

Greening Trade—environmental complementarity in new trade initiatives

International Trade analysis: In the last few years, ‘Green Trade’ has become a recurring theme in political discussions. Is it possible to say that environmental provisions are now common in international trade agreements? Could we still be greening trade? As part of our series of environmental analyses preceding the 26th UN Climate Change Conference (COP26), Rambod Behboodi, an international trade law and policy expert in Geneva who has served as trade law counsel and diplomat with the government of Canada, and advised Canadian negotiating delegations in multilateral environmental negotiations, provides an analysis on environmental opportunities in international trade law.

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Introduction

Few issues in modern times have become so ingrained in our social and political psyche as has the environment, as we have gone from one crisis to the next in the past half-century. Few issues in international trade can elicit emotive responses so deep, generate misconceptions so wide of the mark, and vex theorists, lawyers, and activists alike, as the interaction of trade agreements and environmental protection measures.

Not surprisingly, few questions are answered more illogically, by both sides of the issue, than those dealing with the environment (in its broadest possible meaning). Not surprisingly, it is at once one of the most interesting and more frustrating areas for practitioners and theorists, on both the trade and the environment sides.

The reality is more mundane. Under the World Trade Organization (WTO) Agreement, members already have considerable scope for implementing environmental protection measures, subject only to a requirement of evenhandedness. In negotiating new regional trade agreements (RTAs), members build on this strong base, but so far have not added substantial additional disciplines. New ‘sustainable development’ provisions in RTAs appear to signal, instead, willingness to refrain from challenging environmental measures of trading partners and, potentially, to pursue ‘level playing field’ measures domestically.

Parameters of the discussion

Environmental protection measures may have direct or indirect trade effects. For example, carbon reduction measures could have trade effects in multiple ways, not least in respect of traded goods with high carbon footprint. Where a measure results in a general reduction in carbon-intensive consumption, it would be one with an ‘indirect’ trade effect; a border-adjusted tax to capture the externalities of carbon pricing would be one with a ‘direct’ trade effect. The categories are not impermeable; this distinction is useful for analytical purposes. Those with direct trade effects, for example, import or export taxes or restrictions—may be used to advance three types of environmental objectives.

- a trade measure may be imposed to address a specific domestic environmental concern. For example, an import restriction on dangerous chemical substances, see the [Rotterdam Convention on Prior Informed Consent](#)
- trade measures may be imposed following specific concerns about the ‘global commons’. These measures are of two kinds:
 - measures imposed pursuant to multilateral environmental agreements (The [Basel Convention on the Transboundary Movement of Hazardous Chemicals](#), for example,

includes provisions aimed at ensuring that hazardous chemicals do not end up in country that are not equipped to handle them. And central among these, of course, is the requirement for the implementation of export restrictions on these chemicals.); or

- measures imposed unilaterally for the protection of the global commons (For example, the US had for a long time a [trade ban](#) in place on tuna caught in a way that harmed marine mammals)
- some argue that trade itself is harmful to the environment because it drives unsustainable development and growth. In one multilateral environmental negotiation, activists advocated a comprehensive ban on the trade in agricultural commodities, because of a generalised fear about the impact of this trade on local production processes, or local genetic diversity and so on

An old-new landscape

An evolving multilateral legal framework

Domestic environmental measures have been protected under Articles XX(b) and (g) of the General Agreement on Tariffs and Trade since 1947; these were brought into the WTO Agreement, supplemented by additional provisions in the various covered agreements governing services, technical requirements, and sanitary and phytosanitary measures.

In an [early analysis](#) of the Appellate Body (AB) of the WTO, its highest quasi-judicial instance—the author noted the centrality of environmental concerns to the long-term well-being of the WTO, and how the AB addressed the issue deftly and effectively. In [Reformulated Gasoline](#), the AB found clean air and water to be exhaustible natural resources and made a direct reference to multilateral environmental agreements. Building on its first report, the AB significantly expanded the scope of the various environmental exceptions. In *Shrimps*, for example, it found sea turtles to be ‘exhaustible natural resources’.

In each instance, and in cases that followed (such as [Brazil—Tyres](#)) the only controversy at issue was not an environmental one, but rather, the evenhandedness of the measure at issue.

These findings expanded the policy space of WTO members in respect of protecting both the domestic environment and the global commons, and gave new impetus to the interaction of multilateral environmental agreements with the WTO Agreement, as indeed can be seen in the preambular clauses of the [Rotterdam Convention](#):

‘Recognising that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,

Emphasising that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements [...]

A new bilateral/regional framework

In parallel there were developments in RTAs.

Before the entry into force of the WTO, in the context of the North American Free Trade Agreement, the parties negotiated side agreements covering labour and the environment. The side agreements were concerned with the application and enforcement of the domestic law of each party. While a challenge is launched against one of the parties to the agreement, the applicable law is that of the party, and not internationally agreed substantive rules. Although modest from an international rule-making perspective, it was a major development in the international legal framework governing trade and the environment.

Free trade agreements build on the scaffolding of multilateral trade agreements. For this reason, first the entry into force of the WTO and then the jurisprudential developments related to environmental protection measures changed the RTA landscape considerably.

The European Union, for example, has negotiated specific 'sustainable development' chapters in recent agreements with Canada (Comprehensive Economic and Trade Agreement), Vietnam, and Japan. For example, see [EU statements](#) on the details of its new 'economic partnership' with Japan stressing that the agreement contained a 'full chapter on trade and sustainable development.' The catch-all phrase includes a variety of policy areas such as 'good regulatory practices', labour rights, and environmental protection. Of particular note, the EU and Japan 'commit themselves to effectively implement their obligations under multilateral environmental agreements' such as those governing climate change, endangered species, and biological diversity. In this sense, the new chapter and the renewed emphasis more generally for environmental protection in trade agreements do not in themselves result in additional legal environmental protection, let alone more ambitious environmental protection measures.

A renewed commitment

As environmental protections were enhanced within the WTO, it became less and less necessary for members to seek expanded protections in their bilateral or regional agreements. The relative modesty of even the most ambitious chapters can, in part, be explained by this basic consideration.

These chapters do, however, highlight two trends.

For one thing, however hortatory, joint commitment in RTAs to a broad range of 'sustainable development' objectives makes it difficult for a party to an RTA to challenge the environmental measures of its partners—not just in that RTA but even, I would argue, under the WTO.

For another, and more concretely, we observe a renewed commitment by major players to old concepts ('race to the bottom', 'level playing field') in regulatory matters, environmental protection, carbon pricing measuring, and the like. It can be expected that in the coming years, major trading entities would implement additional border and domestic measures for environmental purposes that affect trade. They would do so, as noted above, expecting that their principal trading partners are already onside with those measures or, at a minimum, will not object to their implementation. This, in turn, is particularly important for long-term planning and investment on the part of manufacturers and exporters.

Interviewed by Elodie Fortin