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Environmental Provisions in Trade Agreements:

A Comparative Analysis of US and EU RTAs

지역무역협정의 환경조항에 관한 연구:
미국과 EU 간의 비교를 중심으로

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Environmental Provisions in Trade Agreements:

A Comparative Analysis of US and EU RTAs

by

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Abstract

Trade liberalization can raise global living standards, but it can also lead to faster depletion of environmental resources. As a result, regional trade agreements (RTAs) have been increasingly leveraged to strengthen international environmental governance. Developed countries, particularly the US and the EU, have been in the forefront of inserting a wide range of detailed environmental provisions in their trade agreements.

Against this backdrop, this paper provides a comparative analysis on the environmental provisions in US and EU RTAs. It suggests that the two major economies in the Atlantic show differences in how they address trade and environmental linkages, particularly in terms of the following three aspects: legal enforcement, environmental cooperation, and climate change. This paper further suggests that the contrasting features can be attributed to the different historical background, political framework, and international relations of the US and the EU. For instance, unlike the US, EU member states are allowed to establish their own environmental regulations, making it difficult for the EU to insert environmental provisions that provide for legal enforcement. Moreover, whereas the US focuses on ensuring a level playing field in trade and environmental legislation, the EU is more devoted to attain coherence in trade,

environmental, and developmental objectives with third countries, especially candidate or potential candidate countries to EU membership as well as developing or least-developed countries (LDCs). Lastly, in terms of the precautionary principle, the EU has taken stronger action against climate change in comparison to the US.

This paper further gives an outlook on whether there is any possibility for their future environmental provisions to converge, as the Transatlantic Trade and Investment Partnership (TTIP) is currently under negotiations.

Keywords: RTA(s), FTA(s), environment chapter, environmental provision(s), trade liberalization, sustainable development

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I. Introduction

1. Background of Research

The global trend of trade liberalization has led to a proliferation of international trade agreements. International trade has the potential to facilitate economic integration and raise global living standards. However, it can also lead to faster environmental depletion, as opening new markets promotes economies of scale and higher efficiencies.[1] With rising awareness that environmental destruction is a transnational issue, both domestic and international efforts to tackle the problem have been increasingly emphasized. Accordingly, environmental protection has long been an important agenda in international trade discussions as well.

There has been much academic work hypothesizing that trade has negative impacts on the environment.[2] However, international trade rules can both facilitate trade and support sustainable development. Therefore, environmental movements worldwide have long targeted trade as a means of addressing

[1] Meltzer, Joshua P. "The Trans-Pacific Partnership Agreement, the Environment and Climate Change." *Trade Liberalisation and International Co-operation*, 2014, 31.

[2] Lindsay, Abby. "FTA Innovations in Environmental Protection and Economic Development." *Working Paper for Bi-Annual Conference*, 2012, 1.

environmental issues by tying environmental governance to the economic benefits of trade liberalization, including lower trade barriers and access to new markets.[3]

Efforts on the harmonization of trade and environment were traditionally made at the multilateral level through the completion of the Uruguay Round, the creation of the World Trade Organization (WTO), and the launch of the Doha Development Agenda (DDA).[4] However, as progress was slow at the multilateral level, the efforts on trade liberalization started to shift to the regional or bilateral level.[5] As a result, the incorporation of environmental provisions in regional trade agreements (RTAs) or free trade agreements (FTAs) has gained importance in achieving the international goal of sustainable development.[6] In the WTO, provisions on environmental measures are integrated into agreements and addressed in Committees, whereas in a number of RTAs, the environment itself is the subject of separate agreements.[7] The

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[3] Jinnah, Sikina, and Julia Kennedy. "A New Era of Trade-Environment Politics: Learning from US Leadership and Its Consequences Abroad." *The Whitehead Journal of Diplomacy and International Relations*, 2011, 95.

[4] George, Clive. "Environment and Regional Trade Agreements." *OECD Trade and Environment Working Papers*, February 2014, 7.

[5] Ibid.

[6] Ibid.

[7] Kernohan, David, and Enrica De Cian. "Regionalism Versus Multilateralism:

incorporation of environmental provisions in RTAs was initially led by developed countries. Thus, this paper particularly looks into the environmental provisions inserted in US and EU RTAs.

2. Research Question and Methodology

Going beyond the traditional approach of regarding environmental protection as an exception to trade rules, the US and the EU have become proactive in inserting various environmental provisions in each of their trade agreements during the past years. They now use trade agreements as a means to "export" their environmental standards to other nations.[8] In this context, the objective of this paper is to examine and compare the environmental provisions inserted in US and EU RTAs. In particular, it focuses on the historical background and political stance behind the differences identified. In addition, this paper aims to seek if there is any possibility for their policies to converge in terms of addressing trade and environment linkages, as the US and the EU are at present

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Addressing Global Environmental Threats." *CEPS Policy Brief*, May 2004, 7.

[8] Vogel, David. *The WTO, International Trade and Environmental Protection: European and American Perspectives*. San Domenico Di Fiesole, Italy: European University Institute, Robert Schuman Centre, 2002, 6.

negotiating the Transatlantic Trade and Investment Partnership (TTIP). A report published by the US government states that "TTIP provides an opportunity for these two major players to develop a framework that not only reflects their own high environmental standards but strengthens their collective capacity to address environmental concerns in the dozens of developing countries whose largest trade and investment relationships are with the United States and the European Union".[9]

This paper is structured in four parts. The first part conducts a literature review on the trade and environment issue. In this part, the historical background of how sustainable development has become a global agenda is discussed. In turn, this paper touches on the trends in international trade, focusing on the shift in the trading system from the multilateral level to the regional or bilateral level. Then it identifies overall trends and changes in environmental provisions contained in RTAs. To articulate the term RTAs, the WTO defines them as "reciprocal trade agreements between two or more

[9] United States Trade Representative. "Standing Up for the Environment." *Special Report*, May 2015, 55.

partners".[10] FTAs have the lowest degree of economic integration among different types of RTAs, and they account for the largest percentage.[11]

The second part of this paper focuses on the environmental provisions contained in RTAs to which the US is party. It looks into the historical background and political stances of the US in terms of addressing environmental issues in trade agreements. In particular, the evolution of trade and environmental governance in the US can be divided into three phases, which will be analyzed. Lastly, this part examines the environment chapter of the Trans-Pacific Partnership (TPP) agreement in order to find out if any changes have been made to the existing trends of US environmental provisions.

The third part of this paper discusses the environmental provisions incorporated in RTAs that the EU is party to. In addition to the historical background and political framework, it examines the environmental agreements concluded with candidate and potential candidate countries of EU membership. Moreover, this part looks into environmental provisions inserted in agreements as a means of development concluded with developing countries; agreements with the main purpose of inter-regional cooperation; and other agreements concluded after the implementation of the 2006 Global Europe Strategy.

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[10] "Regional Trade Agreements and Preferential Trade Arrangements." https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm.

[11] "FTA의 개념." http://fta.go.kr/main/situation/fta/term.

Finally, the last part of this paper conducts a comparative analysis on how the two major players of the Atlantic address trade and environment linkages in RTAs. External differences will first be identified through a coded analysis. In turn, environmental provisions in the US-South Korea (KORUS) FTA and the EU-South Korea FTA will be examined, as they not only include advanced environmental provisions, but also show a good comparison between the different approaches taken by the US and the EU. Finally, the overall implications of the aforementioned analyses will be provided, including an outlook on the possibility of convergence in future trade negotiations.

II. Trade and Environment: Literature Review and Theoretical Framework

1. Background of Sustainable Development

The term sustainable development originates from *Our Common Future*, a report published in 1987 by the World Commission on Environment and Development. Also known as the Brundtland Report, *Our Common Future* declares that the environment and development are inseparable, defining sustainable development as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs".[12] After the report was accepted by the United Nations (UN) General Assembly, the term gained international salience and recognition.

A consistent definition of the term has not been established, and its clear meaning and legal nature are in lack of international consensus.[13] Nevertheless,

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[12] Brundtland, Gro Harlem. *Report of the World Commission on Environment and Development: "Our Common Future."* New York: United Nations, 1987, 39.

[13] Shim, Young-Gyoo. "Regional Trade Agreements and Sustainable Development in International Trade Law - With Speical Reference to the Environmental Regulations in RTAs." *Law Review* 55, no. 1 (2010); Aust, Anthony. *Handbook of International Law*.

it is generally accepted that it calls for maximizing the protection of natural resources and habitats for the future generation, and using environment-friendly scientific innovations to protect resources and human health.[14] This recognition has been reinforced in a number of international organizations, conferences, and agreements. For instance, at the UN Conference on Environment and Development held in 1992, leaders established the Rio Declaration with principles on sustainable development. In this declaration, Principle 12 states, "Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".[15] Agenda 21, affirmed and modified in follow-up UN conferences, provides detailed action plans for program areas, such as "promoting sustainable development through trade" and "making trade and environment mutually supportive".[16] This implies that the Rio Conference recognized that even though environmental purposes may be in some cases

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Cambridge, UK: Cambridge University Press, 2005.

[14] Shim, 2010; Dernbach, John C. *Sustainable Development as a Framework for National Governance*. Cleveland: Case Western Reserve School of Law, 1998.

[15] *Earth Summit: Rio Declaration and Forest Principles: Final Text*. New York: UN, 1992.

[16] *Agenda 21*. New York: United Nations, 1992.

used as justifications for trade barriers, sustainable development can be achieved by means of trade.[17]

In addition, sustainable development has been implemented as an important goal in legally-binding agreements such as the Agreement Establishing the WTO (WTO Agreement) as well as a number of RTAs. The WTO Agreement articulates sustainable development as one of its goals, emphasizing the importance and necessity of environmental protection. After the establishment of the WTO, the concept was discussed in depth in Ministerial Conferences, including the 1996 Singapore Ministerial Conference, the 1998 Geneva Ministerial Conference, and the 1999 Seattle Ministerial Conference.[18] The Ministerial Declaration accepted during the 2001 Doha Ministerial Meeting also reinforces the goal of sustainable development, and emphasizes that environmental protection and sustainable development are mutually supportive.[19]

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[17] George, 2014, 6.

[18] Shim, 2010, 12; Bartels, Lorand, and Federico Ortino. *Regional Trade Agreements and the WTO Legal System*. Oxford: Oxford University Press, 2006.

[19] Shim, 2010, 12; "WORLD TRADE ORGANIZATION." WTO | Doha 4th Ministerial. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

2. Trends in International Trade: Multilateral Trade Agreements and RTAs

With the establishment of the GATT in 1947, trade liberalization has been promoted through multilateral trade negotiations. The multilateral trading system was legally institutionalized in 1994 with the conclusion of the Uruguay Round, and the WTO was established in 1995. However, when the 2008 financial crisis brought about the decline of trust in liberalization and globalization, some nations withdrew trade liberalization pursued by the WTO system and started to return to protectionism.[20] This phenomenon raised concern that the spread of protectionism would trigger anachronistic national self-centeredness, increasing trade disputes and conflicts, which could exacerbate the status quo.[21] This perception has caused the international society to seek for a new world economic order, maintaining trade liberalization, but with a new paradigm of justice, equality, and sustainability.[22] However, as the DDA fell into gridlock, RTAs came to the limelight as an alternative norm for the improvement of trade liberalization and economic integration. In this

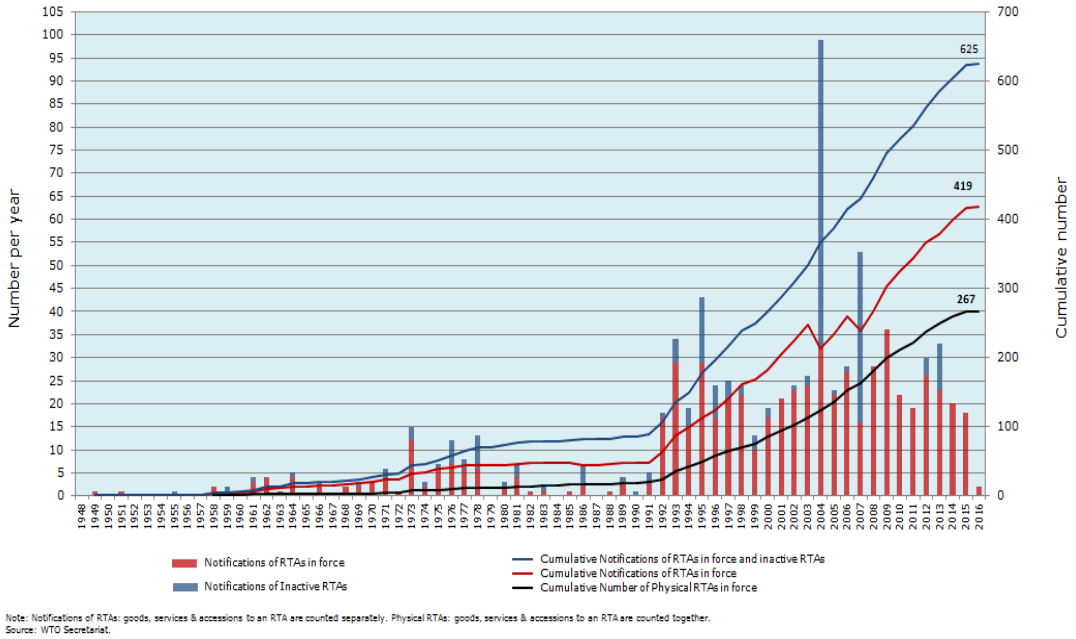
[20] Shim, 2010, 2.

[21] Ibid., 2-3.

[22] Ibid., 3.

context, RTAs have become a preferred forum to maintain and accelerate trade liberalization. Up to date, 625 RTAs have been notified to the WTO, and among them 419 in force as shown in Figure 1.[23]

Figure 1. Evolution of RTAs in the world, 1948-2016[24]



All RTAs include provisions on trade liberalization of goods, such as tariff reduction and non-tariff barrier reduction, but most of the RTAs signed nowadays include regulations in more extensive areas, such as trade in services

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[23] "Regional Trade Agreements: Facts and Figures." Accessed May 20, 2016. https://www.wto.org/english/tratop_e/region_e/regfac_e.htm.

[24] Ibid.

and protection of intellectual property rights (IPR), which are all addressed by the WTO.[25] All the more, recent RTAs go beyond the traditional areas, extending the scope to investment, environment, labor, human rights, and further including "WTO-plus" obligations in areas, such as services, government procurement, trade facilitation, and IPR.[26]

In particular, recent RTAs increasingly contain sustainable development as their main value. As the WTO Agreement is still in lack of an independent agreement for environmental issues, RTAs are useful to address sustainable development as an important agenda. Even though the multilateral trade system of the WTO is endeavoring to establish norms and institutions for sustainable development, RTAs provide more legal opportunities.[27] Moreover, as countries that share similar environments or ecological backgrounds need to cooperate in addressing certain environmental issues, RTAs can be an appropriate legal means for establishing cooperative relations on sustainable development.[28]

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[25] Shim, Young-Gyoo. "A Comparative Study on the TPP Environment Chapter with the Other Major Environmental Provisions in FTAs of Korea." *Han Yang Law Review* 31, no. 4 (2014): 42.

[26] Ibid.

[27] Shim, 2010, 7.

[28] Ibid.; Charnovitz, Steve. *Trade Law and Global Governance*. London: Cameron May, 2002.

Another recent trend in the international trading system is that RTAs are becoming plurilateral and comprehensive. That is, major countries have shifted their trade policy priority to the negotiations of mega-FTAs, such as the TPP, TTIP, and the Regional Comprehensive Economic Partnership (RCEP). These mega-FTAs are expected to play an important role as future benchmarks for how sustainable development will be addressed in the global trading system.

3. Types of Environmental Provisions in RTAs

Recognizing that various environmental problems are transboundary, a number of countries have been discussing environmental issues in RTA negotiations. However, RTAs between developed and developing countries may lead to difficulties in agreeing on environmental protection levels or the scope of environmental agreements. Moreover, some trade partners are in lack of domestic legal institutions to fulfill the obligations of environmental agreements.[29] However, developing countries have enhanced their awareness on environmental issues, and are increasingly inserting environmental

[29] Oh, Sun-Young. "A Study on the Proposals of Environmental Clauses in Korea-China FTA." *Dong-A Law Review* 60 (2013): 403-31.

provisions in their trade agreements.[30] In fact, not only RTAs between developed countries, but also those between developed and developing countries or those between developing countries include various types of environmental provisions.[31] The wide range of environmental regulations in trade agreements can be categorized into groups with similar legal force, contents, and objectives. Each type of provision is emphasized or omitted depending on the trade partners' interests.[32]

3-1. Reference in Preamble

The easiest way to show that a trade agreement considers environmental issues along with economic cooperation or market access is making use of the Preamble.[33] Countries either insert the term "environmental protection" or "sustainable development" in the Preamble to show that they care for the conservation of natural resources in terms of economic development. As this method does not bind countries to enforcement, it is used by a number of

[30] Ibid., 406.

[31] Ibid.; George, Clive and Ysé Serret. "Regional Trade Agreements and the Environment." *OECD Trade and Environment Working Papers*, January 2011.

[32] Oh, 2013, 406.

[33] Ibid., 407.

developing countries. However, as the Preamble outlines the establishment process, objective or basic principle of the trade agreement, and restrains the whole contents of the agreement, trade partners should not overlook the fact that they themselves are subject to the Preamble.[34] When a trade dispute occurs regarding the interpretation of the agreement, one way to solve the dispute is to interpret the Preamble. Thus, referring to environmental protection or sustainable development in the Preamble can be regarded as a fundamental and significant method among many different environmental provisions.[35]

3-2. Environmental Exceptions

The earliest use of environmental exceptions goes back to the GATT, the cornerstone of the multilateral trade system. The GATT has environmental exceptions in Article XX (General Exceptions) which states the conditions under which environmental policies may violate GATT rules. In other words, the article provides exemptions for trade policies that meet certain environmental criteria, which would otherwise be against trade obligations. In specific, two grounds for environmental exceptions in the article are: "(b)

[34] Ibid.

