regional agreements, trade experts — scholars, commentators and negotiators alike — are familiar with only a handful of them, mostly American and European agreements. Yet, these agreements are far from representative. Some other agreements, signed by countries such as Peru, New Zealand and Singapore, include "legal one-hit wonders," i.e., provisions that do not often reach the billboard, despite their uniqueness and creativity.

This paper's objective is to put the spotlight on some of these lesser-known provisions in the hope of contributing to the diffusion of best practices. Several trade negotiators are looking for innovative ways to make trade deals greener. For example, Canada's Minister of Foreign Affairs Chrystia Freeland recently stated that she would like to make NAFTA "more progressive" by "integrating enhanced environmental provisions."[7] Some analysts consider that including innovative

1 Jean-Frédéric Morin, Laura Mordelet & Myriam Rochette, "The environment in Canadian trade agreements", *Policy Options* (2017), online: <http://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements/>.

2 Todd Allee & Manfred Elsig, "Are the Contents of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements" (2015) World Trade Institute Working Paper.

3 Jean-Frédéric Morin & Guillaume Beaumier, "TPP environmental commitments: Combining the US legalistic and the EU sectoral approaches" (2016), online: <www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/tpp_environmental_commitments.pdf>.

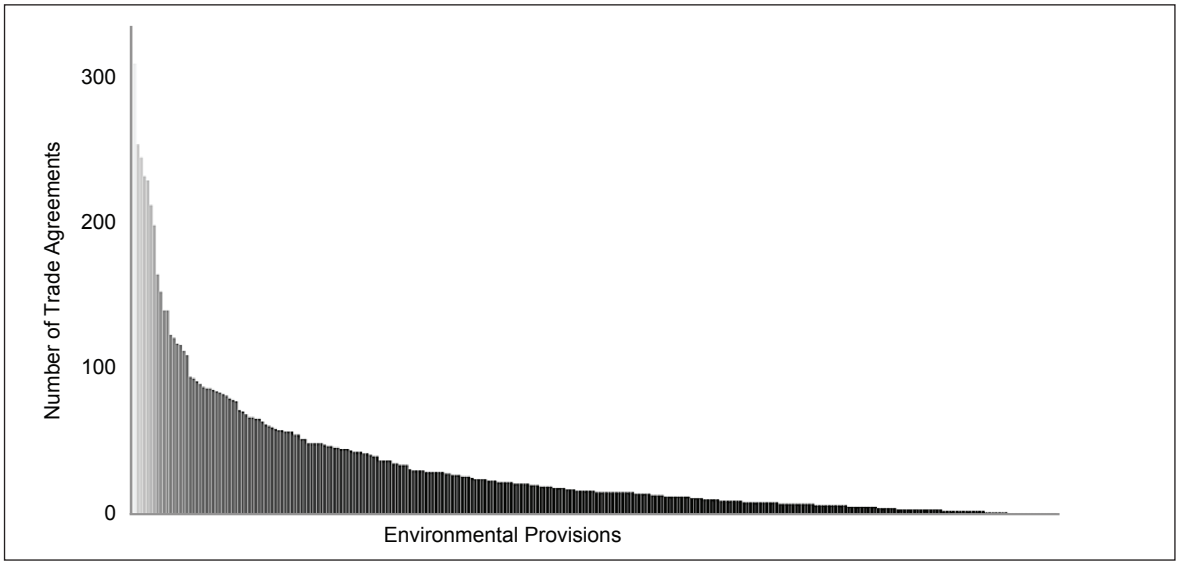
4 Jean-Frédéric Morin, Joost Pauwelyn & James Hollway, "The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements" (2017) 20:2 J Intl Econ L 1 at 19.

5 *Ibid* at 21.

6 *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 art 114 (entered into force 1 January 1994), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>.

7 Chrystia Freeland, "Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA)" (Speech delivered at the University of Ottawa, 14 August 2017) [Freeland], online: Global Affairs Canada <www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html>.

