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ICTSD EPAs and Regionalism Series

Environmental Issues in Economic Partnership Agreements

Implications for Developing Countries

By Beatrice Chaytor
International Lawyers and Economists Against Poverty (ILEAP)

ICTSD
International Centre for Trade and Sustainable Development

Issue Paper No. 1

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ICTSD welcomes feedback and comments on this document. These can be forwarded directly to El Hadji Diouf: ediouf@ictsd.ch

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LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African Caribbean and Pacific Countries
CAFTA	Central America Free Trade Agreement
CARICOM	Caribbean Community
CARIFORUM	CARICOM countries plus the Dominican Republic
CEC	Commission for Environmental Co-operation
CEMAC	*Communauté Économique et Monétaire de l'Afrique Centrale*
C–EPA	CARIFORUM Economic Partnership Agreement
CITES	Convention on Trade in Endangered Species of Wild Fauna and Flora
COMESA	Common Market for Eastern and Southern Africa
CTE	World Trade Organization Committee on Trade and Environment
CTESS	Committee on Trade and Environment Special Session
DRC	Democratic Republic of the Congo
DR	Dominican Republic
EAC	East African Community
ECA	Environmental Co-operation Agreement
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEZ	Exclusive Economic Zone
EGS	Environmental Goods and Services
EPA	Economic Partnership Agreement
ER	Environmental Review
EU	European Union
FLEGT	Forest Law Enforcement, Governance and Trade
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
ILEAP	International Lawyers and Economists Against Poverty
MEA	Multilateral Environmental Agreement
MERCOSUR	Common Market between Argentina, Brazil, Paraguay and Uruguay *(Mercado Común del Sur)*
M&E	Monitoring and Evaluation
MOU	Memorandum of Understanding
NAAEC	North American Agreement on Environmental Co-operation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PAPED	Economic Partnership Agreement Development Programme
PPM	Process and Production Method
PRTR	Pollutant Release and Transfer Register
REC	Regional Economic Community
RTA	Regional Trade Agreement
SDS	Sustainable Development Strategy
SIA	Sustainability Impact Assessment
SIECA	Secretariat for Central American Economic Integration

SME	Small and Medium Enterprise
SPS	Sanitary and Phytosanitary Standards
TBT	Technical Barriers to Trade
TDCA	Trade Development and Co-operation Agreement
TRAC	Ten-year Review and Assessment Committee
UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization

FOREWORD

Regional trade agreements (RTA) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as World Trade Organization (WTO) member countries continue to pursue these agreements. Some 200-odd agreements have been notified to the WTO but their number may be actually higher, as some agreements are never notified to the multilateral bodies and many more are under negotiation. As a result, more and more trade is now covered by such preferential deals, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Many regional pacts contain obligations that go beyond existing multilateral commitments, and others deal with areas not yet included in the WTO, such as investment and competition policies, as well as labour and environment issues. Regional and bilateral agreements between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas by dismantling existing trade and investment barriers, an objective that figures prominently in East Asian countries' trade strategies.

Yet the effects of RTAs on the multilateral trading system are still unclear, as is their impact on trade and sustainable development. RTAs represent a departure from the basic non-discrimination principle of the WTO, and decrease the transparency of global trade rules, as traders are subject to multiple, sometime conflicting requirements. This is particularly the case in relation to rules of origin, which can be extremely complex and often vary in agreements concluded by the same countries. Also, the case that WTO-plus commitments enhance sustainable development is far from proven, and it is not readily apparent whether RTAs enhance trade rather than divert it.

However, developed and developing countries alike continue to engage in RTA negotiations, and this tendency seems to have been intensified recently due to the slow pace of progress in the multilateral trade negotiations of the Doha Round. Countries feel the pressure of competitive regional liberalisation and accelerate their searches for new markets. Thus, while most countries continue to formally declare their commitment to the multilateral trading system and to the successful conclusion of the Doha negotiations, for many bilateral deals are taking precedence. Some countries have concluded so many RTAs that their engagement at the multilateral levels is becoming little more than a theoretical proposition.