[35] Ibid., 407-408.

necessary for the protection of human, animal or plant life or health", and "(g) relating to the conservation of exhaustible natural resources". The same language has been reproduced in a substantial number of RTAs.

3-3. Environmental Laws and Standards

A number of RTAs require trade partners to enforce environmental laws and maintain, at minimum, or improve the current level of environmental standards. Such commitments are necessary to prevent environmental destruction that may occur when trade and investment increase because of relaxed environmental standards.[36] In specific, there are four types of provisions on environmental laws and standards in RTAs: commitments to (1) enforce environmental laws; (2) maintain, or at least not to lower, environmental standards; (3) improve environmental standards; and (4) harmonize environmental standards.[37]

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[36] Yanai, Akiko. "Environmental Provisions in Japanese Regional Trade Agreements with Developing Countries." *IDE Discussion Paper* 467 (2014): 3.

[37] Ibid.; Less, Cristina Tébar, and Joy Kim. "Checklist for Negotiators of Environmental Provisions in Regional Trade Agreements." *OECD Trade and Environment Working Papers*, February 2008.

3-4. Environmental Cooperation

Environmental cooperation means mutual support between trade partners on the improvement of environmental management, which includes cooperation on environmental policy-making, sharing environmental expertise, and working together on shared environmental issues.[38] Countries have different backgrounds, experiences, and capacities in terms of managing complex and diverse environmental problems, which makes environmental cooperation all the more important.[39] Therefore, this type of provision is often used in RTAs between developed and developing countries in order to mitigate the negative perspective that developing countries have on the environmental problems caused by economic development, market access, and other trade provisions, as well as to induce developing countries to participate in environmental protection.[40] Thus, the environmental cooperation provision also includes

[38] Kim, Jeong-Gon, and Hyeyoon Keum. "An Analysis of Environmental Provisions in Free Trade Agreements and Its Policy Implications." *Policy References* 11, no. 9 (2011): 64.

[39] Oh, 2013, 408.

[40] Ibid.

capacity building aimed to narrow down different levels of economic development.[41]

3-5. Public Participation

Public participation refers to the process of non-governmental interest groups influencing governmental policies or decisions. This has been widely used in the implementation and compliance of international environmental law, but both multilateral and bilateral trade agreements have been inactive or passive in terms of using this method.[42] However, with growing importance of public participation, countries are increasingly inserting provisions on public participation in their trade agreements.[43] The reason why this provision is significant is because it provides both transparency and justice in the process of policy making.[44] However, the drawback of this type of provision is that public misinformation may postpone or hinder policy decisions.[45] Thus, trade partners

[41] Ibid.

[42] Ibid., 409.

[43] Ibid.; George, 2014.

[44] Oh, 2013, 409-410.

[45] Ibid., 410.

should be required to disclose information and establish institutions on education opportunities in order to enhance public awareness.[46]

3-6. Dispute Settlement

Arranging procedural institutions to solve environmental disputes in trade agreements helps the implementation of domestic environmental law, and eventually enhance environmental performance. Dispute settlement procedures include state-to-state consultations, council mechanisms, and arbitration. Some RTAs allow the participation of the private sector in the dispute settlement procedure.[47] Moreover, in some cases, environmental violations may allow using the main dispute settlement procedure of the trade agreement.

3-7. Relations to Multilateral Environmental Agreements (MEAs)

This type of provision creates linkages between FTAs and MEAs, creating innovative synergies among different legal orders related to global

[46] Ibid.

[47] Yanai, 2014, 4.

environmental issues.[48] RTAs specify the relations between RTAs and MEAs, such as the Montreal Protocol, the Kyoto Protocol, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The first FTA to stipulate this provision was the North American Free Trade Agreement (NAFTA) concluded between the US, Canada, and Mexico. Article 40 of the North American Agreement on Environmental Cooperation (NAAEC), an environmental agreement as a side-treaty of the NAFTA, states, "Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party".[49] Some agreements also include a covered agreement, which is a list of MEAs to which trade partners are party.

3-8. Environmental Impact Assessment

Environmental impact assessments are conducted in order to anticipate and manage the impact and consequences of the increase in trade. An *ex ante*

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[48] Jinnah, Sikina, and Elisa Morgera. "Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda." *Review of European, Comparative & International Environmental Law* 22, no. 3 (2013): 327.

[49] NAFTA, art 40.

assessment is made before an RTA goes into force, to assess the potential environmental changes or influence that the RTA may cause. In addition, the assessment helps parties find a solution to mitigate or reduce the negative impact on the environment. In particular, the EU conducts impact assessments not only on the environment, but also on various social and cultural issues, and it is distinctive that they expand the scope to other countries as well.[50]

4. How Environmental Provisions in RTAs are Changing

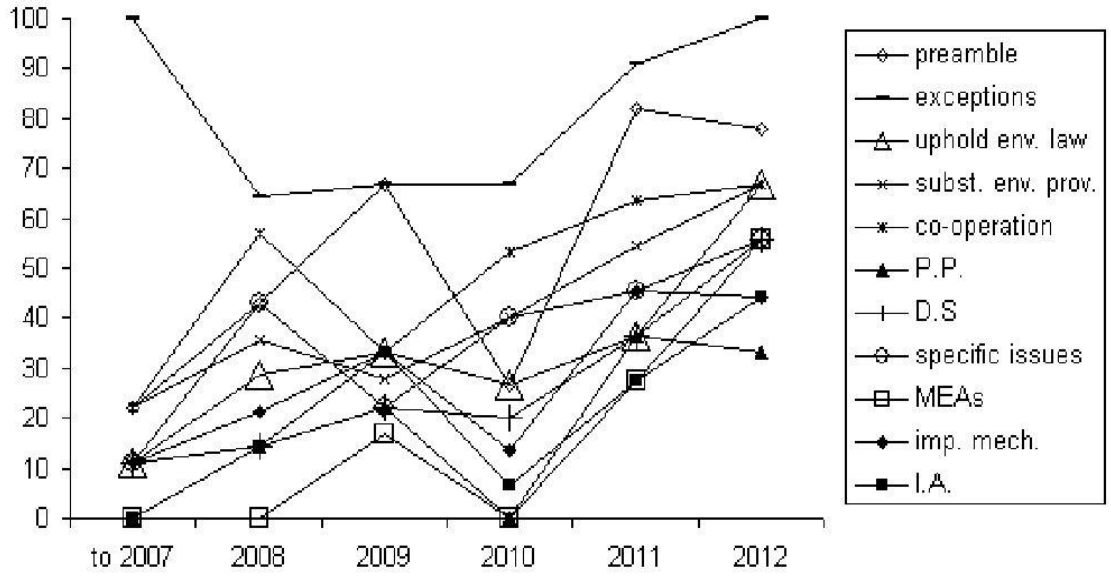
According to an analysis by the OECD (2014) on the environmental agreements in 77 recently concluded RTAs, provisions modelled on GATT Article XX or GATS Article XIV exceptions for the protection of human, animal, and plant life have remained to be the most common type included, found in around 80% of the RTAs that have been reviewed.[51] The second most common type has been the reference to environmental protection or sustainable development in the Preamble, appearing in about half of the RTAs.[52]

[50] Shim, 2010, 20.

[51] George, 2014, 8.

[52] Ibid.

Figure 2. Percentage of RTAs including environmental provisions[53]



Note: P.P. = Public Participation. D.S. = Dispute Settlement. I.A. = Impact Assessment (*ex ante*).

In Figure 2, environmental cooperation, public participation, dispute settlement, coverage of specific environmental issues, specific provisions on MEAs, and implementation mechanism are grouped together as substantive environmental provisions. All substantive provisions have appeared to have an upward trend in general. They remained around 30% of RTAs entering into

[53] George, 2014, 9.

force up to 2010, increased to over 50% in 2011, and close to 70% in 2012.[54] Among these substantive provisions, environmental cooperation has been the most common type throughout the reviewed period, increasing from around 20% in the past to nearly 70% in 2012.[55]

The appearance of *ex ante* impact assessments in RTAs has averaged around 20% in general.[56] Before 2007, Canada, the EU, and the US have already started conducting impact assessments for all their RTAs.[57]

To build upon the aforementioned external trends, some conspicuous changes occurring in RTA environmental agreements are as follows. First, more and more countries are including legally-binding environmental provisions in trade agreements.[58] For instance, the United States' Trade Act of 2002 and the EU's 2006 Global Europe Strategy provide a direction towards enforcing environmental agreements in RTAs, which will be importantly addressed in this paper.

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[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Jung, Bok-Young, and Keun-Yeob Oh. "Environmental Issues and Negotiation Strategies in Korea's Foreign Trade Agreements." *Korea Trade Review* 40, no. 4 (2015): 316.

Second, countries are expanding the scope of environmental cooperation.[59] Some RTAs have detailed environmental cooperation provisions, in some cases, including an annex or a separate Environment Cooperation Agreement. The scope of cooperation is expanding from traditional areas, such as removing pollutants, to new issues, such as endangered species rehabilitation, a trend which seems to continue in the future.[60]

Finally, democratic procedures in trade negotiations are being increasingly leveraged.[61] For instance, during TTIP negotiations between the US and the EU, the US requested the EU to lower environmental safety standards of chemical products, but the EU made an objection, defending the stance of environmental groups.[62] Likewise, the voice of civil groups can be leveraged as a negotiation strategy.

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[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid.

III. Environmental Provisions in US RTAs

1. Historical Background

The role of environmental provisions in US trade agreements has evolved dramatically over the past years.

1-1. Background

Nowadays, one might think the EU is more environment-friendly than the US. In fact, until the early 1990s, the US was a clear global leader in environmental policy, which was emulated by many other countries.[63] For instance, in 1962, the US enacted regulations on approving drugs that were more stringent than those of Great Britain and Germany.[64] In 1969, the US banned cyclamate, an artificial sweetener, which has been permitted in all states in the EU.[65] In 1979,

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[63] Vogel, David. The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States. Princeton: Princeton University Press, 2012, 3.

[64] Ibid., 1.

[65] Ibid.

the US banned Alar, a plant-growth regulator which is permitted in the EU.[66] In 1989, the US regulated the use of lead as a fuel additive, whereas the EU eliminated its use in 2005.[67] Likewise, the US had health, safety, and environmental regulations that were more risk-averse than the EU.

However, in the early 1990s, a prominent discontinuity in regulatory stringency took place in the Atlantic.[68] As a regulatory precursor, the US government became concerned about its competitiveness, as its stringent regulations could place its economy in a disadvantage if foreign competitors had lower environmental standards. Therefore, preventing environmental dumping practices by its trade partners became one of its main objectives.

In November 1999, US President Bill Clinton of the Democratic Party issued Executive Order (EO) 13141, which required the United States Trade Representative (USTR) to undertake environmental reviews on all US trade agreements.[69] In 2002, Congress passed the Trade Act, which established the Trade Promotion Authority (TPA). This legislation reinforced the environmental governance provisions of EO 13141.[70] It encouraged parties to

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[66] Ibid.

[67] Ibid.

[68] Ibid., 2.

[69] Jinnah and Morgera, 2013, 327.

[70] Ibid.

“promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing environmental exceptions under Article XX of the 1994 GATT”.[71]

1-2. Different Environmental Stances between Democrats and Republicans

In the US, the major competition between Democrats and Republicans has a four-year political cycle with the presidential election taking place. This is when political leaders decide on policy plans and legislative programs for the next four years. Both parties release their platforms, which can be a useful standard for predicting future environmental legislations.[72] The two parties’ contrasting environmental stances are shown in Table 1.

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[71] Trade Act of 2002, sec 2102.

[72] Koh, MoonHyun, SaeHoon Kwon, SungBae Kim, Sanghyun Lee, and Roy Andrew Partain. “Advancement of Korea's Environmental Laws Through the Analysis of Major Free Trade Agreements.” January 30, 2013, 72.

Table 1. Comparison of US Democrats' and Republicans' perspectives on environmental law and policy[73]

	Democrats	Republicans
Emphasis regarding environmental law	Emphasis on the risk of climate change and regulations on greenhouse gas emissions	Emphasis on the risk of natural resource depletion and on restrictions on excessive natural resource development
Participating in and implementing the Kyoto Protocol	Agree	Disagree
Energy policies	Emphasis on research and development of renewable energies	Emphasis on safe development of natural gas, petroleum, and nuclear energy
Perspective on the Environmental Promotion Agency (EPA)	Emphasis on the expansion of the EPA's authority and on its role	Should curtail the EPA's authority, state-based regulation

The 2012 National Democratic Platform strongly underscores anthropogenic climate change. Democrats "affirm the science of climate change, commit to significantly reducing the pollution that causes climate change" and know that they "have to meet this challenge by driving smart policies that lead to greater growth in clean energy generation".[74] In addition, Democrats pursue "an all-of-the-above approach to developing America's many energy resources, including wind, solar, biofuels, geothermal, hydropower, nuclear, oil, clean coal,

[73] Koh et al., 2013, 73 (*translated by author*).

[74] 2012 Democratic National Convention. "2012 Democratic National Platform", 55.

and natural gas".[75] They also "pledge to continue showing international leadership on climate change, working toward an agreement to set emission limits in unison with other emerging powers".[76] Even though the Democratic platform shows support on environmental policies, it cannot be regarded as either revolutionary or progressive.[77] This shows that Democrats are cautious in supporting environmental objectives, and they are hesitant to expect much political credit in terms of achieving the goals.[78]

On the other hand, the 2012 Republican Platform shows much difference from that of its counterpart. Democrats have environmental policies included in the "Ensuring Safety and Quality of Life" chapter, whereas Republicans have them in the "America's Natural Resources: Energy, Agriculture and the Environment" chapter. The contrasting terms "safety" and "utility" provide an insight on the contrasting stances between the two parties.[79] That is, Democrats regard environmental law as a means of ensuring public safety, whereas Republicans perceive it as a restriction or regulation on using natural

[75] Ibid., 39.

[76] Ibid., 56.

[77] Koh et al., 2013, 73.

[78] Ibid.

[79] Ibid., 74.

resources.[80]

Republicans state in their platform that they will end the “war on coal and encourage the increased safe development in all regions of the nation’s coal resources”, and “oppose any and all cap and trade legislation”.[81] This means that they are against the requirements of the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.[82] In addition, they state that the US “needs a more proactive approach to managing spent nuclear fuel, including through developing advanced reprocessing technologies”.[83] However, they declare that “the taxpayers should not serve as venture capitalists” in terms of renewable energy.[84] This shows that Republicans are supportive of investment in nuclear energy, whereas they are against public support on renewable energy projects. Accordingly, they criticize that the US Environmental Protection Agency (EPA) is corrupted due to the two-party system, which implies the alleged research errors and political bias of the EPA.[85] Their platform states that they “require full transparency in litigation under the nation’s environmental laws” and “call on Congress to take quick action to

[80] Ibid.

[81] 2012 Republican National Convention. “Republican Platform 2012”, 16.

[82] Koh et al., 2013, 74.

[83] Republican Platform 2012, 16.

[84] Ibid.

[85] Koh et al., 2013, 74.

prohibit the EPA from moving forward with new greenhouse gas regulations that will harm the nation's economy".[86]

2. Environmental Provisions in US RTAs

The evolution of trade and environmental governance in the US can be divided into three phases: (1) prioritizing trade governance over environmental governance; (2) acknowledging the importance of global environmental governance through normative claims, but avoiding substantive linkages to trade regulations; and (3) linking trade and environmental governance closely through innovative policies to improve environmental performance.[87]

2-1. Phase 1: Positioning environmental governance as inferior to trade governance

In the first phase, US policy on trade and environment linkages prioritized

[86] Republican Platform 2012, 19.

[87] Jinnah and Kennedy, 2011, 100.

trade governance over environmental governance.[88] This period is represented in the United States' first FTA, concluded with Israel in 1985. The Israel FTA does not have any environmental provisions. Article 3 outlines the FTA's relationship with other agreements, stating that "[i]n the event of an inconsistency between provisions of this Agreement and such existing agreements, the provisions of this Agreement shall prevail".[89] This phase was when the aforementioned flip-flop between the US and the EU took place in the Atlantic, regarding environmental regulation. For instance, since 1992, the US has permitted a substantial number of genetically modified (GM) varieties for commercial use.[90]

2-2. Phase 2: Recognizing the importance of global environmental governance only through normative claims, but not through strong substantive trade measures

The second phase includes most of US FTAs from NAFTA which took effect

[88] Ibid.

[89] US-Israel FTA, art 3.

[90] Vogel, 2012, 1.

in 1994 to the US-Oman FTA that entered into force in 2009.[91] New and diverse environmental provisions in FTAs emerged during this period, which created normative linkages between trade and environmental governance. In specific, provisions started to contain principles of international environmental law as well as rules on implementation. In contrast to the phase in which the Israel FTA articulated the priority of the FTA over other existing agreements, the second phase showed important changes in the relationship between FTAs and MEAs as well.[92]

A significant FTA concluded in the second phase was the 1994 NAFTA, which was the first FTA in which the US incorporated environmental provisions. The NAFTA has a side agreement, the NAAEC, designed to encourage environmental cooperation as well as the implementation of domestic environmental law. As the NAFTA was negotiated in parallel with the 1994 GATT, it became the benchmark of US FTAs adopting the GATT's environmental exceptions.[93] In addition to these exceptions, the NAFTA incorporates a list of MEAs which could prevail over the trade agreement in case of conflict. The NAAEC also provides a mechanism for the public to police and facilitate the government to enforce such MEA-related

[91] Jinnah and Kennedy, 2011, 100.

