Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

Updated January 13, 2022

Environmental Provisions in Free Trade Agreements (FTAs)

Linkages between trade and environmental protection have long been a concern to some U.S. policymakers and stakeholders. The central question is whether trade liberalization (i.e., the removal of barriers on the exchange of goods and services between nations) advances shared economic and environmental goals. Some observers argue that economic expansion brought on by trade liberalization adversely affects the environment. Among other concerns, they contend that international competition may lead developing countries to adopt less stringent environmental standards to encourage producers to relocate from jurisdictions with more stringent environmental standards. Thus, some observers argue that environmental provisions are necessary in trade agreements to help raise international environmental standards and protect U.S. businesses and workers.

Other policymakers and stakeholders believe that trade liberalization and environmental protection can be mutually supportive. They argue that while economic growth may adversely affect the environment during the initial stages of industrialization, it can also provide resources to mitigate such effects as countries develop. They also argue that trade liberalization can support U.S. environmental goals through the elimination of tariffs on environmental goods, and the reduction of trade-distorting subsidies, among other actions.

Trade-related environmental provisions in U.S. FTAs were first introduced in a side agreement to the North American Free Trade Agreement of 1994 (NAFTA). Through the years, they have moved from side agreements to integral chapters within U.S. FTA texts, and increasingly have incorporated cooperation and dispute settlement (DS) mechanisms. In 1992, President George H.W. Bush instituted the practice of conducting an environmental assessment of trade agreements in conjunction with the consideration of NAFTA, and President Clinton formalized the practice by executive order in 1999. In the Trade Act of 2002 (P.L. 107-210), Congress included environmental provisions as a principal trade negotiating objective in renewing the President's Trade Promotion Authority (TPA) legislation. Since then, the United States has been at the forefront of using trade agreements to promote core environmental protections. Additional negotiating objectives were incorporated into the Bipartisan Comprehensive Trade Priorities Act (TPA) (P.L. 114-26), enacted into law on June 29, 2015. Environmental provisions in the United States-Mexico-Canada Agreement (USMCA) were, in part, based on these negotiating objectives.

The GATT and the WTO

Mechanisms to address environmental protection have been a part of international trade agreements since the General Agreement on Tariffs and Trade (GATT) was signed in 1947. While the GATT does not contain affirmative environmental commitments, its Article XX lays out a number of general exceptions to its provisions—including exceptions for natural resources and protection of human, animal, or plant life, and public health—that could allow for environmental policy measures. Since its establishment in 1995, the World Trade Organization (WTO)—the successor to GATT—has addressed environmental issues through its dispute settlement system and through Doha Round negotiations concerning the relationship between existing WTO rules and international environmental treaties, known as "multilateral environmental agreements" (MEAs). There has been much focus on the use of GATT/WTO dispute settlement and there have been nine Article XX cases on environmental issues to date.

In addition to the WTO's Doha Round, WTO members are also negotiating the reduction or elimination of fisheries subsidies. A plurilateral group of WTO members engaged in negotiations to eliminate of tariffs on environmental goods, such as wind turbines or solar panels. However, these negotiations appear to be in limbo.

Environmental Provisions in U.S. FTAs

Although the WTO has played an important role in global environmental discussions, bilateral and regional FTAs have also addressed environmental policies. FTAs commonly include more detailed provisions than the WTO on trade-related issues, such as the environment. A brief evolution of these provisions is outlined below.

Current Key Environmental Provisions in U.S. FTAs

A party shall

- Not fail to effectively enforce its environmental laws in a manner affecting trade and investment.
- Not waive or derogate from environmental laws to promote trade or investment.
- Adhere to certain multilateral environmental agreements (MEAs).
- Develop mechanisms to enhance environmental performance.
- Retain the right to exercise the "reasonable "or "*bona fide*" exercise of discretion in enforcement.

Other provisions include

- Enforceable dispute settlement and consultations.
- Cooperation and trade capacity building.
- Environmental Affairs Council.

Source: CRS.