Figure 1: Number of Trade Agreements per Type of Environmental Provision



Source: Authors.

environmental provisions in trade agreements serve political objectives in view of facilitating the ratification process: they temper the opposition from environmental groups and allow stronger coalitions in favour of trade liberalization.[8] But innovative environmental provisions can also serve environmental objectives. Recent studies have found strong evidence that environmental clauses in trade agreements can lead to reduced pollution levels. Even clauses that are relatively vague and not subject to a trade dispute settlement mechanism are statistically related to enhanced environmental protection.[9]

To identify lesser-known environmental clauses, this paper builds on the Trade and Environment Database (TREND), a database built with the support of CIGI, among others.[10] It includes 285 different types of environmental provisions, contained within 689 trade agreements signed since 1947.[11] As Figure 1 illustrates, TREND reveals that a considerable number of environmental provisions are included in a limited number of agreements. Of the 285 types of provisions covered by TREND, 56 are found in five trade agreements or fewer, compared to only 20 provisions found in more than 100 trade agreements. This paper presents a selection of the most interesting of these rare clauses.

The rest of this paper is divided into four sections, each looking at a different type of environmental clause, namely:

- those directly addressing the trade and environment interplay;
- those related to development and fairness;
- those related to domestic environmental standards; and
- those related to domestic and international institutions.

8 Vinod K Aggarwal, "U.S. Free Trade Agreements and Linkages" (2013) 18:1 Intl Negotiation at 89–110.

9 Ida Bastiaens & Evgeny Postnikov, "Greening up: the effects of environmental standards in EU and US trade agreements" (2017) 26:5 Envtl Politics at 847–869; Leila Baghdadi, Inmaculada Martinez-Zarzoso & Habib Zitouna, "Are RTA agreements with environmental provisions reducing emissions?" (2013) 90:2 J Intl Econ at 378–390.

10 This dataset was built thanks to the support of CIGI, the Social Sciences and Humanities Research Council, Laval University's Centre for Interdisciplinary Studies in International Trade and Investment, and the Canadian Foundation for Innovation. Trade agreements were borrowed from the Design of Trade Agreements Database: <www.designoftradeagreements.org>.

11 For a comprehensive presentation of the TREND database, see Jean-Frédéric Morin, Andreas Dür & Lisa Lechner, "Mapping the Trade and Environment Nexus: Insights from a New Dataset" (2017) Global Envtl Politics, forthcoming. The full codebook of TREND is available online: <www.chaire-epi.ulaval.ca/trend>. In each agreement, two encoders have coded present norms independently and manually. The discrepancies were arbitrated by a third person.

The Trade and Environment Interplay

Some little-known environmental provisions aim to promote trade in environmental goods. While 51 agreements include a vague commitment to encourage trade in environmental goods, only five agreements include a more specific provision on this matter. Three of them promote the liberalization or the development of markets for organic products and foodstuffs.[12] The fourth agreement is the TPP, which includes a rare provision requiring that some countries "facilitate increased cooperation with respect to [...] the manufacture, importation, sale and operation of motor vehicles using alternative fuels."[13] The fifth and most ambitious agreement in this regard is the agreement between New Zealand and Taiwan signed in 2013, which asks parties to "eliminate all tariffs on environmental goods."[14] Considering that a plurilateral agreement on trade in environmental goods has been under negotiation at the World Trade Organization (WTO) since 2014, it is surprising that only a few preferential trade agreements include specific provisions on this issue. States often use the opportunity provided by preferential trade agreements to test provisions they would like to see become multilateral at the WTO.[15]

Other little-known provisions aim to develop synergies between specific trade and environmental issues. In the field of intellectual property, the 2008 agreement between the European Union and the Caribbean Forum (CARIFORUM) provides for the promotion of "biodiversity through the establishment of geographical indications."[16] On public procurement, four agreements, all signed by Korea, include a provision engaging parties — albeit only timidly — to cooperate in relation to green public procurement.[17] On subsidies, the TPP is the first — and, to date, the only — trade agreement to call for the "control, reduction and eventual elimination of all subsidies that contribute to overfishing."[18] By doing so, these agreements have found unique ways to simultaneously address trade liberalization and environmental protection.

Most trade agreements include environmental exceptions and exclusions allowing states to restrict trade for environmental purposes. Some of these exceptions, however, appear less frequently than others. One of these singular exceptions appears in the 1998 agreement between Jordan and Tunisia. These two countries agreed that their trade commitments "don't apply to the products

12 *Agreement establishing an Association between the European Union and its Member States and Central America*, 29 June 2012, L 346 art 61 (entry into force is pending) [EU-Central America], online: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=9542>; *Agreement between the European Community and the Swiss Confederation on trade in agricultural products*, 21 June 1999, L 114 annex 9, arts 1, 4 (entered into force 1 June 2002), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2002.114.01.0132.01.ENG>; *Vaduz Amendment to the Convention Establishing the European Free Trade Association*, 21 June 2001, annex F, arts 1, 4 (entered into force 1 June 2002), online: <www.efta.int/legal-texts/efta-convention>.