[92] Ibid.

[93] Jinnah and Morgera, 2013, 328.

environmental measures. In the negotiating process of the NAFTA, environmentalists from the US and Canada asserted that the two trade partners should leverage NAFTA to address environmental issues.[94] As a result, the public participation provision was included in the agreement.[95] These non-derogation and public participation mechanisms were introduced in several subsequent FTAs, though the side agreement formation was never used after the NAFTA.

The next important evolution in US environmental provisions occurred in the late 1990s following EO 13141 "Environmental Review of Trade Agreements", which asserts, "Trade agreements should contribute to the broader goal of sustainable development. Environmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects".[96]

Following the EO 13141, the 2001 US-Jordan FTA introduced Article 5 (Environment) which introduced new stipulations on environmental law,

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[94] Choi, Won-Mog. "Study on FTA Environmental Provisions and Environmental Regulations." August 9, 2014, 19.

[95] Ibid.

[96] Exec. Order No. 13141, sec 2.

reflecting and extending the side agreements of NAFTA.[97] The article recognizes "the right of each Party to establish its own levels" of environmental regulation.[98] Moreover, it not only states that "it is inappropriate to encourage trade by relaxing domestic environmental laws",[99] but also requires the parties to strive to continue to improve those laws.[100]

The next stimulation in the development of environmental governance in US FTAs came in with the passage of the controversial 2002 Trade Act.[101] This bill granted President George W. Bush the TPA, or fast-track negotiating authority, subject to the sufficient adherence to a set of guidelines established by Congress. These guidelines set up in the Trade Act of 2002 expanded the environmental governance provisions of EO 13141 by not only reinforcing the EO's norms and principles on environmental governance, but also encouraging parties to include consultative processes in trade agreements to strengthen environmental protection, and to consider the linkages between FTAs and MEAs.[102]

The US FTAs concluded with Chile and Singapore were respectively

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97 Jinnah and Morgera, 2013, 328.

98 US-Jordan FTA, art 5.2.

99 Ibid., art 5.1.

100 Ibid., art 5.2.

101 Jinnah and Kennedy, 2011, 97-98.

102 Ibid., 98.

negotiated pursuant to the 2002 Trade Act, in 2004. They were the first to contain a separate chapter on the environment, the environmental chapter, in US FTAs.[103] Full-scale FTA environment chapters initiated a variety of new environmental provisions, initiating a new trend in environmental provisions that would be replicated in subsequent US FTAs. These include FTAs with Australia (2005), Morocco (2006), Dominican Republic-Central America (CAFTA) (2006), Bahrain (2006), and Oman (2009), which contain provisions on: consultation processes to resolve environmental disputes; an Environmental Affairs Council (Chile and CAFTA) for reinforcing the implementation of environmental measures; enhanced requirements for public participation; rosters of panelists with environmental expertise in trade dispute settlement (Chile and CAFTA); and the relationship between FTAs and MEAs.[104]

In particular, starting with the US-Chile FTA in 2004, this phase brought about enforcement mechanisms for violation of non-derogation provisions, which was unprecedented. Chapters on dispute settlement began to contain stipulations on imposing monetary penalties and tariff suspensions in case disputes occur surrounding the violation of environmental measures.[105]

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[103] Ibid.

[104] Ibid.

[105] Ibid.

2-3. Phase 3: Recognizing the interlinked relationship between trade and environmental governance through practical policies on improving environmental performance

The third phase of the evolution in US FTA environmental provisions starts with the US-Peru FTA. This phase builds on the environmental provisions in earlier FTAs on MEAs and dispute settlement mechanisms while, at the same time, it introduces the new factors of "specific, measurable environmental benchmarks" that the parties must meet.[106] In 2006, the Democratic Party regained control and weakened the TPA. In this period, the US continued to renegotiate FTAs with Peru, Columbia, South Korea, and Panama. These FTAs go beyond "environmental lip service" by introducing normative as well as substantive provisions that link FTA compliance to reinforced enforcement of MEAs.[107] For instance, these agreements include a separate environmental article on biodiversity (Peru and Colombia), covered agreements (all), an annex on forest governance (Peru), and a tightened relationship between environmental provisions and the FTA's dispute settlement process (Peru).[108]

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106 Ibid., 101.

107 Jinnah and Kennedy, 2011, 100.

108 Ibid.

Specifically, the US-Peru FTA includes: (1) Article 18.11 in the environment chapter devoted to biodiversity; (2) an annex on forest governance that requires the government of Peru to stop illegal logging and timber trade; (3) a more expanded list of covered MEAs; and (4) dispute settlement procedures, which for the first time allow remedy for violation of the environmental article, which goes beyond non-derogation, to be subject to the FTA's main dispute settlement mechanism.[109]

2-3-1. Article on Biodiversity

The Peru and Colombia FTAs are the first in US FTAs to contain specialized provisions related to biodiversity. The biodiversity article includes provisions on recognizing "the importance of the conservation and sustainable use of biological diversity"[110]; "the importance of respecting and preserving traditional knowledge […] of indigenous and other communities that contribute to […] biological diversity"[111]; and "the importance of public participation […] on matters concerning […] biological diversity".[112] During trade negotiations,

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109 Ibid., 101-102.

110 US-Colombia FTA, art 18.11.1.

111 Ibid., art 18.11.3.

112 Ibid., art 18.11.4.

Colombia and Peru proposed specific IPR language on biodiversity and traditional knowledge, which was rejected by the US.[113] As a result, the final versions do include side agreements on IPR issues, and the biodiversity article has provisions regarding biodiversity and IPR arrangements, albeit in an unenforceable language. Nonetheless, it holds significance in that it clearly refers to timely issues, such as traditional knowledge and ownership of biological diversity, which address interrelated concerns on trade, environment, and IPR.[114]

2-3-2. Annex on Forest Sector Governance

The annex on forest governance in the US-Peru FTA includes specific, enforceable environmental requirements, and shows the creation of strategic linkages that "push domestic environmental policy development abroad" through an FTA.[115] In specific, the annex requires Peru to "[i]ncrease the number and effectiveness of personnel devoted to enforcing Peru's laws […] relating to […] timber products"[116]; "[i]mpose […] penalties designed to deter

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113 Jinnah and Kennedy, 2011, 102.

114 Ibid.

115 Ibid.

116 US-Peru FTA, art 18.3.4.3.

violations"[117]; and "[a]dopt and implement policies to monitor the […] tree species listed in […] CITES"[118], which Peru has been delaying to carry out.[119] Peru shall "within 18 months after the date of entry into force" of the agreement, take the aforementioned actions.[120] In case of failure to meet any of these requirements, the US can use trade sanctions against Peru, such as blocking timber shipments.[121] This change marks a major development in US trade policy, for it uses "market access" as a vehicle to stimulate Peru's improvement of environmental standards, especially those related to forest management.[122]

2-3-3. Expanded List of Covered MEAs

US FTAs with Peru, Colombia, Panama, and South Korea each builds upon the NAAEC provisions related to MEAs on covered agreements. The FTAs signed in the third phase state that none of the trade agreement provisions should exclude any party from taking action required in the MEA.[123] For

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117 Ibid.

118 Ibid.

119 Jinnah and Kennedy, 2011, 102.

120 US-Peru FTA, art 18.3.4.3

121 Ibid., art 18.3.4.13.

122 Jinnah and Kennedy, 2011, 103.

123 Ibid.

instance, the US-Peru FTA has a legally-binding provision on MEAs with a covered agreement listing seven MEAs, which also allows including more if both parties agree.[124] This is a great leap from earlier FTAs prior to the Peru FTA, which all merely state that the trade partners will try to pursue MEAs and trade agreements that are complementary to one another. This great change in language represents an explicit, rather than implied, stance of the US that parties can implement MEAs without fearing trade retaliation.[125] Moreover, the KORUS FTA, signed in 2010 and entered into effect in 2012, also contains a dedicated chapter on the environment, which provides for the commitment of the trade partners to fulfill their obligations on seven MEAs listed in the annex.

2-3-4. Dispute Settlement beyond Violation of Non-derogation

FTAs concluded before the Peru FTA had relatively weak environmental consultation processes. On the other hand, the Peru and Colombia FTAs go beyond this restriction, placing violation of the environment chapter under the main dispute settlement mechanisms of the trade agreement without restrictions. This is related to negotiating objectives in the 2002 Trade Act updated by the

[124] US-Peru FTA, art 18.2.2.

[125] Jinnah and Kennedy, 2011, 103.

2007 Bipartisan Trade Deal, which states that the US has agreed to "incorporate a list of multilateral environmental treaties" in its trade agreements, and to "alter the non-derogation obligation for environmental laws from a "strive to" to a "shall" obligation".[126] The USTR articulates the new template of trade policy: "[w]e have agreed that all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements - same remedies, procedures, and sanctions. Previously, our environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws".[127] In addition, some senators have requested the USTR to go beyond the Bipartisan Trade Deal and consider additional trade-environment issues, such as natural resources and wildlife.[128]

Allowing access to dispute settlement for FTA environmental provisions, particularly in tandem with introducing specific requirements for environmental management and performance, revolutionizes the relationship between trade and environmental governance.[129]

In conclusion, US policy on trade-environment linkages has evolved from a

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[126] United States Trade Representative. Bipartisan Trade Deal. 2007, 2.

[127] Ibid., 2-3.

[128] Meltzer, 2014, 4.

[129] Jinnah and Kennedy, 2011, 104.

phase in which the environment was inherently inferior to trade, to one in which trade is leveraged to fulfill environmental goals. The strengthened environmental obligations of the US-Peru FTA serve as an entree of the beginning of a new era in US trade and environment governance.[130]

3. Trans-Pacific Partnership (TPP)

As a twenty-first-century trade agreement, the TPP has been signed in October 4, 2015 by 12 countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam. The total gross domestic product (GDP) of the current TPP parties is approximately $27.5 trillion, and comprises 40 percent of global GDP and one third of world trade.[131] The US holds significance both in economic size and political strategy, for it accounts for approximately $15.5 trillion, almost 60 percent of TPP GDP.[132] The ambition of the TPP parties is for the TPP to become the stepping

[130] Ibid., 107.

[131] Meltzer, 2014, 3.

[132] Ibid.

stone towards a Free Trade Area of the Asia-Pacific (FTAAP).[133] Accordingly, the rules that are agreed under the TPP can set trade rules in the broader Asia Pacific region in the future.

The TPP presents an important opportunity to address a variety of environmental issues from illegal logging to climate change, and create rules that provide an appropriate balance between supporting trade liberalization and ensuring governments to address environmental issues. The USTR notes in its fact sheet that the "TPP includes the most robust enforceable environment commitments of any trade agreement in history", and that the agreement puts "environmental protections at the core of the agreement, and making those obligations fully enforceable".[134] The USTR includes commitments on a wide variety of environmental issues, such as to "protect and conserve iconic species", "prohibit harmful fisheries subsidies", and "combat wildlife trafficking, illegal logging, and illegal fishing".[135] Importantly, it states that the "TPP also adds teeth to the enforcement of major multilateral environmental agreements".[136]

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[133] Ibid., 2.

[134] United States Trade Representative. "TPP Preserving the Environment Fact Sheet", 1-2.

[135] Ibid., 1-2.

[136] Ibid., 2.

The TPA expired in July 2007, but the USTR continued to follow this legislation in the TPP negotiations. In other words, even though the TPA technically expired in 2007, it remained in effect for agreements that were already under negotiation. The Obama Administration sought renewal of the TPA, and in June 2015, it passed Congress and was signed by the President.

However, even though the US has concluded FTAs with an environmental chapter included with six countries among TPP members, as these FTAs were finalized before the 2007 Bipartisan Trade Deal, their environmental provisions do not serve as a template for the TPP process.[137] For instance, the US-Australia FTA outlines that parties should enforce their environmental laws, but none of them are subject to the FTA's dispute settlement mechanism.[138] In addition, environmental groups have challenged the USTR, asserting that the TPP's environment chapter "fails to provide the necessary requirements and stronger penalties desperately needed to better fight poaching, protect wildlife habitat and shut down the illegal wildlife trade".[139] A good faith interpretation of the chapter, indeed, indicates that it is toothless and unlikely to meaningfully

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137 Metlzer, 2014, 3.

138 US-Australia FTA, art 19.2.1.

139 Wold, Chris. "Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership." January 4, 2016, 2; "Trans-Pacific Partnership Falls Short for Wildlife." Defenders of Wildlife. 2015. https://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife.

address various issues included in the agreement.[140]

In this section of the paper, the environment chapter of the TPP agreement will be examined, though the mega-FTA has not entered into effect, in order to find out whether the TPP would align with the aforementioned third phase or lead to a new phase in US trade-environment governance.

3-1. MEAs

The TPP provisions on environmental law, particularly related to MEAs, are relatively weak for the following reasons.

3-1-1. Interpretation of Language

The environment agreement states that "[t]he Parties emphasize the need to enhance the mutual supportiveness between trade and environmental law and policies".[141] This is merely restating public discourse from the previous 20 years on trade and environment issues.[142] Moreover, the TPP states that "each

[140] Wold, 2016, 2.

[141] TPP, art 20.4.2

[142] Wold, 2016, 2.

Party affirms its commitment to implement" the MEAs.[143] However, MEAs already contain language that legally binds parties to abide by those agreements. Thus, affirming the commitment to implement laws on MEAs does not add anything to the quality or nature of these obligations.[144] In specific, the TPP's provisions on bringing a claim for violating MEA obligations are weaker than those in the CITES as well as the Montreal Protocol.[145]

3-1-2. TPP and CITES

To prove violation of a party's obligation to "adopt, maintain, and implement" measures related to CITES, the plaintiff "must demonstrate" that the failure to adopt, maintain, or implement those laws "affect trade or investment between the Parties". [146] In contrast, when the CITES Standing Committee recommended that the parties suspend trade of the species listed in CITES with the Lao People's Democratic Republic because of its failure to develop a national ivory action plan, for example, no demonstration of impacts on trade or

143 TPP, art 20.4.1.

144 Wold, 2016, 3.

145 Ibid., 4.

146 TPP, art 20.17.2.

investment was required.[147]

In addition, the TPP has restrictions for using dispute settlement mechanisms in case of violation of CITES, but not the failure of compliance with resolutions and other recommendations directed to the parties.[148] On the other hand, CITES allows imposing trade sanctions for reasons in addition to the failure to implement the measures in the treaty, including the failure to implement adequate national legislation as well as to comply with recommendations of the Standing Committee.[149] Likewise, the TPP's enforcement mechanisms of CITES are much weaker than the treaty itself.

3-1-3. TPP and the Montreal Protocol

The TPP has provisions on the obligation to the Montreal Protocol. A footnote notes that a party will be in compliance of the requirement if it "maintains" its current measures listed in the annex.[150] The word "maintain" suggests that the parties do not have to implement those measures. The fact that "implement" is used in terms of CITES but not for the Montreal Protocol

147 Wold, 2016, 4.

148 Ibid.

149 Ibid.

150 TPP, art 20.5.1.

directs interpreters to assume that the drafters intended to prevent bringing failure to implement the obligations of the Montreal Protocol under the main dispute settlement mechanisms.[151]

Another footnote states that a violation only occurs when a party has not "maintain[ed]" its measures listed in the Annex, and another party "must demonstrate" the other party's failure to take measures to control the production, consumption of, and trade in ozone depleting substances (ODSs) "in a manner that is likely to result in adverse effects on human health and the environment, in a manner affecting trade or investment between the Parties".[152] This means that a violation occurs only when the failure to implement obligations of the Montreal Protocol is likely to have adverse impacts on human health and the environment plus on trade or investment between the parties.[153] In contrast, the Montreal Protocol itself does not require these two conditions to be subject to proceeding mechanisms.

3-1-4. No Provision on MEA Exceptions

In the third phase aforementioned in US trade-environment governance,

[151] Wold, 2016, 5.

[152] TPP, art 20.5.1.

[153] Wold, 2016, 5.

agreements, such as the Peru, Colombia, and Panama FTAs, included exceptions for environmental measures with respect to MEAs. That is, in case of contradiction between trade measures and MEA-related measures, the party is allowed to implement the provisions of an MEA if it does not intend to impose a disguised restriction on trade.

However, since the TPP does not have such provision, it is likely that a TPP party can challenge another party for trade restrictions adopted in order to abide by the rules relating to MEAs.[154]

These outcomes show that the TPP environmental provisions are inconsistent with the statement that the TPP "adds teeth to the enforcement of major multilateral environmental agreements such as CITES[155]." The third phase in the evolution of US trade and environment linkages has featured expanded lists of covered MEAs and strengthened enforcement mechanisms. However, even though the TPP has a long list of covered MEAs, it does without substantive measures which are, in some cases, even weaker than the MEAs themselves.

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[154] Ibid., 7.

[155] "TPP Preserving the Environment Fact Sheet", 2.

3-2. Enforcement

Two important types of provisions on environment-related enforcement mechanisms in US RTAs beginning with NAFTA are citizen submissions and state-to-state dispute settlement mechanisms. These traits apply to the TPP as well, except that the mechanisms are likely to be less effective than those of earlier RTAs.[156]

3-2-1. Citizen Submission Process

The citizen submission processes of a number of US RTAs allow the public to claim that a party has failed to effectively enforce environmental law. In terms of the NAFTA, however, the parties have shown little interest in effectively implementing this type of provision.[157] For instance, the US has never made effort to enforce the Migratory Bird Treaty Act (MBTA), even though the Secretariat of the Commission for Environmental Cooperation (CEC) found that the allegations of the submitters were consistent with the failure to

[156] Wold, 2016, 18.