Thus, gaining a better understanding of the workings of RTAs and their impact on the multilateral trading system is a key concern of trade analysts and practitioners. Current WTO rules on regional agreements, mainly written in the late 1940s, do not seem well equipped to deal with today's web of RTAs. Economists dispute whether RTAs create or divert trade, and political scientists try to explain the resurgence of RTAs by a mix of economic, political and security considerations. In some cases, the fear of losing existing unilateral non-reciprocal trade preferences provides the rationale for launching RTA negotiations, as is the case of the Economic Partnership Agreement (EPA) negotiations between the European Union and its former colonies in Africa, the Caribbean and the Pacific (ACP). Many worry about the systemic impact of RTAs and dispute whether they should be considered "building blocks" to a stronger and freer international trading system or rather "stumbling blocks" that erode multilateral rules and disciplines.

There are many interpretations of the dynamic relationship between RTAs and the WTO. The fact remains, however, that RTAs are here to stay. If anything, they will continue to increase in number in the coming years. They are already an integral part of the international trade framework, and influence the behaviour of governments and traders. They co-exist with the multilateral trading system and impact it in manners that have yet to be fully understood. Regional rules often replicate

multilateral disciplines, but sometimes go beyond them by going deeper into some commitments, with implications for sustainable development that need to be highlighted. And it may well be that some regional disciplines might be able to find their way into the multilateral framework.

It is for these reasons that ICTSD has decided to initiate a research, dialogue and information programme whose main purpose is to contribute to filling in these knowledge gaps and gaining a better understanding of the evolving reality of RTAs and their interaction with the multilateral trading system.

This issue paper, titled "*Environmental Issues in Economic Partnership Agreements: Implications for Developing Countries*", and written by Mrs. Beatrice Dove-Edwin, is a contribution to that process. The paper exhaustively reviews all rules related to trade and environment in several of the already signed EPAs. The aim of the paper is to enable ACP countries to understand how trade policy related to the environment has been introduced in EPAs, and how those policies might impact sustainable development in ACP countries. The paper starts by presenting the current European approach on trade and environment in those agreements. More specifically, it addresses the current state of negotiations, analyses precise proposals made, and explores some of the implications of introducing environmental issues in the EPAs.

Some of the issues for ACPs examined by the paper include a discussion of the difficulties of managing and coordinating the various regional groupings in the negotiations, the potential complementarities and conflicts with other existing international agreements (multilateral environmental agreements and WTO agreements), the challenges related to the implementation of new environmental standards, and the settlement of disputes as well as the strengthening of environmental capacities.

The main conclusion of the paper is that the incorporation of environmental provisions within the EPAs may present some benefits to ACP countries. These include increased enforcement of environmental laws and the raising of domestic environmental standards. However, developing countries will have to seek ways to mitigate some risks and challenges associated with internal and regional coordination in negotiations, legal burdens of the negotiating process itself and the implementation of obligations as well as the establishment and maintenance of appropriate levels of environmental protection and institution building. ACP countries will need appropriate packages of technical assistance, capacity building, and environmental cooperation to meet this new environmental agenda in their trade agreements.

We hope that this paper, together with the others in this series on regional agreements, will clarify some of the many questions posed by RTAs, and help promote a better understanding of the workings of RTAs and how the deals interact with the multilateral trading system.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

Trade and environment debates have traditionally been mired in controversy, yet the discussion about the relationship between these two public policy areas continues. Recent years have seen the proliferation of bilateral and regional trade agreements with the inclusion of substantial provisions on environment. The countries leading this trend are mainly OECD (Organisation for Economic Co-operation and Development) countries. Proponents of the inclusion of environmental provisions within bilateral and regional trade agreements have emphasised the need to ensure policy synergy between these areas which may impact on each other both in positive and negative ways (the notion of "mutual supportiveness" between trade and environment measures). Pressure has come from consumers and environmental groups and the imperative to avoid "pollution havens" and a "race to the bottom" in environmental standards. As more regional trade agreements (RTAs) are concluded, new models are proposed to incorporate the interests of environmental protection without sacrificing the overall objective of free trade in these agreements. Environmental provisions in RTAs range from mere exception clauses, to general trade obligations, to full environmental chapters with provisions that are subject to dispute settlement.