13 *Trans-Pacific Partnership Agreement*, 4 February 2016 (entry into force is pending) [*TPP*], appendix between Japan and the United States on Motor Vehicle Trade, art 9.1(d); appendix between Japan and Canada on Motor Vehicle Trade, art 5.1(c), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

14 *Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation*, 10 July 2013, NZTS 2013 No 11 c 17, art 3.2(a) (entered into force 1 December 2013), online: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3080>.

15 Richard Baldwin, Simon Evenett & Patrick Low, "Beyond Tariffs: Multilateralising Non-Tariff RTA Commitments" in Richard Baldwin & Patrick Low, eds, *Multilateralising Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009) at 79–141; Iza Lejárraga, "Deep Provisions in Regional Trade Agreements: How Multilateral-friendly? An Overview of OECD Findings" (2014) OECD Trade Policy Papers, No 168, online: <http://dx.doi.org/10.1787/5jxvgfn4bjf0-en>.

16 *Economic Partnership Agreement between the CARIFORUM States, and the European Community and its Member States*, 15 October 2008, L 289 art 164.2(c) (entry into force is pending), online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF>.

17 *Free Trade Agreement between the Republic of Colombia and the Republic of Korea*, 21 February 2013, annex 16-A, art 2, (entered into force 15 July 2016), online: <www.sice.oas.org/TPD/COL_KOR/Draft_Text_06.2012_e/June_2012_Index_PDF_e.asp>; *Free Trade Agreement between the European Union and its Member States and the Republic of Korea*, 6 October 2010, L 127 annex 13, art 1(d) (entered into force 1 July 2011), online: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8962>; *Free Trade Agreement between the Republic of Korea and the Republic of Peru*, 21 March 2011, annex 19A, art 1(c) (entered into force 1 August 2011), online: <www.sice.oas.org/TPD/PER_KOR/PER_KOR_Texts_e/PER_KOR_ToC_e.asp>; *Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey*, 1 August 2012, art 5.10, s 2(d) (entered into force 1 May 2013), online: <www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002366&layoutMenuNo=23274>.

18 *TPP, supra* note 13, art 20.16, s 5.

or materials banned to enter [...] in any of the two countries for [...] environments reasons."[19] Similarly, the 2016 Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada includes a rare oddity. It is the only trade agreement to explicitly exclude water from its scope, providing that "water in its natural state [...] is not a good or a product," and that no country is obliged to "permit the commercial use of water for any purpose."[20] Finally, three agreements prohibit, or ask parties to consider prohibiting, the export of products whose use or importation is prohibited within the other parties' territory.[21] These prohibitions transfer some of the enforcement burden onto the shoulders of exporting countries. They are among the exceptions and exclusions that are uncommon, but can contribute to reduced tensions between trade and environmental objectives.

Fairness and Equity in Environmental Protection

Not all provisions in a trade agreement are trade related. Following the spirit of the 1992 Rio Summit, several environmental provisions in North–South trade agreements are actually more related to development than to trade itself. Some of them, for example, call on developed countries to provide assistance to and build capacity in developing countries. Many trade agreements also establish specific funding mechanisms designed to assist developing countries in enhancing their environmental standards.

Still, some normative pillars of the conceptual trilogy of development, environment and growth are left behind. The principle of common but differentiated responsibilities is a good illustration. As a fundamental principle of international environmental law, it asserts that if states have a common responsibility to protect the environment, this responsibility differs due to states' contribution to environmental problems and their capacity to manage them.[22] Still, only two out of 689 trade agreements — both of them signed between the European Union and Latin American countries in July 2012 — explicitly acknowledge this principle.[23] Considering the legal, economic and political importance of this principle, in particular as it relates to climate change, and considering that an increasing number of trade agreements specifically call on the parties to reduce their greenhouse gas emissions,[24] it is surprising that trade agreements' environmental chapters do not refer to it more regularly.