[157] Ibid.

enforce the MBTA.[158]

In fact, the TPP's submission process is weaker than that of the NAAEC.[159] The TPP allows written submissions "regarding implementation of this Chapter", but unlike the NAAEC and the US-CAFTA, submissions are not sent to an independent commission.[160] Instead, they are first directed to the respondent party. As there is no independent entity to assess the allegations, it is obvious that the submission process cannot be effectively implemented.[161] Also, a party may ask a submitter to "explain how, and to what extent, the issue raised affects trade or investment between the Parties".[162] However, assessing specific impacts on trade or investment is difficult, which makes the submission process less likely to be used.[163] Further, in terms of submission, the plaintiff party must request that the TPP's Committee on Environment discusses the submission as well as any written response.[164] This means that submitters are not even allowed to bring these kinds of submissions to an independent party.[165] Thus, the submission process is entirely dependent on the governments, and

158 Ibid.

159 Ibid., 19.

160 Ibid.

161 Ibid.

162 TPP, art 20.9.2.

163 Wold, 2016, 19.

164 TPP, art 20.9.4.

165 Wold, 2016, 20.

does not leave room for the preparation of a factual record.[166]

3-2-2. State-to-State Dispute Settlement

The TPP's state-to-state dispute settlement provisions establish a multi-step process that hinders parties to resort to the main dispute settlement.[167] First, a party may request consultations with another party on "any matter arising under this Chapter".[168] If the parties fail to reach a "mutually satisfactory resolution", they can move on to request the Environment Committee for help.[169] If they have failed to resolve the matter through the Environment Committee, then they can request Ministerial consultations.[170] Failing to resolve the dispute from this stage, the parties can finally move on to seek dispute settlement.[171] Likewise, these three steps to reach dispute settlement act as barriers to have parties resort to the main dispute settlement.[172] In fact, no dispute under a US RTA

166 Ibid.

167 Ibid.

168 TPP, art. 20.20.2.

169 Ibid., art. 20.21.1.

170 Ibid., art 20.22.1.

171 Ibid., art 20.23.1.

172 Wold, 2016, 20.

environment chapter has ever reached dispute settlement that is binding.[173] The benchmark Peru FTA does contain provisions on using these mechanisms in case of violating obligations on timber harvesting and trade, as previously mentioned. However, the government simply chose not to use the substantive mechanisms,[174] though there still is a possibility that the provisions can be made use of only if governments choose to. Peru has faced no trade-related challenges to date, much less penalties, even though it has violated the trade agreement provisions by allowing illegal logging and exporting the illegally cut down trees to the US.[175]

The third phase in US trade policy, as mentioned, showed improvement in linking environmental issues with main dispute settlement mechanisms. However, the TPP is in lack of provisions on public participation mechanisms in terms of the effective enforcement of environmental measures. Also, the state-to-state dispute settlement in the TPP agreement does not reflect this trend; the process is too cumbersome, and the multi-step barriers make bringing

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[173] Ibid.

[174] Ibid.

[175] Sierra Club. "TPP Text Analysis: Environment Chapter Fails to Protect the Environment", 7.

claims unrealistic.[176] The fact that no environmental dispute with regards to a US RTA has ever reached dispute settlement that is legally-binding, it is unlikely that the TPP's even weaker provisions would be successful. [177]

3-3. Climate Change

The 2015 UN Conference on Climate Change, officially known as COP21, was held in Paris, France from November 30 to December 12, 2015. 195 countries adopted an ambitious climate pact, limiting global warming well below 2℃ above pre-industrial levels. The objective of COP21 was to achieve a universal legally-binding agreement on climate change for the first time in over 20 years of UN negotiations. However, the agreement will not become binding until at least 55 parties that produce 55 percent of the total global greenhouse gas emissions have ratified the agreement. The TPP could have been an opportunity to build a more cooperative framework for realizing the transition to a more climate-positive economy in this context.

[176] Wold, 2016, 21.

[177] Ibid., 20.

3-3-1. Language

The TPP includes language that presumably refers to climate change. However, it does not directly mention the terms “climate change” or the “UNFCCC”, even though all TPP parties are party to the climate convention.[178] The agreement states that the TPP parties acknowledge that “transition to a low emissions economy requires collective action”,[179] but the specific kind of emissions is not identified. Also, there is no requirement to such action or provision to prevent the TPP from increasing emissions that may affect climate change.[180] A provision calls for the parties’ cooperation of addressing environmental issues of common interest that “may include” energy efficiency and clean and renewable energy.[181]

3-3-2. Lack of Measures on Eliminating Fossil Fuel Subsidies

A binding regulation on eliminating fossil fuel subsidies would have been consistent with the pledges made by G-20 and the Asia-Pacific Economic

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[178] Ibid., 16.

[179] TPP, art 20.15.1.

[180] Sierra Club, 7.

[181] TPP, art 20.15.2.

Cooperation (APEC) forum which includes all TPP countries.[182] Fossil fuel subsidies increase fossil fuel consumption as well as carbon dioxide emissions, which undermine climate change mitigation efforts.[183] Moreover, the subsidies worsen local pollution problems by increasing sulphur dioxide (SO2) and nitrogen oxides (NOx) emissions, as well as particulate matter that cause human health problems such as respiratory diseases.[184] As measures on reducing fossil fuel subsidies can bring about many advantages, the failure to introduce such provisions in the TPP is another missed opportunity.[185]

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[182] Wold, 2016, 17.

[183] Ibid.

[184] Ibid.; Anderson, Kym, and Warwick J. Mckibbin. "Reducing Coal Subsidies and Trade Barriers: Their Contribution to Greenhouse Gas Abatement." *Envir. Dev. Econ. Environment and Development Economics* 5, no. 4 (2000): 457-81.

[185] Wold, 2016, 18.

IV. Environmental Provisions in EU RTAs

Requirements on environmental protection have been generally included in the EU's external relations, but in a differentiated manner, depending on the fundamental features of the agreement. However, more recent EU agreements concluded against the background of the 2006 Global Europe Strategy indicate a shift in its environmental practices towards a more systematic approach.[186] The EU's environmental provisions in agreements concluded with various countries are shown in Table 3.

1. Historical Background

The EU has been in the forefront with the US of having high standards of environmental measures in RTAs. However, the motivations of the two major players hold some differences. The EU intends to achieve better coherence between trade, environmental, and developmental objectives, particularly with candidate countries to EU membership as well as former colonies.

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[186] Durán, Gracia Marín, and Elisa Morgera. *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*. Oxford: Hart Pub., 2012, 57.

1-1. Background

The EU consists of 28 member countries with independent sovereignty. It is currently heading towards full political and economic integration.[187] However, in addition to the empowerment of the EU, member countries are allowed to establish their own environmental policies of which the scope is more independent compared to that of the US.[188] Even though the EU's environment law is EU-based, member countries are allowed to establish their own regulations with higher standards, according to Article 193 of the Treaty on the Functioning of the EU.[189]

The period when the EU became a global precursor in environmental regulations was only in the 1990s.[190] Until then, it merely caught up with several US regulations, including those on automative emissions, approval of new chemicals, and ozone-depleting emissions. In fact, the cap-and-trade system, a cornerstone of the EU's climate policy, was inspired by the 1990 US Clean Air Act aimed to reduce sulfur-dioxide emissions from power plants. However, the transatlantic shift occurred in the early 1990s. For instance,

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187 Koh et al., 2013, 48.

188 Ibid.

189 TFEU, art 193.

190 Vogel, 2012. 2.

American and Swedish air pollution control standards since 1990 were compared to a hare and a tortoise, stating that "the American federal regulatory policy hare has been moving like a tortoise, while the pace of the European tortoise resembles a hare".[191] As the US started to diverge from the previous pattern, its European counterparts became more inclined to regulate, even when the scientific understanding of environmental risks is incomplete, establishing the precautionary principle.

The reasons behind this discontinuity in the Atlantic are numerous. In the late 1980s, there were a number of noteworthy environmental degradations, such as the Chernobyl nuclear disaster, the hole in the ozone layer, and the acidification of historical monuments. These events influenced environmental protection to be included in the political agenda. Subsequently, green parties made use of proportional representation systems in Europe to acquire political gain. As all EU members are ecologically interdependent, the EU is a suitable means for the greenest EU member states to extend their measures to other members with relatively low standards. In this context, the EU became the next global leader in terms of adopting stringent environmental regulations. The fact that the EU switched places with the US led to a sense of collective pride in the EU, as it was struggling for integration. Protecting the environment as well as human

[191] Ibid., 4.

rights and social justice contributes towards consolidating a European identity.

Since 1987, the EU has been subject to its TFEU which obligates member states to address environmental concerns in all policies and activities, including trade policies.[192] Environmental consideration in RTAs was facilitated by undertaking Trade Sustainability Impact Assessments since 2000.[193] This legal requirement of the Treaty was articulated through a key policy document titled, "Global Europe-Competing in the World", in November 2006. It states that the EU seeks "to contribute to a range of the Union's external goals, in particular development and neighbourhood objectives" through trade policies, and that "coherence of the Union's external policies is vital to strengthening the EU's global role".[194] The Global Europe Strategy led to the negotiations of new FTAs that would contain cooperative provisions on the environment. The EU has clarified that with respect to its external environmental agenda, it aims to: foster the sustainable environmental development of developing countries, with the objective of poverty eradication; help to create international measures for environmental preservation and to achieve sustainable management of natural resources; and promote an international system with stronger multilateral

[192] Jinnah and Morgera, 2013, 327.

[193] Ibid.

[194] European Commission. "Global Europe-Competing in the World", 2006.

environmental cooperation and good global environmental governance.[195] These goals have influenced the EU to not only integrate environmental provisions in RTAs, but also particularly consider making efforts to encourage environmental multilateralism as well as helping developing countries with environmental protection.[196] Simultaneously, the EU's environmental governance is expected to contribute to reaching the EU's other objectives in external relations.[197]

1-2. Agreements with Candidate and Potential Candidate Countries to EU Membership

The EU has expanded its external competences by concluding a substantial number of agreements with other countries as well as with international organizations. A noteworthy feature of the EU is that it establishes Association Agreements (AAs) among others, with non-EU countries, which are cooperative frameworks including commitments to political, economic, or social development. AAs are often hailed by the EU as the most advanced form

[195] Jinnah and Morgera, 2013, 327.

[196] Ibid.

[197] Ibid.

of contractual relations engaged with a third party.[198]

Some AAs play a role as a "prelude" to EU membership agreements with neighboring countries that are candidates or potential candidates for EU membership.[199] Before analyzing these agreements, the EU's enlargement process will be briefly explained. EU accession is formally subject to Article 49 of the Treaty on European Union (TEU), stating that "[a]ny European State which respects the values" of the EU, and "is committed to promoting them may apply to become a member of the Union".[200] However, in practice, EU accession requires a pre-accession period with different stages from the initial "applicant state" status to the final "acceding state" status.[201] During the pre-accession period, countries that aspire to become EU member states shall demonstrate "a necessary degree of compliance" with a set of conditions, the so-called Copenhagen criteria, which are broader than those explicit in Article 49 TEU.[202] The criteria consists of: "(1) political conditions: stability of institutions guaranteeing democracy, respect for the rule of law, human rights and minority rights; (2) economic conditions: existence of a functioning market

198 Duran and Morgera, 2012, 57.

199 Ibid., 58.

200 TEU, art 49.

201 Duran and Morgera, 2012, 65.

202 Ibid.

economy and the capacity to cope with the competitive pressures and market forces within the Union; and (3) acceptance of the *acquis communautaire*: transposition of EU law into national law, its effective implementation and enforcement through appropriate administrative and judicial structures, and the ability to take on the obligations of membership".[203] While the enlargement process is formally based on negotiations, in practice, it is a unilateral process of the EU evaluating other countries' performances, focusing on the compliance with a set of existing EU rules and procedures.[204] In terms of environmental protection, during the pre-accession period, aspiring countries should make their existing environmental laws in parallel with EU standards, which involves a review of legislation as well as administrative and judicial capacity.[205] In addition, the candidate countries are provided with financial and technical assistance by the EU, which is based on national programs for adopting the *acquis*.[206]

On the other hand, the Stabilization and Association Process (SAP) was launched at the Zagreb Summit in November 2000 as a framework for renewing closer relations for regional cooperation between the EU and five South-Eastern

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[203] Ibid.

[204] Ibid., 66.

[205] Ibid.

[206] Ibid.

European countries, namely, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia, and Albania.[207] These countries had the prospect of becoming members of the EU: Croatia became the 28th member of the EU in 2013; Macedonia, Albania, Montenegro, and Serbia are enjoying a candidate status; and Bosnia and Herzegovina is a potential candidate. Kosovo also attained a potential candidate status, as the EU proclaimed in 2008 to assist the economic and political development of Kosovo. Thus, Stabilization and Association Agreements (SAAs) have been concluded with six South-Eastern European countries, as in Table 2, namely, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, and Kosovo, at the time of writing. SAAs have been concluded with all six countries as part of the pre-accession strategy to assist them on fulfilling the Copenhagen criteria. In general, the SAAs show great consistency in content and legal wording in their environmental provisions, which are placed under Title VIII Cooperation Policies.[208]

Economic integration is a significant aspect in the EU's external relations with the countries under the SAAs, as these agreements all have the objective of

[207] Ibid., 67.

[208] Ibid., 68.

gradually establishing a free trade area.[209] As the countries may possibly be integrated into the EU single market, the agreements go beyond trade liberalization in goods.[210] A general exception clause, modelled on Article 36 TFEU, is found in all SAAs. According to Article 36, trade restrictions may be imposed if "justified on grounds of […] public policy" or to protect "health and life of humans, animals or plants".[211]

However, the agreements do not provide other regulatory details in terms of trade and environment linkages. Only the Albania, Bosnia, Montenegro, and Serbia SAAs include an identical provision on the supply of international maritime transport services, which requires the parties to "respect international and European obligations in the fields of safety, security and environmental standards".[212] The reason why there are no additional clauses linking trade and environmental regulation may be the fairly low possibility of a "race to the bottom" in environmental standards in these associated countries, as they are subject to an obligation to align their domestic environmental laws with the EU

[209] Ibid., 72.

[210] Ibid., 57.

[211] TFEU, art 36.

[212] Duran and Morgera, 2012. 73; Albania AA, art 59.2; Bosnia AA, art 59.2; Montenegro AA, art 61.2; and Serbia AA, art 61.2.

acquis, which is supported by the EU's technical and financial assistance.[213]

Table 2. EU's Association Agreements (AAs) with candidate and potential candidate countries to EU membership

Year of entry into force	Association Agreements (AAs)	Status
1973	Turkey AA	Candidate
2004	Macedonia SAA	Candidate
2009	Albania SAA	Candidate
2010	Montenegro SAA	Candidate
2013	Serbia SAA	Candidate
2015	Bosnia and Herzegovina SAA	Potential Candidate
2016	Kosovo SAA	Potential Candidate

2. Agreements for Development

Some EU agreements play a role as a development tool.[214] These are agreements concluded with developing or least-developed countries (LDCs), most of which were former colonies of the EU member states. The most representative example is the Cotonou Partnership Agreement concluded with

[213] Duran and Morgera, 2012. 73.

[214] Ibid., 59.

78 African, Caribbean, and Pacific (ACP) States.[215]

2-1. Cotonou Partnership Agreement

The Cotonou Partnership Agreement, concluded between the EU and 78 ACP States in June 2000 and taken into effect since April 2004 for a 20-year period, represents the world's largest economic and political framework for North-South cooperation. After being taken into effect, the agreement has been revised twice, first in 2005 and then in 2010.[216]

Environmental provisions are included in the Preamble, objectives,[217] political pillar,[218] and cooperation strategies.[219] Considering different levels of development, the EU's financial and technical assistance to the ACP States is one of the main modalities of the Cotonou Agreement.[220] The agreement provides details on development finance cooperation[221], outlining EU financial commitments for projects and programs in the ACP States as well as their

[215] Ibid., 82.

[216] Ibid., 84.

[217] Cotonou Agreement, part I, title I.

[218] Ibid., part I, title II.

[219] Ibid., part III, title I, II.

[220] Cotonou Agreement, part IV, Annexes I-IV; Duran and Morgera, 2012, 85.

[221] Cotonou Agreement, part IV and Annexes I-IV.

conditions and procedures.[222] The European Development Fund (EDF) can also be taken into consideration, which is a financial tool outside the EU budget.[223]

With respect to environmental protection, the most significant change introduced through revisions is a stronger commitment to meet the Millennium Development Goals (MDGs) and an explicit reference to climate change issues. Whereas the initial Preamble of the Cotonou Agreement only referred to sustainable development, more forceful language on the MDGs and climate change was added through the second revision.[224] The EU and ACP States acknowledge the "need to make a concerted effort to accelerate progress towards attaining the Millennium Development Goals",[225] which implicitly include MDG-7, which focuses on environmental sustainability.[226] Moreover, the parties acknowledge the "serious global environmental challenge posed by climate change", and have deep concern for "the most vulnerable populations […] in developing countries, in particular in Least Developed Countries and

[222] Duran and Morgera, 2012, 85.

[223] Ibid.

[224] Ibid., 85.

[225] Cotonou Agreement, Preamble.

[226] Duran and Morgera, 2012, 85.

Small Island ACP States".[227]

Regarding trade and environment linkages, the Cotonou Agreement has environmental concerns integrated under the Economic and Trade Cooperation title.[228] However, the trade provisions in the Cotonou Agreement are only applicable for a temporal period, which should have ended on December 31, 2007, until the Economic Partnership Agreements (EPAs), are established between the EU and ACP States.[229] Therefore, the Cotonou Partnership provides a framework for these new trade agreements, addressing the "objectives, principles, modalities, and procedures" for their negotiations throughout Articles 34 to 37.[230] During this temporal period, which is still lasting for most ACP countries, the Lome IV trade regime has been partially maintained.[231] To illustrate, under the Lome IV trade regime, the EU provided trade preferences to the ACP countries on a non-reciprocal basis: "duty-free access for industrial and agricultural products (except for agricultural commodities covered by the EU Common Agricultural Policy (CAP)), preferential treatment for certain CAP-covered commodities under specific

[227] Cotonou Agreement, Preamble.