Through the environmental provisions inserted into RTAs, the US, the EU and other OECD countries appear to be getting around the uncertainty of accommodating environmental considerations within the multilateral trading system. Developing countries have historically resisted the incorporation of environmental provisions in the World Trade Organization (WTO) agreements (basically because of the threat of trade sanctions). They fear that high environmental standards or strong enforcement mechanisms will be used to create new barriers to their exports to developed partner markets. This contrasts with their stance within RTAs, with some developing countries like Chile and Mexico demonstrating increasing ambition in the trade/environment interface within RTAs. However, the majority of developing countries continue to be wary of the incorporation of environmental provisions within bilateral and regional trade agreements.

The European Union has long been an advocate of reconciliation between trade and environment policies and, in that context, it seeks to align its global ambitions on environment with the regional trade agreements it has with a growing number of countries. This is the case for the Economic Partnership Agreements (EPAs) it is concluding with a number of African, Caribbean and Pacific (ACP) countries, and the trend is likely to continue in the RTAs it is negotiating with Central American and Andean countries. In each case, the approach towards incorporation of environmental provisions is different depending on the nature of the relationship the EU is seeking with the particular country or region. Nevertheless, consideration of the type of provisions contained in these RTAs, as well as the RTAs concluded between the US and various developing nations will be instructive for any region or country negotiating a trade agreement with the EU.

As the only EPA concluded and signed between the EU and an ACP country,[1] the CARIFORUM EPA (Caribbean Community plus the Dominican Republic) sets a high benchmark for other regions negotiating an EPA with the EU. It has a full environment chapter, which brings international standards into the domestic policy arena, with a hybrid of binding and non-binding measures including detailed procedures for dispute settlement. That said, the CARIFORUM–EPA (C–EPA) does not attempt to go beyond the existing models presented by the recent US free trade agreements where environment is placed on an equal footing with trade policies and measures. In the C–EPA, the mutual supportiveness objective is present but approached cautiously through more co-operative and positive measures. The same is true of the EU's trade agreements with other developing countries such as Chile, Mexico and the Mediterranean countries. All the interim EPAs forecast future detailed environmental provisions, which may or may not become full environment chapters. Yet, the EU is likely to insist on some broadly similar provisions in order to ensure consistency among the EPAs. For Andean and Central

American countries currently negotiating with the EU, there is likely to be a similar approach as that taken for Chile and Mexico. In each case, the EU's political and diplomatic relations will characterise the particular agreement for each country or region. That said, the EU will also consider existing RTAs between the US and similar groups of countries with which it is negotiating to determine levels and details of commitments. Where it is confident that those countries have taken on sufficiently detailed commitments, including stringent enforcement provisions, it does not seek the same kinds of commitments in its own RTA.

While there is a growing trend to include environmental provisions within RTAs, there are inherent challenges associated with negotiation and implementation of such provisions, not least those associated with lack of institutional and technical capacity among public and private sectors in developing countries. At the same time, negotiators and policy-makers will want to keep an eye on the substantive commitments made in the RTAs to ensure their synergy with multilateral and other regional or bilateral commitments. In particular, the adoption of international standards and the possible enforcement of those international standards within the domestic policy arena is a key challenge now presented to the CARIFORUM countries which needs careful consideration. African, Caribbean and Pacific developing countries may find that while their own national environmental legislation and implementation systems are in their infancy, they are negotiating fairly advanced environmental provisions within the EPAs.

Yet some benefits may flow from reconciling environmental issues with regional trade agreements, and developing country negotiators and policy-makers should seek to maximise the potential benefits that could be achieved from these policy relationships. They should seek to incorporate fairly detailed packages of technical assistance, capacity building and environmental co-operation measures in order to help their producers to make the necessary adjustments to meet the new environmental challenges presented by these regional trade agreements. In this way a more positive trade and environmental agenda may be possible that would include mechanisms to enhance market access while improving environmental performance in these countries. The C–EPA makes a start with this through its prioritisation of environmental goods and services and environmental technologies. Other regions could focus on specific natural resource or other sectors where there are export interests coupled with environmental management priorities. In this way, developing countries could get the best out of the increased incorporation of environmental provisions within trade agreements.