Other trade agreements include provisions echoing some elements related to the common but differentiated responsibilities principle. A number of agreements recognize that environmental degradation particularly threatens developing countries, or that they are more vulnerable and are therefore facing more pressure to deal with environmental degradation. The third Lomé Convention is one of the few agreements to specify that drought and desertification are holding back development efforts and threaten "the physical, economic and political existence of certain ACP [African, Caribbean and Pacific] States."[25] For its

19 *Agreement of Free Trading Zone between the Government of the Hashemite Kingdom of Jordan and the Government of the Tunisian Republic*, 22 April 1998, art 8A (entry into force unknown), online: <http://wits.worldbank.org/GPTAD/PDF/archive/Jordan-Tunisia.pdf>.

20 *Canada-European Union (EU) Comprehensive Economic and Trade Agreement*, 30 October 2016, L 11 art 1.9 (entry into force is pending), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

21 *Canada-Chile Free Trade Agreement*, 5 December 1996, Can TS 1997 No 50 art 2.3 (entered into force 5 July 1997), [*Canada-Chile*], online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng>; *Fourth ACP-EEC Convention*, 15 December 1989, L 229 art 39.1 (entered into force 1 September 1991), online: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=10261>; *North American Agreement on Environmental Cooperation*, 17 December 1992, art 2.3 (entered into force 1 January 1994) [*North American Agreement*], online: <www.cec.org/about-us/NAAEC>.

22 Philippe Sands, *Principles of International Environmental Law*, (Cambridge, UK: Cambridge University Press, 2003) at 286.

23 *EU-Central America*, *supra* note 12, arts 50.2, 20.1; *Trade Agreement between the European Union and its Member States and Colombia and Peru*, 26 June 2012, L 354 arts 267.4, 275.2 (entered into force 1 March 2013) [*EU-Colombia-Peru*], online: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=9561>.

24 Jean-Frédéric Morin, Nicolas Michaud & Corentin Bialais, "Trade negotiations and climate governance: the EU as a pioneer, but not (yet) a leader" (2016), online: Institute for Sustainable Development and International Relations <www.iddri.org/Publications/Collections/Syntheses/IB1016EN_trade%20climate.pdf>.

25 *Third ACP-EEC Convention of Lomé*, 8 December 1984, L 86 art 38.1 (entered into force 1 May 1986), online: <http://aei.pitt.edu/56884/>. See also *Fourth ACP-EEC Convention*, *supra* note 21, art 54.

part, the fourth Lomé Convention uses singular language when it states that: "the existence of some ACP States is under threat as a result of a rapid deterioration of the environment."[26]

In addressing the gap between developed and developing countries' capacity, some trade agreements provide innovative clauses in the realm of assistance. More than 25 agreements include a provision on emergency assistance in case of natural disaster. However, the Yaoundé Convention between the European Community and the Associated African States is the only trade agreement to create a specific fund dedicated to this matter.[27] Two other trade agreements provide that goods imported for natural disaster relief may enjoy an exceptional rebate for customs duties.[28] Moreover, only two trade agreements ask parties to provide assistance to third countries, even if they are not party to the agreement.[29]

Other trade agreements favour an inclusive approach with specific underprivileged stakeholders. In particular, 41 agreements refer to the contribution of Indigenous groups' traditional knowledge to environmental protection.[30] Women, however, are much less frequently mentioned in relation to environmental protection, despite being one of the "major groups" identified at the 1992 Earth Summit whose participation is essential to reach sustainable development. Only four agreements referred to environmental and gender policies together. Three of them provide only vague clauses, requiring states to give particular attention to the "gender dimension" or "gender approach" in their cooperation activities.[31] Only the fourth Lomé Convention is more specific and explicitly acknowledges "the crucial role women play in [...] management of natural resources and environmental protection," and the need to assure the "dissemination of information to women and training of women in these areas [as] fundamental factors to be considered at the programming stage."[32] At a time when Canada would like to see a new chapter on gender rights introduced in NAFTA,[33] it seems fitting to further explore the interplay among gender, trade and environmental protection.

Domestic Environmental Regulations

Trade agreements increasingly define how domestic regulations should be adopted. For example, 46 agreements provide that governments should consult the public before adopting environmental regulations. Some agreements also prescribe very specific regulations, such as for endangered species.[34] Analysts argue that trade agreements are now used as vehicles to diffuse certain domestic policies and practices.[35]

26 *Fourth ACP-EEC Convention, supra* note 21, art 34.