[228] Cotonou Agreement, part III, title II.

[229] Duran and Morgera, 2012, 92.

[230] Ibid.

[231] Ibid.

Protocols, and duty exemptions for fishery products".[232]

In the Lome IV Convention, the trade-environment linkage is addressed through an exception clause modelled on Article 36 TFEU.[233] This is complemented by an unprecedented provision in the Cotonou Agreement, Article 49 (Trade and Environment) under Chapter 5 (Trade Related Areas), which explicitly provides for cooperation between the EU and the ACP countries on the basis of positive actions.[234] The article states that "[t]he Parties reaffirm their commitment to promoting the development of international trade in such a way as to ensure sustainable and sound management of the environment, in accordance with the international conventions and undertakings in this area".[235] Moreover, the parties take account the "respective level of development" and "agree that the special needs and requirements of ACP States should be taken into account in the design and implementation of environmental measures."[236] The agreement also reaffirms the commitment to the goal of strengthening the mutual supportiveness of trade and environment, and further provides for enhanced cooperation between the parties in relation to

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232 Ibid.

233 Ibid., 93.

234 Ibid.

235 Cotonou Agreement, art 49.

236 Ibid.

"the establishment of coherent national, regional and international policies, reinforcement of quality controls of goods and services related to the environment, the improvement of environment friendly production methods in relevant sectors". [237] Declaration IX, a joint declaration on trade and environment, states that the parties should make every effort to sign and ratify the Basel Convention as quickly as possible as well as its 1995 ban amendment.[238] The second revision of the Cotonou Agreement in 2010 added that the parties "agree that environmental measures should not be used for protectionist purposes",[239] which is a soft commitment, though a major concern for ACP countries.[240]

In addition to this specific provision, integrations of environmental issues into other trade-related areas can be found. The parties "underline the importance, in this context, of adhering to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) to the WTO Agreement and the Convention on Biological Diversity (CBD)."[241] In addition, they "agree on prior consultation and coordination within the CODEX ALIMENTARIUS, the

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237 Ibid.

238 Duran and Morgera, 2012, 93.

239 Cotonou Agreement-2010 revision, art 49.3.

240 Duran and Morgera, 2012, 93.

241 Cotonou Agreement, art 46.

International Office of Epizootics and the International Plant Protection Convention, with a view to furthering their common interests".[242]

2-2. Caribbean Forum (CARIFORUM) EPA

It remains to be seen whether and how the final EPAs would meet the provisions of the Cotonou Agreement, in terms of trade and environment issues. Only one final EPA has been concluded with the Caribbean Forum (CARIFORUM) States in October 2008, while negotiations are still in process with the other six regional groups of ACP States.

The CARIFORUM EPA was negotiated and concluded against the backdrop of the 2006 Global Europe Strategy that calls for more detailed trade and environment provisions in new EU FTAs. Accordingly, the CARIFORUM EPA regards the environment as a trade-related matter and contains a whole chapter devoted to trade and environmental linkages, which is new in EU agreements.[243]

After reaffirming the Cotonou Agreement principles, the chapter on trade and environment approaches the trade-environment linkage in a number of

[242] Ibid., art 48.

[243] Duran and Morgera, 2012, 98.

unprecedented ways. First, the chapter ensures mutual supportiveness between trade and environment.[244] To illustrate, the parties "reaffirm their commitment to promoting the development of international trade in such a way as to ensure sustainable and sound management of the environment, in accordance with their undertakings in this area including the international conventions to which they are party and with due regard to their respective level of development".[245] Moreover, the agreement underscores the facilitation of trade in environmental goods and services, which is also an EU priority in the DDA. The environmental products addressed in the agreement includes: "environmental technologies, renewable and energy-efficient goods and services and eco-labelled goods".[246]

Second, the trade and environment chapter of the CARIFORUM EPA addresses environmental standards, and contains provisions linking domestic environmental performance with MEAs, though it does not use bold mandatory language.[247] The parties should "conserve, protect and improve the environment, including through multilateral and regional environmental

[244] Ibid.

[245] CARIFORUM EPA, art 183.4.

[246] Ibid., art 183.5.

[247] Duran and Morgera, 2012, 99.

agreements to which they are parties".[248] Article 185 states that the parties "recognise the importance of establishing effective strategies and measures at the regional level". Moreover, the parties further "agree that in the absence of relevant environmental standards in national or regional legislation, they shall seek to adopt and implement the relevant international standards, guidelines or recommendations, where practical and appropriate". Likewise, the agreement contains provisions on international environmental standards, whereas it does not address relevant MEAs. Moreover, CARIFORUM States have rejected the EU's proposal of using certain environmental standards existing in the EU as benchmarks, as they exceeded international standards.[249] Furthermore, the CARIFORUM EPA supports a high level of environmental law, allowing the parties to establish their own minimum standards.[250] The sovereign right of parties is recognized, but they "shall seek to ensure that its own environmental […] laws and policies provide for and encourage high levels of environmental […] protection", and "shall strive to continue to improve those laws and policies".[251]

Third, the chapter requires the parties to uphold levels of protection, using

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[248] CARIFORUM EPA, art 183.3.

[249] Duran and Morgera, 2012, 99.

[250] Ibid., 99-100.

[251] CARIFORUM EPA, art 184.

strict wording. In addition to the recognition of the parties' sovereign rights to regulate, they commit: "not to encourage trade or foreign direct investment to enhance or maintain a competitive edge by: (a) lowering the level of protection provided by domestic environmental and public health legislation; (b) derogating from, or failing to apply, such legislation [and] commit to not adopting or applying regional or national trade or investment-related legislation or other related administrative measures as the case may be in a way which has the effect of frustrating measures intended to benefit, protect or conserve the environment or natural resources or to protect public health".[252]

Moreover, the provisions to uphold protection levels is also contained in a separate article, which states that the parties "shall ensure that foreign direct investment is not encouraged by lowering domestic environmental […] legislation […] aimed at protecting and promoting cultural diversity".[253] Another article further provides details on enforcement and mandates the parties, "within their own respective territories", to take "such measures as may be necessary" in order to ensure that "investors do not manage or operate their investments in a manner that circumvents international environmental […]

[252] Ibid., art 188.

[253] Ibid., art 73.

obligations arising from agreements" [254] to which the EU and the CARIFORUM States are parties. In fact, these provisions in the investment chapter are subject to the general dispute settlement procedures and represent the only commitments related to environmental protection which theoretically may lead to the suspension of trade concessions.[255]

Fourth, the trade and environment chapter also contains provisions on special and differential treatment of the CARIFORUM States, as in the Cotonou Agreement. The parties consider the special needs and requirements of CARIFORUM States in terms of the design and implementation of environmental measures that affect trade between them.[256] Moreover, the parties "recognise the importance, when preparing and implementing measures aimed at protecting the environment […], of taking account of scientific and technical information, the precautionary principle, and relevant international standards, guidelines or recommendations". [257] Furthermore, there is a requirement for transparency in terms of the same issue, which includes: "due notice, appropriate and timely communication, mutual consultations as well as

[254] Ibid., art 72.

[255] Duran and Morgera, 2012, 101.

[256] Ibid, 102.

[257] CARIFORUM EPA, art 186.

public consultation of non-state actors".[258]

Fifth, the trade and environment chapter has a specific environmental exception clause, modelled after GATT Article XX(b) and (g), but broader in scope.[259] The right of the parties to adopt or maintain measures "necessary to protect human, animal or plant life or health" (as in GATT Article XX(b)) and/or "related to the conservation of natural resources or the protection of the environment" (broader than GATT Article XX(g)) is recognized, which is subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade between them (as in GATT Article XX-chapeau).

Finally, the chapter addresses cooperation in terms of trade and environmental issues. The parties agree to cooperate in various areas, including "technical assistance and capacity building", "promotion and facilitation of private and public voluntary and market-based schemes", and "promotion and facilitation of public awareness and education programmes in respect of environmental goods and services".[260] Such cooperation should be conducted within the framework of the Cotonou Agreement's financing instrument, the EDF, and procedures, which implies that this would take the form mainly of EU

[258] Ibid., art 187.

[259] Duran and Morgera, 2012, 102.

[260] CARIFORUM EPA, art 190.

assistance to the CARIFORUM States.[261]

2-3. Central America AA

The Central America AA provides for the progressive establishment of a free trade area covering both goods and services between the EU and six Central American countries, namely, Panama, Guatemala, Costa Rica, El Salvador, Honduras, and Nicaragua. At present, they still access the EU market on a preferential and non-reciprocal basis under the Generalized System of Preferences (GSP), and more specifically its GSP-plus arrangement.[262] Presumably, the trade part of the AA will replace the GSP-plus access to the EU market when the AA enters into force and the free trade area is fully implemented.[263]

First, in terms of standards of environmental protection, the trade and environment chapter of the Central America AA makes a clearer linkage between domestic environmental protection and international environmental standards, supported by a closed list of MEAs, in contrast to the CARIFORUM

[261] Duran and Morgera, 2012, 103.

[262] Ibid.

[263] Ibid.

EPA.[264] The agreement recognizes the parties' "own levels of domestic environmental protection" and states that they "shall strive to ensure that [their] laws and policies provide for […] high levels of environmental […] protection […] consistent with the internationally recognized standards",[265] that is, MEAs articulated in Article 287 (Multilateral Environmental Standards and Agreements): the Montreal Protocol, the Basel Convention, the Persistent Organic Pollutants (POPs) Convention, CITES, the CBD and its Biosafety Protocol, and the Kyoto Protocol.

Second, the chapter requires parties to uphold levels of protection with strict wording. However, the provisions are more limited in scope when compared to the CARIFORUM EPA. The Central America AA states that "[a] Party shall not waive or derogate from […] its […] environmental legislation in a manner affecting trade or […] investment" and that "[a] Party shall not fail to effectively enforce its […] environmental legislation in a manner affecting trade or investment".[266] It does not address the prohibition contained in the CARIFORUM EPA on trade or investment-related legislation that undermines environmental protection measures.

Third, regarding environmental exception provisions, the Central America

[264] Ibid., 100.

[265] Central America AA, art 285.

[266] Central America AA, art 291.

AA has the full provisions of GATT Article XX as a general exception clause.[267] Moreover, it expressly requires measures undertaken in order to enforce the MEAs listed to satisfy GATT Article XX-chapeau.[268]

Finally, in terms of environmental cooperation, the parties agree to cooperate by supporting technical assistance, training and capacity building actions in "promotion of legal and sustainable trade, for instance through fair and ethical trade schemes, including those involving corporate social responsibility and accountability"; "promoting trade related cooperation mechanisms […] to help implement the current and future international climate change regime"; and "promoting trade in products derived from sustainably managed natural resources". [269] The agreement further provides details on positive trade measures with a best-endeavor obligation provided for parties in terms of a variety of issues.[270] Further, the parties commit to promote trade on sustainably managed forest products, with references to CITES and the EU Forest Law Enforcement, Governance and Trade (FLEGT) initiative,[271] and on fish

[267] Duran and Morgera, 2012, 102.

[268] Ibid.

[269] Central America AA, art 63.

[270] Duran and Morgera, 2012, 103.

[271] Central America AA, art 289. The FLEGT initiative is a form of EU cooperation on forestry issues, which is established through bilateral negotiations called Voluntary Partnership Agreements (VPAs) with timber-exporting countries.

products, referring to international rather than regional treaties.[272] Lastly, the AA has provisions on the precautionary approach.

3. Agreements for Inter-regional Cooperation

The EU has concluded agreements with more advanced developing countries located in geographically distant regions. The AAs concluded with Chile and South Africa respectively can be an example of associations as a tool for interregional cooperation, rather than for development.[273] Both AAs take a cooperative approach to the environment, with environmental provisions mostly found under the cooperation part of the text, but they differ in terms of legal force and content.[274] Neither, however, deals substantively with the trade and environment linkage, other than through general exception clauses.

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[272] Ibid., art 290; Duran and Morgera, 2012, 104.

[273] Duran and Morgera, 2012, 109.

[274] Ibid., 110.

3-1. South Africa AA

The EU's relations with South Africa have developed since 1994 with the end of apartheid and the establishment of a multi-racial democracy in South Africa.[275] The Trade, Development and Cooperation Agreement was concluded in October 1999 and was fully taken into force in May 2004, and both sides entered into a Strategic Partner in May 2007.

The South Africa AA states that "[i]n order to achieve the objectives of this Agreement, South Africa shall benefit from financial and technical assistance from the Community".[276] On the other hand, the Chile AA does not have explicit provisions on EU assistance to Chile. Furthermore, the South Africa AA states that as priorities, "[p]rogrammes shall be focused on the basic needs of the previously disadvantaged communities and reflect the gender and environmental dimensions of development".[277]

In addition, the South Africa AA recognizes the right of the parties to impose trade restrictions for environmental protection purposes, through a general

[275] Ibid., 109-110.

[276] South Africa AA, art 93.1.

[277] Ibid., art 66.3.

exception clause modelled after Article 36 TFEU.[278] Trade restrictions may be imposed if "justified on grounds of […] public policy" or to protect "health and life of humans, animals or plants".[279] In addition, such prohibitions or restrictions must not constitute "a means of arbitrary or unjustifiable discrimination where the same conditions prevail" or a "disguised restriction on trade between the Parties".[280]

3-2. Chile AA

The origins of the EU's relations with Chile goes back to the cooperation agreements signed in 1993 and 1996, which brought back bilateral relations after the end of the military dictatorship headed by General Augusto Pinochet as well as the reestablishment of democracy in Chile.[281] These were replaced by a subsequent AA with more ambitious goals, signed in November 2002 and taken into force since March 2005.

The Chile AA, unlike the South Africa AA, recognizes "the need to promote economic and social progress for their peoples, taking into account the principle

[278] Duran and Morgera, 2012, 114.

[279] Chile AA, art 72.

[280] Ibid.

[281] Duran and Morgera, 2012, 109.

of sustainable development and environmental protection requirements".[282] However, the Chile AA is relatively weaker in terms of legal language and environmental cooperation.[283] It has vague implementation cooperation modalities, merely stating that "[t]he Parties re-affirm the importance of economic, financial and technical cooperation, as means to contribute to implementing the objectives and principles".[284]

In fact, the Chile AA has the most detailed and expansive trade chapter found so far in EU agreements with non-candidate countries, which shifts from a potential to an actual liberalization of trade in services.[285]

The Chile AA contains a GATT-type general exceptions clause for goods, and a GATS-type clause for services, in which the parties may deviate from their trade obligations to undertake measures "necessary to protect human, animal and plant life and health", and/or "relating to the conservation of exhaustible natural resources". Such measures "are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail" or "disguised restriction on trade between the Parties" as in GATT Article XX-chapeau. However, based on past experience, the lack

[282] South Africa AA, Preamble.

[283] Duran and Morgera, 2012, 111.

[284] Chile AA, art 16.

[285] Duran and Morgera, 2012, 114.

of a clear reference to the environment may lead to conflicts similar to those that have occurred in the WTO dispute settlement proceedings.[286] In particular, the Chile AA lacks flexibility in interpretation, which may have been provided by a clause modelled on Article 36 TFEU that allows for trade measures to be justified on grounds of public policy.[287]

4. Other Post-2006 Global Europe Strategy Agreements

The EU-South Korea FTA is a representative example in terms of a shift in EU agreements, following the adoption of the 2006 Global Europe Strategy. In fact, the agreement is the first case in which the EU has taken a new and more expansive trade-environment approach, which it wishes to model on in its future FTAs.[288] The Colombia and Peru FTA (COPE FTA), is equally symbolic of the Post-Global Europe Strategy trend in addressing trade and environment linkages, though the two agreements have legal differences.[289]

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[286] Ibid., 115.

[287] Ibid.

[288] Ibid., 117.

[289] Ibid.

4-1. South Korea FTA

The Korea FTA is hailed as "ground-breaking" by the EU itself, as it is the first trade agreement concluded with an Asian country, containing the most comprehensive provisions on trade outside the context of EU enlargement.[290] In Chapter 1 (Objectives and General Definitions), the agreement recognizes that "sustainable development is an overarching objective", and that the parties commit "to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level".[291] Moreover, the parties commit "to promote foreign direct investment without lowering or reducing environmental […] standards".[292]

A whole chapter is devoted to trade and sustainable development in the Korea FTA. The agreement uses a best-endeavor language in terms of the parties' commitment to ensure the mutual supportiveness between trade and sustainable development: "the Parties reaffirm their commitments to promoting the development of international trade in such a way as to contribute to the objective of sustainable development" and "strive to ensure that this objective is

[290] Ibid., 118.

[291] Korea FTA, art 1.

[292] Ibid.

integrated and reflected at every level of their trade relationship".[293] The parties "shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods".[294]

With respect to trade-environment linkages, the Korea FTA first clarifies that it is not the intention of parties to harmonize environmental standards, but "to strengthen their trade relations and cooperation in ways that promote sustainable development".[295] The agreement further has provisions linking domestic environmental performance with MEAs in relatively concrete terms. It recognizes the parties' respective sovereign right to regulate, stating that the parties "shall seek to ensure that those laws and policies provide for and encourage high levels of environmental […] protection" and "shall strive to continue to improve those policies and laws".[296] This differs from the CARIFORUM EPA in that the Korea FTA also frames the high level of environmental protection as being "consistent with the internationally

[293] Korea FTA, art 13.1.1.