1. INTRODUCTION

Bilateral and regional trade agreements (RTAs)[2] have proliferated over the past decade, and even as they set out the basis for their respective Parties' trade relations, their provisions have increasingly included environmental ones. This trend has grown rapidly and stems from the recognition among countries that economic and environmental policies are interlinked and should take account of each other. The attempt to achieve mutual supportiveness of trade and environmental measures within international and regional trade agreements has therefore become more or less routine among the international community.[3] Having said that, the degree to which environmental issues are included in trade agreements is controversial. The debate pits free traders against environmental defenders, and usually concerns whether differing environmental standards between developed and developing countries create economic and social issues that should be addressed in trade agreements. Advocates of environmental provisions in RTAs highlight the strong correlation between trade and the environment. They fear an increase in environmental degradation if adequate safeguards are not included in the agreements. They argue that failure to include high environmental standards in such agreements will encourage developing countries to lower their standards in order to create a competitive advantage that would attract investment and lower prices of export goods.[4] Such groups have long maintained that the most effective way to increase environmental standards is to incorporate them into multilateral and regional trade agreements. The rationale is that in such agreements there is the opportunity to include trade sanctions that penalise violations in order to ensure effective enforcement of environmental commitments. Moreover, there is evidence to show that good environmental practices lead to less waste and improved economic performance.[5]

On the other hand, some caution that environmental provisions should not be included in trade agreements because their inclusion can create barriers to trade (TBT) thereby diminishing a developing nation's growth and its ability to acquire the economic resources necessary to improve environmental standards. Many developing countries argue that a country's sovereignty would be infringed if a trade agreement forced each Party to comply with (mostly) international environmental standards. Developing countries point to the historical development pattern of developed countries which, in their early stages of development, did not have to face such stringent environmental standards. They remain committed to trade liberalisation and enhanced environmental protection but they seek to ensure that any accommodation of environmental concerns within trade agreements is achieved in a balanced manner and that it takes account of their own environmental and developmental conditions. Developing country negotiators have been cautious about incorporating trade and environment at the multilateral level. Many are also wary of incorporating trade and environment in regional trade agreements for fear of prejudicing their multilateral positions.

The comparative method used in this study is a simple analysis of the various RTAs concluded by the European Union (EU) and the United States of America (US). By their very nature, comparative analyses contain a dialectical tension. On the one hand, the subjects of the comparison should have an element of similarity in order to make the analysis meaningful. On the other hand, comparative analysis is meaningless where there is total similarity between the objects of the study. In this respect, the EU and US RTAs being studied offer a good subject for comparison. On the one hand, the number of recent RTAs, the one full Economic Partnership Agreement (EPA) and the interim EPAs which have been concluded with the EU can be points of reference. They all face the same issue: how to reconcile trade and environmental protection policies, and they seek to address this problem through a mix of measures within the same instrument. On the other hand, because of important contextual, political and institutional differences, the nature of the provisions adopted by the US and EU RTAs

will differ, thereby providing a good basis for comparison. In this context, the use of the comparative method will have two main objectives. The first, and most significant, will be to better understand how the aim of mutual supportiveness between trade and environment measures is handled through the RTAs. What form does this "mutual supportiveness" take? To what extent do the RTAs provide examples of positive or negative trade instruments to address environmental protection concerns? The second is a policy objective: to consider to what extent the provisions found to address this objective are suitable for adoption by other EPAs and RTAs now being negotiated between the EU and various developing country groups.

The study is structured as follows: Section 2 examines and compares the scope and nature of environmental provisions in the CARIFORUM EPA and in interim EPAs. Section 3 analyses the EU's approach to environmental protection and the relationship to trade as it has been reflected in RTAs it has concluded with developing countries. Section 4 compares various types of environmental provisions concluded or being negotiated in EPAs with those negotiated under bilateral and regional treaties involving the US. Section 5 considers the implications for developing countries of negotiating various types of environmental provisions within EPAs and other RTAs. Section 6 assesses a number of benefits and challenges to implementing different types of environmental provisions in EPAs. Cross-cutting issues associated with environmental provisions in EPAs are considered in Section 7. Finally Section 8 draws some key policy conclusions and makes a number of recommendations for developing countries negotiating RTAs with the EU.