27 *First Yaoundé Agreement between the European Economic Community and the 18 Associated African States and Madagascar*, 20 July 1963, L 282 Protocol No 5, art 39 (entered into force 1 June 1964), online: <www.cvce.eu/obj/la_convention_de_yaounde_20_juillet_1963-fr-52d35693-845a-49ae-b6f9-ddbc48276546.html>.

28 *1969 Southern African Customs Union Agreement*, 11 December 1969, art 4.4(a)(i) (entered into force 1 March 1970), online: <www.sacu.int/show.php?id=565>; *2002 Southern African Customs Union Agreement*, 12 November 2002, art 20.3(a) (entered into force 15 July 2004), online: <www.sacu.int/show.php?id=566>.

29 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, C 306 art 188J.1 (entered into force 1 December 2009), online: <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A12007L%2FTXT>; *United States-Australia Joint Statement on Environmental Cooperation*, 18 May 2004, art 6 (entered into force 1 January 2005) [*United States-Australia*], online: <www.state.gov/documents/organization/131489.pdf>.

30 Jean-Frédéric Morin & Mathilde Gauquelin, "Trade Agreements as Vectors for the Nagoya Protocol's Implementation" CIGI, CIGI Papers No 115, 28 November 2016, online: <www.cigionline.org/publications/trade-agreements-vectors-nagoya-protocols-implementation>.

31 *Free Trade Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China*, 28 April 2009, art 164(a), (entered into force 1 March 2010), online: <http://fta.mofcom.gov.cn/topic/enperu.shtml>; *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, C 340, art 2.3(e) (entered into force 1 May 1999), online: <www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>; *EU-Central America, supra* note 12, art 72.4.

32 *Fourth ACP-EEC Convention, supra* note 21, arts 153, 155.

33 Freeland, *supra* note 7.

34 Sikina Jinnah & Abby Lindsay, "Diffusion through issue linkage: environmental norms in US trade agreements" (2016) 16:3 Global Envtl Politics 41–61.

35 Clive George, "Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers" (2014) OECD Trade and Environment Working Papers, online: <http://dx.doi.org/10.1787/5jz0v4q45g6h-en>; Sikina Jinnah, "Strategic linkages: the evolving role of trade agreements in global environmental governance" (2011) 20:2 J Envt & Devt 191–215.

Some innovative but rare environmental provisions concern domestic policy-making processes. For instance, two trade agreements — out of the 689 agreements screened by TREND — include a commitment to monitor the state of the environment and periodically report publicly on this matter.[36] Four other agreements provide that states must ensure the participation of the public in their domestic environmental impact assessments.[37] Furthermore, the agreement between the United States and Korea is the only trade agreement that includes environmental standards requiring that goods must meet in outward processing zones.[38] Although environmental standards are listed among other standards, such as labour practices, this clause remains innovative and deserves further study in future trade agreements.

Additional provisions address production methods and quality control. The 2000 Cotonou Agreement provides that the parties should cooperate to achieve "the improvement of environment-friendly production methods."[39] The 2008 agreement between China and New Zealand includes a singular clause, asking both parties to promote "the enhancement of product quality, with a view to protecting the [...] environment."[40] So far, no other trade agreement has duplicated these provisions.

Other provisions address specific environmental issues. While more than 100 trade agreements include provisions on biodiversity, 88 on hazardous waste, 70 on renewable energy, 56 on forest conservation and 46 on air pollution, other environmental issue areas are less frequently addressed in trade agreements. Only two African agreements tackle the problem of illegal waste dumping, undertaking "to co-operate and adopt common positions against" this issue.[41] Likewise, only four agreements call for cooperation for the management of, protection against and preparation for oil spills.[42] In relation to these two threats, the 2001 agreement establishing the Caribbean Community (CARICOM) innovates in asking for the international recognition of the Caribbean Sea as a "Special Area requiring protection from the potentially harmful effects of the transit of nuclear and other hazardous wastes, dumping, pollution by oil or by any other substance carried by sea or wastes generated through the conduct of ship operations."[43]

With regard to fisheries, only two agreements mentioned the importance of reducing bycatch. The first is the agreement between Korea and

36 *Agreement on Environmental Cooperation to the Canada-Chile Free Trade Agreement*, 5 December 1996, art 2.1 (entered into force 5 July 1997), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng>; *North American Agreement, supra* note 21, art 2.1(a).