[294] Ibid., art 13.6.2.

[295] Ibid., art 13.1.3.

[296] Ibid., art 13.3.

recognized standards".[297] A subsequent provision on MEAs states that the parties "reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party".[298] Likewise, the Korea FTA has international environmental standards as the criterion for domestic environmental performance whereas it fails to have details on the related MEAs, as the CARIFORUM EPA does.[299]

Second, there is a bold commitment to uphold levels of protection in the Korea FTA, though narrower in scope when compared to the CARIFORUM EPA.[300] Moreover, a provision on this matter is not included in the investment chapter of the Korea FTA, unlike the CARIFORUM EPA, in which parties are obligated to ensure that investors do not manage or operate their investments in a manner that degrades environmental protection.

Third, the Korea FTA also addresses the design and implementation of environmental measures, in soft-law language.[301] In Article 13.8 (Scientific Information), the parties "recognise the importance […] of taking account of scientific and technical information, and relevant international standards,

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297 Ibid.

298 Ibid., 13.5.2.

299 Duran and Morgera, 2012, 122.

300 Ibid., 123.

301 Ibid., 124.

guidelines or recommendations", when preparing and implementing such measures.[302] Further, in Article 13.9 (Transparency), the parties "agree to develop, introduce and implement any measures […] that affect trade between the Parties in a transparent manner, with due notice and public consultation, and with appropriate and timely communication to and consultation of non-state actors including the private sector".[303]

Fourth, the agreement does not contain a specific environmental exception clause, but contains the GATT General Exception clause, recognizing the right of the parties to adopt or maintain measures "necessary to protect human, animal, or plant life or health" (GATT Article XX(b)), and/or "related to the conservation of exhaustible natural resources"(GATT Article XX(g)), under the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade between them (GATT Article XX-chapeau). Further, the agreement states that environmental standards "should not be used for protectionist trade purposes", and "[t]he Parties note that their comparative advantage should in no way be called into question".[304]

Finally, the Korea FTA addresses cooperation in terms of trade and

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[302] Korea FTA, art 13.8.

[303] Ibid., art 13.9.

[304] Ibid., art 13.2.

environment by including an annex entitled Cooperation on Trade and Sustainable Development. The parties commit to conduct cooperative activities, such as, “exchange of views on the positive and negative impacts of this Agreement on sustainable development”; “exchange of views on the trade impact of environmental regulations, norms and standards”; and “exchange of views on the relationship between multilateral environmental agreements and international trade rules.[305] Moreover, parties commit to cooperate on “trade-related aspects of the current and future international climate change regime”; “trade-related aspects of biodiversity”, “trade-related measures to promote sustainable fishing practices”; and “trade-related measures to tackle the deforestation”.[306] Further, the agreement also underscores cooperation in international negotiations on trade-environment linkages, in particular, “the WTO, the ILO, the United Nations Environment Programme and multilateral environmental agreements”.[307]

4-2. Colombia and Peru (COPE) FTA

First, with respect to standards of environmental protection, the COPE FTA

[305] Ibid., Annex 13.1.

[306] Ibid.

[307] Ibid.

links domestic environmental performance more specifically with a closed list of MEAs almost identical to that in the Central America AA, unlike the Korea FTA and the CARIFORM EPA.[308] The agreement recognizes "the sovereign right of each Party to establish its […] own levels of environmental […] protection, consistent with the internationally recognized standards" referred to in subsequent provisions, and states that "each Party shall strive to ensure that its […] laws […] provide for and encourage high levels of environmental […] protection".[309] The MEAs in question are outlined in Article 270: the Montreal Protocol, the Basel Convention, the POPs Convention, CITES, the CBD and its Biosafety Protocol, the Kyoto Protocol, and the Rotterdam Convention. The reason why this list is almost the same with that in the Central America AA may be explained by the fact that all these countries unilaterally access the EU market under the GSP-plus until the agreements go into effect, with the requirement of ratifying and fully implementing all the listed MEAs, except for the Rotterdam Convention.[310] A difference between the two agreements is that the COPE FTA enables amendments of the list unlike the Central America AA.

Second, Article 277 in the COPE FTA addresses upholding levels of environmental protection. However, similar to the provisions in the Korea FTA

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[308] Duran and Morgera, 2012, 122.

[309] COPE FTA, art 268.

[310] Duran and Morgera, 2012, 122.

and the Central America AA, there is no additional provision on this matter in the investment chapter, unlike the CARIFORUM EPA which prohibits investment behaviors that circumvent international environmental obligations in Article 72. The COPE FTA further states that "[t]he Parties recognize the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental […] regulations and standards".[311]

Third, in terms of exceptions, the COPE FTA states that "[t]he provisions of this Title shall not be interpreted or used as a means of arbitrary or unjustifiable discrimination between the Parties or as a disguised restriction to trade or investment".[312] It also states that regarding the MEA-related obligations, measures to implement the agreements "shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade".[313] These are general provisions, albeit in a mandatory language. This agreement is also in lack of a specific environmental exception clause as it merely uses the wording of GATT Article XX.[314]

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311 COPE FTA, art 277.3.

312 Ibid., art 265.5.

313 Ibid., art 270.4.

314 Duran and Morgera, 2012, 125.

Fourth, in terms of environmental cooperation, the COPE FTA has more detailed provisions. The agreement identifies a wide variety of possible cooperation activities, such as “the evaluation of the impacts of this Agreement on environment”; the “monitoring and effective implementation of […] multilateral trade agreements”; “activities related to […] climate change”, and so forth.[315] Moreover, the agreement includes positive trade measures to support sustainable development.[316] It states that “[t]he parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services”; “agree to promote best business practices related to corporate social responsibility”; and “recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development”.[317] Moreover, the COPE FTA has a detailed provision on forest products, which states that “the Parties recognize […] the effective implementation and use of CITES with regard to timber species”; “voluntary mechanisms for forest certification that are recognized in international markets”; “transparency and the promotion of public participation”; and “independent supervision institutions”.[318] Even

[315] COPE FTA, art 286.

[316] Duran and Morgera, 2012, 125.

[317] COPE FTA, art 271.

[318] COPE FTA, art 273.

though there is no explicit reference to the FLEGT initiative, this may be implicitly referring to it.[319] This means that the EU engages third countries in terms of the assessment of their own legal framework on sustainable forest management against international standards as well as stakeholder interests.[320] Thus, the distinctive feature shown here is that the EU uses FLEGT to "complement" the CITES, and to engage third countries with the prospect of reaching a future multilateral agreement on sustainable forest management.[321] Moreover, in the COPE FTA, fish products are addressed, stating that "[t]he Parties recognise the need to cooperate in the context of Regional Fisheries Management Organisations",[322] which shows that it mentions cooperation with regional fisheries management organizations rather than global entities. Lastly, the agreement also includes a provision on the precautionary approach.

Finally, a noteworthy feature of the COPE FTA is that it contains provisions exclusively devoted to climate change and biodiversity within the sustainable and development chapter.[323] The article on climate change mentions the "United Nations Framework Convention on Climate Change […] and the Kyoto

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319 Jinnah and Morgera, 2013, 334.

320 Ibid.

321 Ibid.

322 COPE FTA, art 274.

323 Duran and Morgera, 2012, 126.

Protocol" and states that "the Parties will promote the sustainable use of natural resources and […] promote trade and investment measures that promote […] technologies for clean energy" and that "[t]he Parties agree to consider actions to contribute to achieving climate change mitigation and adaptation objectives […] by facilitating the removal of trade and investment barriers to […] goods, services and technologies that can contribute to mitigation or adaptation".[324] Moreover, the agreement has a unique detailed provision on biological diversity, which states that "[t]he Parties recognize […] biological diversity […] as a key element for the achievement of sustainable development".[325] The article also states that the parties will "continue to work towards […] establishing […] protected areas"; "endeavor to jointly promote […] programmes aiming at fostering appropriate economic returns from the conservation and sustainable use of biological diversity"; and "respect and maintain knowledge".[326] In terms of the CBD, the provision further requires the "prior informed consent" of the holders of traditional knowledge.[327] The language used here is more relevant to human rights instruments, but controversial in the CBD context.[328] The

[324] COPE FTA, art 275.

[325] Ibid., art 272.1.

[326] Ibid., art 272.

[327] Ibid., art 272.4.

[328] Duran and Morgera, 2012, 126.

CARIFORUM EPA also has a provision related to traditional knowledge, but does not refer to the prior informed consent. The COPE FTA biodiversity article also has an unusual provision in best-endeavor language, ensuring access and benefit-sharing related to genetic resources.

Table 3. Environmental integration in bilateral and inter-regional agreements[329]

Type of Agreement	Attention to the Environment	Legal Language and MEAs	Cooperation	Exception	Institutional Mechanism
SAAs (Prelude to EU membership)	• Strong overall attention to environment	• Generally mandatory language • Heavy reliance on EU *acquis*	• Similar cooperation priorities • Cross-cutting clause on environmental integration (specific clauses on agriculture, fisheries, transport, energy, industry and criminal matters)	• Only general exception clause (art 36 TFEU)	• No specific institutional mechanism, but special arrangements for approximation to EU *acquis*

[329] Ibid., 2012, 141-142 (*rearranged by author*).

Cotonou Agreement (Development tool)	• Strong overall attention to environment • Extended trade and environment linkages	• Mandatory language • Systemic references to MEAs	• Strong cross-cutting approach to environmental integration (specific clauses for agriculture, fisheries, marine transport, humanitarian assistance) • Innovative provision on climate change		• No specific institutional mechanism, but emphasis on public participation
Associations Chile/South Africa (Inter-regional cooperation)	• Weaker overall attention to environment	• Generally soft legal language • No reference to MEAs, albeit South Africa AA underscores global environmental issues	• Variations in priorities for cooperation • No cross-cutting environmental integration clause (specific provisions for agriculture and energy in	• General exception clauses (art XX GATT/art 36 TFEU)	• No specific institutional mechanism, but emphasis on public participation

			both)		
'Post-Global Europe' Agreements **• CARIFORUM EPA** **• South Korea FTA** **• Central America AA** **• COPE FTA**	• Innovative provisions on trade, investment and environment (positive commitments, cooperation and capacity building)	• International standards as benchmark for domestic environmental performance (generic references to MEAs/closed list of selected MEAs)	• Detailed provisions on climate change • Specific integration clauses for energy, tourism and research		• Specific monitoring and dispute settlement mechanisms (public participation, consultations and no full enforceability)

V. Comparative Analysis of Environmental Provisions in US and EU RTAs

1. External Differences

A coded analysis on environmental provisions in US and EU RTAs is presented in Table 4. The table shows that both the US and EU trade agreements, in general, contain provisions on: regulatory sovereignty; continued strengthening of environmental protection; prohibition of environmental laws to be relaxed to enhance trade; and enforcement of domestic environmental laws.

However, whereas several US FTAs have articles devoted to public submission on enforcement matters, none of the EU FTAs do. Moreover, while several US FTAs have no restriction for using the main dispute settlement for environmental disputes, all EU FTAs do not allow taking recourse to the main dispute settlement. Finally, all US FTAs do not directly address climate change. The TPP's environmental agreement includes Article 20.15 (Transition to a Low Emissions and Resilient Economy), which presumably refers to climate change, but does not directly use the word "climate change". On the other hand,

all EU FTAs shown in Table 4 address climate change either by inserting an exclusive article on climate change or by using clauses directly mentioning the words “climate change” or “UNFCCC”. This is in line with the EU using a precautionary approach through the scientific information article that states “the lack of full scientific certainty should not be used as a reason for postponing protective measures”.[330]

Table 4. Coded analysis on environmental provisions in US and EU FTAs[331]

		Year of Entry into Force (* Signed Year)	Regulatory Sovereignty	Continued Strengthening of Environmental Protection	Environmental Laws will not be Relaxed to Enhance Trade	Enforcement of Domestic Environmental Laws	Public Participation: Submissions on Enforcement Matters	Dispute Settlement: No Restrictions	Precautionary Approach	Climate Change
US	**Israel**	**1985**	×	×	×	×	×	×	×	×
	NAFTA	**1994**	√	√	×	√	√	×	×	×
	Jordan	**2001**	√	√	√	√	×	×	×	×
	Chile	**2004**	√	√	√	√	×	×	×	×
	Singapore	**2004**	√	√	√	√	×	×	×	×
	Australia	**2004**	√	√	√	√	×	×	×	×
	Morocco	**2006**	√	√	√	√	×	×	×	×
	CAFTA	**2006**	√	√	√	√	√	×	×	×
	Bahrain	**2006**	√	√	√	√	×	×	×	×

330 Central America AA, art 292; COPE FTA, art 278.

331 Jinnah and Morgera, 2013, 336 (*rearranged by author*).

	Oman	**2009**	√	√	√	√	×	×	×	×
	Peru	**2009**	√	√	√	√	√	√	×	×
	Panama	**2011**	√	√	√	√	√	√	×	×
	Korea	**2012**	√	√	√	√	×	√	×	×
	Colombia	**2012**	√	√	√	√	√	√	×	×
	TPP	**2015***	√	√	√	√	√	√	×	∆
EU	**Korea**	**2010**	√	√	√	√	×	×	×	√
	COPE	**2012***	√	×	√	√	×	×	√	√
	Central America	**2012***	√	√	√	√	×	×	√	√

2. Comparative Analysis of the KORUS FTA and the Korea-EU FTA

The KORUS FTA has paved the way for subsequent Korean FTAs to include a chapter wholly devoted to the environment, from those that merely contain environmental clauses.[332] Thus, the KORUS FTA can be regarded as a breakthrough in environmental agreements in Korean FTAs.[333] Moreover, the Korea-EU FTA has started a new generation in the development of EU RTAs since the implementation of the 2006 Strategy, providing a comprehensive chapter on trade and sustainable development that covers labor and

[332] Lee, Joo-Yun. "A Comparative Analysis and Evaluation of the Main Provisions under the Korean Free Trade Agreements." 2012, 159.

[333] Jung and Oh, 2015, 318.

environmental issues.[334] Similar approaches have been applied in subsequent trade negotiations of the EU. Against this backdrop, a comparative analysis of environmental provisions in the KORUS FTA and the Korea-EU FTA will be provided. The outcomes are organized in Table 5.

2-1. Standards of Environmental Protection

With respect to environmental standards, the KORUS FTA recognizes the right of each trade partner to regulate, stating that "each Party shall strive to ensure" that their domestic laws and policies provide for "high levels of environmental protection" and "shall strive to continue to improve its respective levels of environmental protection".[335] A subsequent provision states that "[a] Party shall adopt, maintain, and implement laws […] to fulfill its obligations under the multilateral environmental agreements"[336] which are annexed as covered agreements. This shows that the KORUS FTA specifies the MEAs in question.

On the other hand, the Korea-EU FTA states that "it is not the intention […] to harmonise the labor or environment standards of the Parties, but to

[334] George, 2014, 16.

[335] KORUS FTA, art 20.1.

[336] Ibid., art 20.2.

strengthen their trade relations and cooperation in ways that promote sustainable development".[337] The agreement recognizes "the right of each Party" to regulate, stating that "each Party shall seek to ensure" that their domestic laws and policies "provide for […] a high levels of environmental […] protection", and "shall strive to continue to improve those laws and policies".[338] Also, it frames the high level of environmental protection as being "consistent with the internationally recognised standards or agreements".[339] A subsequent provision on MEAs states that "[t]he Parties recognise the value of international environmental governance"[340] and "reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party".[341] Thus, the Korea-EU FTA has international environmental standards as the criteria for domestic environmental performance, but fails to have details on the related MEAs.

337 Korea-EU FTA, art 13.1.3.

338 Ibid., art 13.3.

339 Ibid.

340 Ibid., art 13.5.1.

341 Ibid., art 13.5.2.

2-2. Upholding Levels of Protection

There is a bold commitment to uphold levels of protection in the KORUS FTA, stating that "[n]either Party shall fail to effectively enforce its environmental laws [...] in a manner affecting trade or investment between the Parties"[342] and that "neither Party shall waive or otherwise derogate from [...] laws in a manner that weakens or reduces the protections [...] in a manner affecting trade or investment between the Parties".[343] Moreover, a provision on this matter is included in the investment chapter of the agreement in a separate article entitled Investment and Environment.[344] It states that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".[345] Moreover an annex clarifies that environmental measures are not indirect expropriation, stating "[e]xcept in rare circumstances, [...] non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as

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342 KORUS FTA, art 20.3.1(a)

343 Ibid., art 20.3.2.

344 Ibid., art 11.10.

345 Ibid.

public health, safety, the environment [...], do not constitute indirect expropriations".[346]

The Korea-EU FTA also has a bold commitment to uphold levels of protection, stating that "[a] Party shall not fail to effectively enforce its environmental […] laws […] in a manner affecting trade or investment between the Parties"[347] and that "[a] Party shall not weaken or reduce the environmental […] protections […] in a manner affecting trade or investment between the Parties".[348] However, most of the provisions other than Article 13.7 in the Korea-EU FTA are outlined in soft-law language, providing best-endeavor clauses rather than legally-binding obligations.[349] Moreover, a provision on upholding levels of protection is not included in the investment chapter of the Korea-EU FTA.