The North American Free Trade Agreement (NAFTA). The first U.S. bilateral FTAs—with Israel (1985) and Canada (1988)—did not contain environmental provisions. NAFTA (1994, with Canada and Mexico), however, included a list of MEAs whose provisions generally would supersede NAFTA in the event of conflict. President Clinton, fulfilling a campaign promise, further negotiated an environmental side agreement to NAFTA. The North American Agreement on Environmental Cooperation contained 10 objectives on environmental cooperation in matters affecting trade, technical assistance, and capacity building. It also included a dispute settlement arrangement distinct from NAFTA that could levy a monetary assessment, with the suspension of trade benefits as a last resort. Since NAFTA, all U.S. FTAs have included environmental provisions. The U.S. FTA with Jordan (2001) contained the first environmental provisions incorporated directly into the main text of the agreement, but with less rigorous dispute settlement provisions than more recent agreements.

FTAs Under the 2002 Trade Promotion Authority. The G.W. Bush Administration negotiated 11 FTAs with 16 countries under the five-year TPA put in place by the Trade Act of 2002. The environmental provisions in these agreements went beyond the U.S.-Jordan FTA in terms of scope, and included one enforceable provision: a party shall not fail to effectively enforce its environmental laws "in a manner affecting trade between the parties." Procedures for environmental disputes capped limits on monetary penalties at $15 million, with suspension of benefits as a last recourse. Other provisions included (a) commitments not to derogate from one's own environmental laws to encourage trade and investment; (b) extensive provisions for cooperation and capacity building; and (c) the creation of an Environment Affairs Council.

TPA-2015. TPA-2015 enhanced U.S. trade negotiating objectives on the environment from the 2002 TPA in several ways. It

- Mandated adherence to seven referenced MEAs and other MEAs to which both the United States and one or more other parties to the negotiations are full parties and agree to be included.
- Altered the non-derogation obligation for environmental laws from a "strive to" to a "shall" obligation.
- Required enforcement of all FTA environmental obligations under the same dispute settlement procedures as other provisions in the agreement.

TPA-2015 also prohibited the negotiation of obligations related to climate change in FTAs. TPA-2015 expired on July 1, 2021.

USMCA. The USMCA largely incorporated the trade negotiating objectives of TPA-15. USMCA was signed on November 30, 2018, after the Trump Administration launched negotiations in the spring of that year. Subsequent negotiations between Members of Congress and the Administration resulted in changes to the environmental and other provisions of the agreement and were added as a Protocol of Amendment (PA) to USMCA, which was signed by the three countries on December 10, 2019. Implementing legislation subsequently was enacted by Congress and signed by President Trump on January 29, 2020 (P.L. 116-113). USMCA replaced NAFTA on July 1, 2020. See CRS Report R44981, *The United States-Mexico-Canada Agreement (USMCA)*.

USMCA, in addition to the provisions in the text box above, includes

- A presumption that an environmental dispute affects trade and investment unless a respondent party can prove otherwise;
- Obligations to address illegal trade in flora and fauna;
- Prohibitions on the "most harmful" fisheries subsidies;
- Commitments on sustainable use of biodiversity, conservation, alien species, and management of forests and fisheries;
- Provisions on air quality and marine litter; and
- Promotion of trade in environmental goods and services.

Investment and ISDS

Investor-state dispute settlement (ISDS) provisions have long been a part of U.S. trade agreements. Such provisions provide a mechanism for investors to challenge policies that may violate the terms of a trade agreement. Many U.S. businesses and other stakeholders maintain that ISDS provides a neutral venue for the adjudication of basic rights and protections already afforded to investors under U.S. law. Other stakeholders argue that ISDS enables investors to target environmental laws and creates a chilling effect on the future use of environmental regulation. USMCA, eliminated ISDS provisions between the United States and Canada, and limited its use between the United States and Mexico, a major revision to NAFTA and a break with practice under past U.S. FTAs.

Issues for Congress

In considering future TPA legislation or future trade agreements, Congress may examine the use and application of environmental provisions in FTAs. Issues could include

- The impacts of increased trade and economic growth on both the national and the global environment;
- The effectiveness of including environmental provisions in FTAs as a means of protecting U.S. businesses and workers from perceived unfair competition;
- Whether USMCA is a template for future environment chapters in U.S. FTAs;
- The appropriateness of using FTAs as a vehicle for improving environmental practices in other countries or enforcing independently negotiated MEAs;
- The effectiveness of Environment Affairs Councils (and the Environmental Cooperation Agreement in USMCA) to provide technical assistance and capacity building, and to resolve or prevent disputes without recourse to dispute settlement; and
- The effectiveness of dispute settlement provisions to enforce environmental provisions in FTAs.

Richard K. Lattanzio, Specialist in Environmental Policy
Christopher A. Casey, Analyst in International Trade and Finance

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.