37 *Agreement on the Environment to the Free Trade Agreement between Canada and the Hashemite Kingdom of Jordan*, 28 June 2009, Can TS 2012 No 22 art 6.2 (entered into force 1 October 2012), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/background-contexte.aspx?lang=eng>; *Agreement on the Environment to the Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15 art 4.3 (entered into force 1 August 2009), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng>; *Dominican Republic–Central America Free Trade Agreement*, 5 August 2004, annex 17.9, art 3 (entered into force 1 January 2009), online: <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; *Free Trade Agreement between the United States of America and the Republic of Korea*, 30 June 2007, art 2(a)–2(d) (entered into force 15 March 2012), online: <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

38 *Ibid*, annex 22-B, art 3.

39 *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, and the European Community and its Member States*, 23 June 2000, L 317 art 49.2 (entered into force 1 April 2003) [*Cotonou Agreement*], online: <www.acp.int/sites/acpsec.waw.be/files/Cotonou2000.pdf>.

40 *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China*, 7 April 2008, TRT/CN-NZ/001, annex 14, preamble (entered into force 1 October 2008), online: WIPO <www.wipo.int/wipolex/en/treaties/text.jsp?file_id=228087>.

41 *Agreement Establishing a Common Market for Eastern and Southern Africa*, 5 November 1993, 2314 UNTS 265, art 125.1 (entered into force 8 December 1994) [COMESA], online: <www.jus.uio.no/english/services/library/treaties/09/9-01/comesa_treaty.xml>; *Treaty for the Establishment of the East African Community*, 30 November 1999, 2144 UNTS 255 art 113.1 (entered into force 7 July 2000) [*EAC Treaty*], online: WIPO <www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173330>.

42 *Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy*, 5 July 2001, 2259 UNTS 293 art 141 (entered into force 1 January 2006) [*Revised Treaty of Chaguaramas*], online: <https://idatd.cepal.org/Normativas/CARICOM/Ingles/Revised_Treaty_of_Chaguaramas.pdf>; *Fourth ACP-EEC Convention, supra* note 21 art 159(d); *EAC Treaty, supra* note 41 art 112.1(d); *Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area*, 19 January 2006, annex (selected areas for environmental cooperation) (entered into force 1 January 2009) [*United States-Oman*], online: <https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>.

43 *Revised Treaty of Chaguaramas, supra* note 42 at art 141.

Australia concluded in 2014.[44] Korea and Australia later duplicated this provision in the TPP, to which they are signatories. The TPP provides that each party should "reduce bycatch of non-target species and juveniles, including through the regulation of fishing gear that results in bycatch and the regulation of fishing in areas where bycatch is likely to occur."[45] So far, these are the only two trade agreements to address bycatch.

The protection and management of coral reef ecosystems is mentioned in only three agreements.[46] Among them, the 2000 agreement between the United States and Jordan provides that "to protect the fragile coral reef ecosystems in the Gulf of Aqaba, the United States is providing support for improved management and monitoring of the Binational Red Sea Marine Peace Park in the Gulf of Aqaba, and funding the expansion of the existing Aqaba wastewater treatment facility."[47] These developments in trade agreements are significant, as the protection of coral reefs is one of the environmental issue areas that is most weakly institutionalized in international law.

Institution Building

Several recent trade agreements established intergovernmental committees and stakeholder committees. Less common, however, is the establishment of more specialized organizations on environmental matters. Three iterations of the agreement between Europe and the African, Caribbean and Pacific countries establish centres for agricultural cooperation.[48] More recently, the 2006 agreement between the United States and Oman creates a centre responsible for promoting environmental technology businesses.[49] The 2001 CARICOM agreement establishes four specialized institutions: the Caribbean Disaster Emergency Response Agency, the Caribbean Meteorological Institute, the Caribbean Meteorological Organisation and the Caribbean Environmental Health Institute.[50]

Likewise, numerous trade agreements refer to existing multilateral environmental agreements, especially the Convention on Biological Diversity, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. In most cases, trade parties merely recall the signature of these agreements. In some other cases, they provide that these environmental agreements should prevail in case of an inconsistency with their trade agreement. It is less frequent, however, that a trade agreement requires its parties to ratify a multilateral environmental agreement. Yet, member states of the Common Market for Eastern and Southern Africa "agree to accede to the Montreal Protocol" on substances that deplete the ozone layer[51]; the fourth Lomé Convention requests the ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[52] the agreement between the European Union and Central American countries provides for the ratification of the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;[53] and two Stabilisation and Association Agreements of the European Union call for the ratification of

44 *Korea-Australia Free Trade Agreement*, 8 April 2014, ATS 43 art 16.6, s 1(a) (entered into force 12 December 2014), online: <http://dfat.gov.au/trade/agreements/kafta/official-documents/Pages/default.aspx>.