2-3. Public Participation

The KORUS FTA has detailed provisions on opportunities for public

346 Ibid., Annex 11-B, 3(b).

347 Korea-EU FTA, art 13.7.1.

348 Ibid., art 13.7.2.

349 Koh et al., 2013, 29-30.

participation, which is similar to those in the NAAEC.[350] First, the agreement starts by stating that "[e]ach Party shall promote public awareness of its environmental laws by ensuring that information is available to the public regarding environmental laws and environmental law enforcement and compliance procedures, including procedures for its interested persons to request the Party's competent authorities to investigate alleged violations of its environmental laws".[351] The agreement further states that "each Party shall […] seek to accommodate requests from persons of either Party for information or to exchange views", and "provide for the receipt of written submissions".[352] Moreover, the Side Letter of the agreement clarifies that "such a submission shall be transmitted to it by the other Party and that the other Party shall transmit such a submission only if it has reason to believe that the submission is submitted by a person of the other Party and the submission concerns matters related to the implementation of specific provisions of Chapter Twenty (Environment)". Moreover, "[e]ach Party shall respond to these submissions […] and make the submissions and its responses easily accessible to the public in a timely manner".[353]

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350 Choi, 2014, 45.

351 KORUS FTA, art 20.7.1.

352 Ibid., art 20.7.2.

353 Ibid.

The agreement further states that the Council shall review the implementation of the environment chapter and "prepare and submit to the Joint Committee a written report on the results of that review no later than 180 days after the first anniversary date of entry into force" of the agreement, and "thereafter on the request of either Party".[354]

On the other hand, the Korea-EU FTA has provisions on Domestic Advisory Groups as well as the Civil Society Forum. The agreement states that "[e]ach Party shall establish a Domestic Advisory Group(s) on sustainable development […] with the task of advising on the implementation" of the trade and sustainable development chapter.[355] The Domestic Advisory Group comprises representatives "of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders".[356] Also, members of the Domestic Advisory Group of each party will meet at a Civil Society Forum, which is a vehicle for having the public voice be heard. Thus, it is similar to the public participation provision in the KORUS FTA, but the latter allows for more direct advisory, in that it provides each government the right to address submissions received from persons of either Party.[357]

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354 Ibid., art 20.7.4.

355 Korea-EU, art 13.12.4.

356 Ibid., art 13.12.5.

357 Choi, 2014, 58.

2-4. Dispute Settlement

The KORUS FTA states that "[a] Party may request consultations [...] regarding any matter" arising under the environment chapter,[358] and "shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seek advice or assistance".[359] Moreover, the Side Letter of the FTA confirms that "[b]efore initiating dispute settlement under the Agreement for a matter arising under Article 20.3.1(a), a Party should consider whether it maintains environmental laws that are substantially equivalent in scope to those that would be the subject of the dispute". However, as this is an obligation of consideration, it should be noted that the clause does not legally restrict the parties to initiate dispute settlement only for a matter with equivalent environmental laws.[360]

The KORUS FTA states that "[i]f the consultations fail to resolve the matter, either Party may request that the Council be convened to consider the matter by delivering a written request", and that the Council shall endeavor to resolve the

358 KORUS FTA, art 20.9.1.

359 Ibid., art 20.9.2.

360 Choi, 2014, 49.

matter by “good offices, conciliation, or mediation”.[361] This shows that, in order to prevent diplomatic problems, the KORUS FTA provides an obligatory provision on consultations within the environment chapter, seeking settlement based on the distinctive features of environmental disputes.[362]

If the Parties have failed to resolve the matter within 60 days of the request for consultations, the complaining Party may take recourse to the dispute settlement under the trade agreement. The dispute settlement process starts by establishing a Joint Committee: (1) consultations → (2) referral to the Joint Committee → (3) establishment of panel → (4) submission of panel report → (5) implementation of the final report.[363] The agreement states that the panel shall have three members, and allows a party to exercise peremptory challenges up to three times.[364] This shows that the KORUS FTA encourages neutrality in the selection of panelists, considering that the NAFTA allows exercising peremptory challenge only once.[365]

It should be noted that the KORUS FTA has special provisions for disputes arising under Article 20.2 (Environmental Agreements) that involve issues

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361 KORUS FTA, art 20.9.3.

362 Choi, 2014, 49.

363 Ibid.

364 KORUS FTA, art 22.9.2.

365 Choi, 2014, 49.

relating to a trade partner's obligations under the covered agreement. With respect to these disputes, "a panel convened under Chapter Twenty-Two (Dispute Settlement)" shall (1) consult fully, through the EAC mechanism, concerning the issue with "any entity" authorized under the relevant environmental agreement; (2) "defer to any interpretative guidance on the issue under the agreement"; and (3) in case "the agreement admits of more than one permissible interpretation relevant to an issue", if "the Party complained against relies on one such interpretation, accept that interpretation".[366] Moreover, the agreement allows a party to take measures to comply with its obligations under the covered agreement, provided that the purpose of the measure is "not to impose a disguised restriction on trade".[367]

With regard to environmental disputes, Australia, Singapore, Oman, and Morocco FTAs concluded with the US require that the Party complained against pay annual penalties in case of non-compliance.[368] Similar requirements were agreed to be inserted in the KORUS FTA as well. However, additional KORUS FTA negotiations came to an agreement to eliminate all the provisions on penalties in terms of environmental disputes, and instead to apply

366 KORUS FTA, art 20.9.6.

367 Ibid., art 20.10.3.

368 Choi, 2014, 50.

the dispute settlement procedures of the agreement.[369] As a result, the KORUS FTA allows trade retaliation or annual monetary assessment based on the extent of the damage.[370] The party complained against can decide to provide monetary assessment instead of being retaliated. However, while rich countries may make use of the annual monetary assessment, some poor countries may be unable to use the assessment, which may lead to violation of international law.[371]

On the other hand, the Korea-EU FTA restricts any matter arising under the trade and sustainable development chapter to be only subject to the procedures provided for in Articles 13.14 and 13.15.[372] The agreement states that "[a] Party may request consultations regarding […] any matter of mutual interest" arising under the trade and sustainable development chapter.[373] Before taking recourse to the dispute settlement procedures, the trade partners shall make attempt to resolve the matter through consultations. If the matter has not been satisfactorily addressed through government consultations, "a Party may […] request that a Panel of Experts be convened to examine the matter".[374] However, "[t]he Parties shall make their best efforts to accommodate advice or

369 Ibid.

370 Ibid.

371 Ibid., 51.

372 Korea-EU FTA, art 13.16.

373 Ibid., art 13.14.

374 Ibid., art 13.15.1.

recommendations of the Panel of Experts on the implementation"[375] of the trade and sustainable development chapter, which means that the advice or recommendations of the Panel are not legally-binding and do not lead to trade sanctions, which differs from the procedures in the KORUS FTA.[376] However, "the implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development",[377] which implies that the agreement encourages voluntary implementation by means of bilateral monitoring.[378] Moreover, "[t]he report of the Panel of Experts shall be made available to the Domestic Advisory Group(s) of the Parties",[379] which enables the Advisory Groups to advise the government by means of the recommendations of the Panel of Experts. It can be inferred that consultations are emphasized in the Korea-EU FTA from the fact that the agreement prohibits the trade partners from using dispute settlement procedures other than those provided for in the articles aforementioned on any matter arising under the trade and sustainable development chapter.[380]

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375 Ibid., art 13.15.2.

376 Choi, 2014, 59.

377 Korea-EU FTA, art 13.15.2.

378 Choi, 2014, 59.

379 Korea-EU FTA, art 13.15.2.

380 Shim, Young-Gyoo, "A Legal Consideration on the Implementation of Environmental Provisions in the FTAs." *Han Yang Law Review* 44 (2013): 88.

Table 5. Comparison between the KORUS FTA and the Korea-EU FTA

	KORUS FTA	Korea-EU FTA
Standards of environmental protection: Enforcing MEAs	In addition to requiring effective enforcement of domestic environmental law, the KORUS FTA requires that "[a] Party shall adopt, maintain, and implement laws […] to fulfill its obligations under the multilateral environmental agreements (KORUS FTA, art 20.2)" which are annexed as covered agreements. These obligations are all legally-binding. This shows that the US takes a more "MEA-friendly" position, when compared to prior US FTAs (Choi, 2014: 44).	The Korea-EU FTA frames the high level of environmental protection as being "consistent with the internationally recognised standards or agreements (Korea-EU FTA, art 13.1.3)", whereas it fails to elaborate on the MEAs in question. The provision requiring the trade partners to "commit to cooperating on the development of the future international climate change framework in accordance with the *Bali Action Plan* (Ibid., art 13.5.3)" is not legally-binding.
Upholding levels of protection: Additional provisions in the investment chapter	A bold commitment to uphold levels of protection is included in the investment chapter, other than the trade and sustainable development chapter of the agreement, in the Investment and Environment article.	A provision on the same matter is not included in the investment chapter of the agreement.
Public participation: Direct advisory to the government	The KORUS FTA allows for direct advisory; it gives both	The Domestic Advisory Group comprises

	parties the right to address submissions received from persons of either trade partner (Choi, 2014: 58).	representatives "of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders (Korea-EU FTA, art 13.12.5)". They will meet at a Civil Society Forum, which is a vehicle for having the public voice be heard.
Dispute Settlement: Taking recourse to the main dispute settlement procedures of the agreement	The KORUS FTA enables the trade partners to take recourse to the main dispute settlement procedures.	Environmental disputes may not be subject to the main dispute settlement procedures. They are restricted to the specific dispute settlement procedures outlined in the Government Consultations article and the Panel of Experts article. This shows that the Korea-EU FTA emphasizes consultations (Shim, 2013: 88). The Panel of Experts can only provide non-binding advice or recommendations. Thus, any kind of sanction is unavailable to enforce the environment provisions.

3. Implications

The implications of the comparative analysis of environmental provisions in US and EU RTAs are shown in Table 7, and the details are as follows.

3-1. Enforcement of Environmental Law

The US is more active than the EU in terms of inserting legally-binding provisions in FTA environmental agreements. Dispute settlement procedures on environmental law using legal and administrative mechanisms have been actively negotiated in US RTAs.[381]

3-1-1. Findings

In particular, recent US agreements contain environment chapters that are explicitly linked to dispute settlement based on sanctions.[382] In practice, however, there is a low possibility of the dispute settlement provisions to be utilized, as there are several consultative procedures that must be gone through

[381] Oh, 2008, 412.

[382] Jinnah and Morgera, 2013, 335.

before seeking remedy through the dispute settlement.[383] Nevertheless, the existence of this possibility is likely to stimulate parties to take environmental provisions more seriously.[384]

Moreover, compared with EU FTAs, US FTAs have created deeper MEA linkages.[385] This is manifested by the US-Peru FTA's forest annex, which has eight pages of specific provisions that Peru must follow, mostly to comply with CITES.[386] This is also subject to the full force of the dispute settlement as well as compliance procedures of the FTA, which strengthens CITES in terms of its enforcement capacity.

Furthermore, US FTAs have more detailed public participation provisions in some of its FTAs,[387] in comparison with the EU FTAs. In addition to the provisions requiring public access to information on the trade decision-making processes, which are also contained in EU FTAs, some US FTAs have citizen enforcement provisions. These provisions enable the citizens of trade partners to hold their countries accountable for failing to enforce their domestic environmental laws, including those on the implementation of MEAs. In US

383 Ibid.

384 Ibid.

385 Ibid., 334.

386 Ibid.

387 Ibid., 335.

FTAs, these citizen enforcement provisions disappeared after NAFTA, but reemerged in the CAFTA, and into subsequent FTAs with Peru, Panama, and Colombia.[388] However, the legal force of the final TPP environmental agreement is yet to be seen.

The difference in legal force may first be attributed to the United States' fundamental approach to environmental protection, which is to ensure a level playing field in trade and environmental legislation. On the other hand, the EU has various purposes of concluding agreements with third countries. The agreements can be categorized into: "association as a prelude to EU membership", "association as a development tool", and "association as an instrument for inter-regional cooperation".[389]

Second, each EU member state has the right to establish its own environmental policies, which provides the Union more independence, compared to the US.[390] Even though an EU-based environment law exists, member states can establish their own regulations with higher standards, according to TFEU Article 193. In order to establish legally-binding agreements with third countries, the EU needs a uniform law, but in reality it

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[388] Ibid.

[389] Duran and Morgera, 2012, 58-59.

[390] Koh et al., 2013, 48.

does not have one.[391] Thus, this may be a possible reason behind the relatively soft commitments in the EU's environmental provisions.

3-1-2. Prospects for Convergence

Even though the EU's environmental provisions are relatively weak in terms of legal force, they may, in the future, converge to those in US FTAs, as it has been advocated since 2010 by the European Parliament.[392] This is also implied in the fact that the EU RTAs concluded after the post-Global Europe agreements show further developed environmental provisions, providing for linkages with MEAs, institutional innovations, and dispute settlement by consultation. The agreements indicate a shift in its environmental practices towards a more standardized approach.[393]

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391 Ibid.

392 Jinnah and Morgera, 2013; Zvelc, Rok. "Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements." *The External Environmental Policy of the European Union*, 2012.

393 Duran and Morgera, 2012, 57.

3-2. Environmental Cooperation

Compared to the US, the EU has broader and more detailed provisions on environmental cooperation in its agreements. Instead of using forceful language, the EU instead underscores cooperation through consultations, assistance, and voluntary mechanisms.

3-2-1. Findings

The EU usually resorts to cooperation, using provisions providing for joint approaches in terms of monitoring and dialogue, and enabling the trade partner to identify and assess non-compliance instances in order to encourage compliance with environmental measures.[394] This approach is further reinforced by the provisions that allow parties to engage relevant international bodies and MEA secretariats or their mechanisms in these dialogues.[395] Likewise, the EU leaves the details up to the trade partners regarding the ratification and implementation of MEAs, and offers assistance on

[394] Jinnah and Morgera, 2013, 335.

[395] Ibid.

capacity-building as well.[396]

Moreover, the EU uses MEA linkages to establish alliances with the view of influencing MEAs under negotiation, such as climate change negotiations.[397] Environmental provisions also gradually open the door to new multilateral negotiations, which is demonstrated by the EU FLEGT initiative, leading to a possible multilateral agreement regarding forest governance in the future.[398]

The difference in cooperation provisions may be attributed to the similar reasons behind the difference in legal force. First, the EU, comprised of 28 member countries with independent sovereignty, is at present heading towards the goal of achieving full integration.[399] Thus, the EU's main goal is to attain coherence in trade, environmental, and developmental objectives in terms of cooperation with other countries. This may be a reason behind the wider "breadth" of the environmental issues addressed as well as the shallower "depth" of implementation mechanisms, when compared to the US.[400]

Second, it is unlikely that a "race to the bottom" in environmental standards would occur in candidate or potential candidate countries as well as developing

396 Ibid.

397 Ibid., 337.

398 Ibid.

399 Koh et al., 2013, 48.

400 Jinnah and Morgera, 2013, 334.

countries. This is because trade partners aspiring to be member states of the EU are required to approximate their domestic environmental law with the EU *acquis*, and this process is supported by the EU's assistance.[401] Moreover, it is outlined that one of the main modalities of the Cotonou Agreement is the EU's financial and technical assistance to the ACP States.[402] This may be the reason why the EU's agreements include intense cooperation.

3-2-2. Prospects for Convergence

Even though the EU has provisions that address broader issues of environmental cooperation compared to the US, US FTAs have started to consider a wider range of issues as well. For instance, it includes a separate environmental article on biodiversity in Peru and Colombia FTAs as well as an annex on forest governance in the Peru FTA. Also, the TPP covers a broad range of environmental issue-areas in separate articles, as shown in Table 7, which implies that the US may, in the future, commit to cooperate with trade partners on a wider range of environmental issues.

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[401] Duran and Morgera, 2012, 73.

[402] Cotonou Agreement, part IV, Annexes I-IV.

Table 6. Specific environmental issues in the TPP agreement[403]

	Article	Title	Language of legal force
Specific environmental issues	20.13	Trade and Biodiversity	recognize, are committed, reiterate, enhance
	20.14	Invasive Alien Species	recognize, coordinate
	20.15	Transition to a Low Emissions and Resilient Economy	acknowledge, recognize, agree
	20.16	Marine Capture Fisheries	acknowledge, recognize, shall seek, shall promote, affirm, shall
	20.17	Conservation and Trade	affirm, acknowledge, commit to, shall endeavor, shall
	20.18	Environmental Goods and Services	recognize, as soon as possible, shall consider, shall endeavor, may develop

[403] Shim, 2014, 64 (*rearranged by author*).

3-3. Precautionary Approach and Climate Change

EU FTAs include detailed provisions addressing climate change as well as the precautionary approach, which cannot be found in US FTAs. Even the TPP does not directly address climate change in its environment chapter.

3-3-1. Findings

Climate change has gradually but uniquely emerged not only as an important cooperation priority but also as an explicit and ambitious issue-area of environmental cooperation in most EU agreements.[404]

For instance, stronger language on the MDGs and climate change was added in the Cotonou Agreement by its second revision.[405] The Preamble states that the parties are "aware of the serious global environmental challenge posed by climate change, and deeply concerned that the most vulnerable populations live in developing countries, in particular in Least Developed Countries and Small Island ACP States, where climate-related phenomena such as sea level rise, coastal erosion, flooding, droughts and desertification are threatening their

[404] Jinnah and Morgera, 2013, 332.

[405] Duran and Morgera, 2012, 85.

livelihoods and sustainable development". Article 1 (Objectives of the Partnership) states that "[t]he principles of sustainable management of natural resources and the environment, including climate change, shall be applied and integrated at every level of the partnership". Also, Article 8 (Political dialogue) states that the political dialogue between the parties "shall encompass cooperation strategies, including" climate change. Moreover, Article 11 (Peace building policies, conflict prevention and resolution, response to situations of fragility) states that "[t]he Parties acknowledge that new or expanding security threats need to be addressed" and "[t]he impacts of global challenges like [...] climate change [...] need to be taken into account".