45 *TPP, supra* note 13, art 20.16, s 3(b).

46 *Cotonou Agreement, supra* note 39, art 32; *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, 24 October 2000, annex (selected environmental technical cooperation programs) (entered into force 1 January 2010) [*United States-Jordan*], online: <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text>; *United States-Australia, supra* note 29, art 4.

47 *United States-Jordan, supra* note 46, annex (selected environmental technical cooperation programs).

48 *Fourth ACP-EEC Convention, supra note* 21, art 53; *Third ACP-EEC Convention, supra* note 25, art 37; *Second ACP-EEC Convention*, 31 October 1979 L 347 art 88 (entered into force 1 January 1981), online: <http://aei.pitt.edu/4216/1/4216.pdf>.

49 *United States-Oman, supra* note 42, annex (selected areas for environmental cooperation).

50 *Revised Treaty of Chaguaramas, supra* note 42, art 21.

51 *COMESA, supra* note 41, art 125.3.

52 *Fourth ACP-EEC Convention, supra* note 21, annex IX.

53 *EU-Central America, supra* note 12, art 287.4.

the Kyoto Protocol on Climate Change.[54] Although these occurrences requiring the ratification of an environmental agreement remain rare, they demonstrate that trade agreements can be used to reinforce the multilateral environmental system.

One of the multilateral environmental agreements least frequently mentioned in trade agreements is the Cartagena Protocol on Biosafety. This is no doubt due to tensions between the Cartagena Protocol and the WTO's agreement on sanitary and phytosanitary measures. Nevertheless, two European agreements with Latin American countries call for the implementation of the Cartagena Protocol.[55] One of them even includes a provision stating that "[n]othing in this Agreement shall limit the right of a Party to adopt or maintain measures to implement [the Cartagena Protocol],"[56] implying its prevalence over the concluded trade agreement. Considering that the Cartagena Protocol on Biosafety has significant trade implications, this provision is quite audacious. It implies that the parties to this convention — the European Union, Colombia and Peru — deliberately chose to warn of possible contradictions that could arise from their different engagements by giving precedence to their environmental obligations — in a trade agreement!

Conclusion

Most of the literature on the interplay between trade and environmental law focuses on the same set of well-known trade agreements and their environmental clauses. These clauses are undoubtedly important for legal, economic and environmental reasons. Some of them also have systemic effects on the entire trade regime. Yet, the existing trade regime has more to offer than these well-known and widely diffused provisions. This policy brief has uncovered a wide diversity of isolated yet innovative environmental provisions.

Pointing to these isolated provisions has two main benefits. First, it reveals some of the weak spots of the trade regime. Some issues, such as the common but differentiated principle, the protection of coral reefs and the liberalization of environmental goods, deserve greater attention. Second, exposing some rarities can provide negotiators with ideas to emulate in future trade agreements. While not all rare provisions deserve to be widely diffused, some of them do, such as the prohibition to export goods whose importation is prohibited in the importing country, the establishment of international research centres and the requirement to ratify multilateral environmental agreements.

54 *Stabilisation and Association Agreement between the European Communities and their Member States and Bosnia and Herzegovina*, 16 June 2008, L 164 art 108 (entered into force 1 June 2015), online: <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12701>; *Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Montenegro*, 21 September 2007, L 108 art 111 (entered into force 1 May 2010), online: <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12781>.

55 *EU-Central America*, *supra* note 12, art 287.2(f); *EU-Colombia-Peru*, *supra* note 23, art 270.4.

56 *EU-Colombia-Peru*, *supra* note 23, art 270.4.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan qui formule des points de vue objectifs dont la portée est notamment mondiale. Nos recherches, nos avis et l'opinion publique ont des effets réels sur le monde d'aujourd'hui en apportant autant de la clarté qu'une réflexion novatrice dans l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org