Article 20 (The approach) states that "[s]ystematic account shall be taken in mainstreaming into all areas of cooperation" including climate change, and "shall also be eligible for Community support". Article 29 (ACP–EU cooperation in support of regional cooperation and integration) also states that "cooperation shall support [...] the environment and the sustainable management of natural resources, including water and energy, and addressing climate change".[406]

Moreover, Article 32A (Climate change) is wholly devoted to climate change cooperation. The article states that "[t]he Parties acknowledge that climate

[406] Cotonou Agreement-2010 revision, art 29.3.

change is a serious global environmental challenge and a threat to the achievement of the Millennium Development Goals requiring adequate, predictable and timely financial support". It also states that cooperation shall: "recognise the vulnerability of ACP States and in particular of small islands and low-lying ACP States to climate-related phenomena [...] and in particular of least developed and landlocked ACP States to increasing floods, drought, deforestation and desertification"; "strengthen and support policies and programmes to mitigate and adapt to the consequences of, and threat posed by, climate change including through institutional development and capacity building"; "enhance the capacity of ACP States in the development of, and the participation in, the global carbon market"; and focus on the activities, including "integrating climate change into development strategies and poverty reduction efforts"; "raising the political profile of climate change in development cooperation"; "assisting ACP states to adapt to climate change in relevant sectors such as agriculture, water management and infrastructure, including through transfer and adoption of relevant and environmentally sound technologies"; "promoting disaster risk reduction, reflecting that an increasing proportion of disasters are related to climate change"; "providing financial and technical support for mitigation action of ACP states in line with their poverty reduction and sustainable development objectives"; "improving weather and

climate information and forecasting and early warning systems"; and "promoting renewable energy sources, and low-carbon technologies". These provisions are harmonized with the announcement that EU policy "shall contribute to pursuit of […] combating climate change",[407] which has been approved by the Treaty of Lisbon.[408]

Post-Global Europe agreements either contain a chapter exclusively devoted to climate change cooperation or provide detailed regulations on climate change in terms of cooperation.[409] For instance, the EU-COPE FTA has an article on the precautionary approach as well as an article wholly devoted to climate change. Article 278 (Scientific Information) states that "the lack of full scientific certainty should not be used as a reason for postponing protective measures", which implies the precautionary approach of the EU on controversial environmental issues, such as climate change.[410] The article on climate change starts by referring to the international climate change regime, the UNFCCC and the Kyoto Protocol. It states that the parties will "promote the sustainable use of natural resources and will promote trade and investment measures that promote [...] the use of best available technologies for clean

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407 TFEU, art 191.1.

408 Duran and Morgera, 2012, 88.

409 Jinnah and Moregera, 2013, 332.

410 COPE FTA, art 278.

energy production and use, and for mitigation of and adaptation to climate change".[411] Moreover, the parties agree to facilitate "the removal of trade and investment barriers to [...] goods, services and technologies that can contribute to mitigation or adaptation, taking into account the circumstances of developing countries", and to promote "measures for energy efficiency and renewable energy".

On the other hand, in terms of the United States' politics on climate change, the 2012 National Democratic Platform strongly emphasizes "anthropogenic" climate change. The platform states that Democrats "affirm the science of climate change, commit to significantly reducing the pollution that causes climate change" and know that they "have to meet this challenge by driving smart policies that lead to greater growth in clean energy generation".[412] Notwithstanding the Democrats' support on climate change policies, the platform is neither revolutionary nor progressive.[413] Moreover, the 2012 Republican Platform reflects the Republicans' view regarding environmental measures as restrictions to using natural resources.[414] It states that they will end the "war on coal and encourage the increased safe development in all regions of

411 Ibid., art 275.

412 2012 Democratic National Platform, 55.

413 Koh et al., 2013, 73.

414 Ibid., 74.

the nation's coal resources", and "oppose any and all cap and trade legislation",[415] which implies their position against the UNFCCC and the Kyoto Protocol.[416] In addition, they "call on Congress to take quick action to prohibit the EPA from moving forward with new greenhouse gas regulations that will harm the nation's economy".[417]

With respect to the precautionary approach, the Scientific Information article in EU RTAs states "the lack of full scientific certainty should not be used as a reason for postponing protective measures".[418] Also, in the CARIFORUM EPA, the parties "recognise the importance, when preparing and implementing measures aimed at protecting the environment […], of taking account of scientific and technical information, the precautionary principle, and relevant international standards, guidelines or recommendations".[419] In terms of such precautionary principle, the EU has taken stronger action against climate change in comparison to the US. When climate change emerged as an international agenda, the EU was in the lead in multilateral efforts of curbing greenhouse gas emissions. On the other hand, the US was a reluctant signatory

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415 Republican Platform 2012, 16.

416 Koh et al., 2013, 74.

417 Republican Platform 2012, 19.

418 Central America AA, art 292; COPE FTA, art 278.

419 CARIFORUM EPA, art 186.

of the UNFCCC in 1992 as well as the Kyoto Protocol. The Kyoto agreement called for the US, EU, and other industrialized nations to control their average greenhouse gas emissions in the period 2008 to 2012 to a level below their 1990 emissions. The emissions targets were set at 8% for the US and 7% for the EU. While the EU reached its target, the US did not submit the Kyoto Protocol to the Senate for ratification, and the subsequent Bush Administration officially withdrew from the protocol.[420] To satisfy the Kyoto target, in 2007, the EU proposed the "20-20-20 by 2020" plan, which self-imposed an even more ambitious reduction target which calls for: emissions cut of 20% below the 1990 levels, a 20% increase in energy efficiency over forecasted consumption, and 20% of energy to be produced as renewable energy by 2020.[421] Likewise, the EU has been more proactive in multilateral efforts for climate change response. However, it should also be noted that regarding the precautionary principle itself, the reality is not one region (the US) being more precautionary than the other (the EU), rather it is "a scenario of selective application of precaution to different risks in different places and time" and climate change is one of the risks to which the EU takes a more precautionary approach,[422] which

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[420] Wiener, Jonathan Baert. *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*. London: RFF Press, 2011.

[421] Ibid.

[422] Ibid.

is also reflected in the differences between US and EU RTAs.

3-3-2. Prospects for Convergence

Defending economic interests has been one of the major reasons for the United States' reluctance to the precautionary principle,[423] including climate change regulations. As a result, the nation's most intensive counteraction to the precautionary principle has been found in the sectors in which its economic interests are most vulnerable.[424] According to an EU official, the American stance on the Kyoto Protocol has "reverberated into the politics of trade and environment and trade negotiations," making the EU less trustful of the US commitment to environmental protection and thus even more determined to have these issues addressed in the next trade round.[425] In fact, Europe's precautionary principle has been identified as a potential stumbling block to a successful TTIP agreement.[426]

Moreover, there has been criticism suggesting that the recently signed TPP

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[423] Veinla, Hannes. "Free Trade and the Precautionary Principle." Juridica International VIII (2003): 193.

[424] Ibid.

[425] Vogel, 2002, 28.

[426] Bergkamp, Lucas, and Lawrence Kogan. "Trade, the Precautionary Principle, and Post-Modern Regulatory Process." *EJRR*, April 2014, 493-494..

could have been used to build a more cooperative framework for realizing the transition to a more climate-positive economy. First, the TPP has an article which presumably addresses climate change, Article 20.15 (Transition to a Low Emissions and Resilient Economy), but does not directly mention the words "climate change" or the "UNFCCC". In addition, a provision calls for the parties' cooperation of addressing environmental issues of common interest that "may include" energy efficiency and clean and renewable energy,[427] which is quite vague. Therefore, the possibility of the US and the EU's convergence on climate change provisions is ambiguous.

Table 7. Prospects for convergence in environmental provisions

	Convergence	Details
Enforcement ("depth" of implementation mechanisms)	○ (EU → US)	Even though the EU's environmental provisions are relatively weak in terms of legal force, they may, in the future, converge to those in US FTAs, as it has been advocated since 2010 by the European Parliament (Jinnah and Morgera, 2013: 335; Zvelc, 2012). Also, Post-2006 Global Europe agreements

[427] TPP, art 20.15.2.

		indicate a shift in its environmental practices towards a more standardized approach (Duran and Morgera, 2012: 57).
Environmental cooperation ("breadth" of specific environmental issues)	○ (US → EU)	US FTAs have started to include a separate environmental article or annex on specific issue-areas, such as biodiversity (Peru and Colombia) and forest governance (Peru). Also, the TPP covers a broad range of environmental issues in separate articles: Trade and Biodiversity (TPP, art 20.13), Invasive Alien Species (Ibid., art 20.14), Transition to a Low Emissions and Resilient Economy (Ibid., art 20.15), Marine Capture Fisheries (Ibid., art 20.16), Conservation and Trade (Ibid., art 20.17), and Environmental Goods and Services (Ibid., art 20.18).
Precautionary approach and climate change	△	EU FTAs include detailed provisions directly addressing climate change, as well as articles on the precautionary approach, which cannot be

		found in US FTAs. Even the recently signed TPP led by the US does not directly use the word “climate change” or “UNFCCC” and lacks details on the specific emissions that affect climate change.

VI. Conclusion

The increased attention on environmental issues has led to both domestic and international efforts to protect the environment. Thus, environmental protection has become one of the main issues in international discourse on trade as well. There has been growing awareness that international trade rules can be leveraged to enhance environmental performance.

The trade and environment linkages were initially addressed at the multilateral level through the WTO. However, as multilateral negotiations came to a gridlock, and as the WTO Agreement does not address environmental issues in an independent agreement, the trade and environment governance

started to shift to the regional or bilateral level.[428] All RTAs include provisions on trade liberalization of goods, but most of the agreements concluded nowadays extend to broader areas. In particular, sustainable development is addressed as an important agenda in RTAs.

Noteworthy changes in this context include not only the increasing incorporation of environmental provisions in RTAs, but also the evolution of these provisions, leading to agreements with a chapter or article wholly devoted to the environment with more detailed and legally-binding provisions. Firstly, more and more countries are legally institutionalizing the direction of addressing environmental issues in trade agreements.[429] Secondly, countries are expanding the scope of environmental cooperation.[430] Finally, democratic procedures in trade agreement negotiations are increasingly being utilized.[431]

Developed countries, particularly the US and the EU, have been in the forefront of leveraging RTAs for sustainable development. In terms of the US, environmental provisions in trade agreements have greatly evolved over the past years, and the US has kept its fundamental approach to avoid environmental dumping by its trade partners. The evolution of trade and

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[428] George, 2014, 7.

[429] Jung and Oh, 2015, 316.

[430] Ibid.

[431] Ibid.

environment linkages in US agreements can be categorized into three periods: (1) prioritizing trade over environmental protection; (2) reflecting the importance of environmental governance in normative claims but without substantive linkages to trade restrictions; and (3) tightly connecting trade and environmental governance through new policies in environmental agreements in RTAs.[432]

With respect to the EU, environmental provisions have been generally included in its trade agreements, but with various objectives. That is, the EU pursues to improve coherence between various external policies, particularly through agreements concluded with candidate or potential candidate countries to EU membership as well as developing countries or LDCs that receive EU assistance. Recent agreements concluded with the EU against the backdrop of the 2006 Global Europe Strategy reflect a shift in the EU's trade and environment linkages towards a more standardized approach.[433]

Even though the two major players in the Atlantic have both taken the lead in environmental agreements in RTAs, they have significant differences. Firstly, legally-binding environmental provisions are actively inserted in US trade agreements. In particular, most recent US FTAs have environment chapters that

[432] Jinnah and Kennedy, 2011, 100.

[433] Duran and Morgera, 2012, 57.

are expressly linked to dispute settlement based on sanctions,[434] and provide detailed and prescriptive provisions on public participation, such as citizen enforcement provisions. Indeed, there is a low possibility of the dispute settlement provisions to be utilized in practice, but the existence of these provisions itself is likely to stimulate governments to regard environmental provisions as more important.[435] The difference in legal force may first be attributed to the United States' fundamental approach to establish a level playing field in environmental legislation as well as the EU's various purposes of concluding agreements with third countries. Moreover, the absence of a uniform environmental law in the EU may be a possible reason behind the soft language used in the EU's environmental provisions. However, it is noteworthy that the EU's RTAs are increasingly taking a more systematic approach regarding environmental regulations.[436] EU RTAs concluded after the post-Global Europe show further developed environmental provisions, such as linkages with MEAs, institutional innovations, and dispute settlement by consultation. Likewise, regarding legal force, the environmental provisions in EU RTAs may converge to those in US RTAs.

Secondly, the EU has detailed provisions on environmental cooperation with

[434] Jinnah and Morgera, 2013, 335.

[435] Ibid.

[436] Duran and Morgera, 2012, 57.

a wider scope of environmental issues, compared to the US. As the EU is at present heading towards the goal of achieving full integration, it aims to attain coherence in trade, environment, and development objectives. This may be a reason behind the wider "breadth" of the environmental issues addressed.[437] Moreover, the reason behind its shallower "depth" of implementation mechanisms[438] may be that the EU has various purposes of concluding agreements with other countries, depending on the partners. For instance, the partner may be a candidate or a potential candidate for EU membership that is obligated to approximate its law with the EU's. Also, in some cases, the EU concludes agreements with a developing country or a former colony, which the Union utilizes as vehicles for development. These cases all require the EU's assistance, which lowers the possibility of a race to the bottom, making environmental cooperation all the more important. As a result, the EU usually emphasizes cooperation with detailed provisions. However, US FTAs are increasingly addressing broader environmental issues of cooperation as well. The Peru and Colombia FTAs both have an exclusive environmental article on biodiversity, and the Peru FTA has an annex on forest governance. Also, the TPP agreement addresses various environmental issue-areas in separate articles,

[437] Jinnah and Morgera, 2013, 334.

[438] Ibid.

which implies that future US RTAs may address a wider breadth of specific issues for cooperation.

Finally, the EU's trade agreements contain provisions on the precautionary approach as well as climate change, which cannot be found in any of the United States' agreements. Among various environmental issues, climate change has become a priority and ambitious area of cooperation in most EU agreements,[439] both before and after the implementation of the 2006 Global Europe Strategy. Post-Global Europe agreements have an article fully devoted to climate change, providing detailed provisions in the context of cooperation.[440] This can be aligned to the fact that with respect to the precautionary principle, the EU has taken stronger measures against climate change in comparison to the US. The recently signed US-led TPP has been perceived as an opportunity to cover a wide range of environmental issues including climate change. However, the TPP agreement, though it may not be the final version at the time of writing, has limits in that it does not directly refer to climate change or the UNFCCC. In sum, a convergence on this issue is not very promising for the near future, but the results in the long run remain to be seen, as the UNFCCC is preparing for a new era of climate change.

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[439] Jinnah and Morgera, 2013, 332.

[440] Ibid.

In conclusion, RTAs are increasingly being leveraged to strengthen international environmental governance. More detailed, strengthened, and broader environmental provisions are being incorporated in RTAs. The US and the EU have been proactive in harmonizing international trade and environment, but they show major differences based on their national politics, economy, and international relations. A recent trend in international trade is that plurilateral and comprehensive RTAs, namely, mega-FTAs, are being negotiated by a number of major countries. The US and the EU are in the process of negotiating the TTIP. Whether the TTIP may establish a new template for future environmental agreements in RTAs remains to be seen.

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US-Oman FTA

US-Peru FTA

US-Panama FTA

US-South Korea FTA

US-Colombia FTA

TPP

EU-Turkey AA

EU-Macedonia SAA

EU-Albania SAA

EU-Montenegro SAA

EU-Serbia SAA

EU-Bosnia and Herzegovina SAA

EU-Kosovo SAA

EU-Algeria AA

EU-Egypt AA

EU-Israel AA

EU-Jordan AA

EU-Lebanon AA

EU-Morocco AA

EU-Palestine AA

EU-Tunisia AA

Cotonou Partnership Agreement

CARIFORUM EPA

EU-Central America AA

EU-South Africa AA

EU-Chile AA

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국문초록

무역자유화는 세계 경제의 발전을 가져오지만 동시에 환경자원의 고갈을 촉진시킬 수 있다. 따라서 국제 환경 거버넌스를 강화하고 지속 가능한 발전을 이룩하기 위해 국가 간 지역무역협정이 지렛대로 활용되고 있다. 특히 미국과 EU를 중심으로 선진국들은 무역협정문에 광범위하고 구체적인 환경조항을 도입하는 데 앞장서왔다.

이러한 배경 속에서 본 연구는 미국과 EU가 각각 제3국과 체결한 지역무역협정 내의 환경조항들을 비교·분석한다. 두 국가의 환경조항은 크게 법 집행, 환경협력, 그리고 기후변화라는 세 가지 측면에서 차이점을 보인다. 이러한 차이점이 나타나는 원인은 두 국가의 상이한 역사적 배경, 정치체제, 그리고 국제관계에 있다. 예컨대, 미국과 달리 EU는 환경법이 통합되어 있지 않다. 즉, EU의 규정이 존재하더라도 개별회원국이 국내적으로 별도의 규범을 제정할 권한을 갖고 있어 EU는 무역협정에 법 집행 관련 환경조항을 도입하기 어려운 입장이다. 또한 미국은 무역과 환경법에 있어

공평한 경쟁의 장을 마련하는 것을 중요시하는 반면, EU는 정치적, 경제적 통합을 이룩하기 위해 무역, 환경, 그리고 개발 등 대내외적 정책의 일관성을 유지하는 것에 중점을 두고 있다. 마지막으로, 사전예방의 원칙과 관련하여, EU는 미국보다 더욱 적극적인 기후변화정책을 시행해왔다.

나아가, 현재 범대서양 무역투자동반자협정(TTIP)의 협상이 진행되고 있는 만큼 본 연구는 미국과 EU의 환경조항이 향후 수렴할 가능성이 있는지에 대해서도 살펴본다.

주제어: RTA, FTA, 지속 가능한 발전, 환경 장, 환경조항, 무역자유화

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