2. ENVIRONMENTAL PROVISIONS IN ECONOMIC PARTNERSHIP AGREEMENTS

As the first EPA to be concluded and signed, the economic partnership agreement between the CARIFORUM States and the European Union (C-EPA) was always going to be the benchmark against which other EPAs would be measured, so it is not surprising that countries continuing to negotiate with the EU will look to the C-EPA for the range of environmental provisions it contains in order to learn lessons from the negotiation of such measures.

2.1 Scope of Environmental Provisions

The environmental provisions in the C-EPA and the interim EPAs range from comprehensive ones involving a chapter on environmental issues (the C-EPA), to minimal ones limited to exception clauses, to the general trade provisions of the agreement (most interim EPAs).[6] Generally, the integration of environmental issues into the C-EPA follows the same broad standard of integrating environment in trade adopted by other RTAs negotiated in recent years. However, the balance between trade and environment objectives differs. This will be further developed and discussed in Section 4 of this study. The environment provisions in the interim EPAs are not fully developed and where environment has been introduced into the negotiating texts, the precise language has not yet been mutually agreed.[7] For this reason, the following discussion focuses primarily on the C-EPA environmental provisions to provide a backdrop to the comparisons in the following sections with selected RTAs concluded by the EU and US.

2.1.1 References to sustainable development

Sustainable development is the broad remit of all the EPAs with the EU, where it is reflected in the preamble and objectives as well as in the existing environmental provisions. This sets the tone for how the Parties may treat situations where trade and environment issues intersect. Thus in the C-EPA the issue of environment is not limited to trade; instead it is part of a broad-based, more co-operative approach covering a whole range of issues under the category of sustainable development. Under Part I which is titled "Trade Partnership for Sustainable Development", Article 3 recalls key articles from the Cotonou Agreement[8] in reaffirming the prime objective of sustainable development, which is "*to be applied and integrated at every level of [the Parties'] economic partnership*".[9] This objective is understood as a commitment that the implementation of the EPA should take fully into account, the "*human, cultural, economic, social, health and environmental best interests of [the Parties'] respective populations and of future generations*". In Article 3.3, the point is clearly made that the ultimate goal is "*sustainable development centred on the human person, who is the main beneficiary of development*". Thus the backdrop to C-EPA's Chapter 4 on environment is sustainable development. The same or similar words are used in the Pacific interim EPA[10] and the East African Community (EAC) interim EPA.[11] In the case of the Pacific, the eradication of poverty is linked to this overall objective.[12]

This general approach is reflected in most interim EPAs, where sustainable development references are contained in the preamble (recalling the Cotonou Agreement's objectives and provisions) and objectives of the agreements. Thus the references to environment or sustainable development in the Cotonou Agreement are more or less the minimum standards that will be applied in any EPA, and they will usually be recalled in the preamble or the provision on objectives in the EPA. The exception is the interim agreement between Côte d'Ivoire and the EU, which only mentions sustainable development by recalling the objectives of the Cotonou Agreement; the agreement does not itself contain sustainable development as a specific objective.[13] Instead, there are to be further negotiations to conclude specific provisions on sustainable development (rather than

environment) in a comprehensive EPA between the EU and West Africa.[14]

In the case of the interim EPA with Cameroon, there is a slim chapter on sustainable development.[15] Thus the all-encompassing objective reflected in the C–EPA is a similar theme in the interim EPA with Cameroon. In Article 60 of chapter 5, the EC and Cameroon recognise that sustainable development is an overall objective of the EPA. They agree to ensure that sustainability considerations are reflected in all the titles of the EPA. Although they also agree to draft specific chapters covering environmental and social issues, reference is made to a set of potential commitments on sustainable development, rather than on the environment.[16]

The EAC interim EPA does not spell out the precise scope of environmental issues; instead a marker is set down for future provisions on trade, environment and sustainable development in the *rendez-vous* clause.[17]

It is worth noting that there is no provision defining the terms "environment", "sustainable development" or "environmental law" in either the C–EPA or the interim EPA. It seems that the reference to the Cotonou Agreement implies that these terms are known to the Parties; where other issues are to be included in these terms, they are done through the environmental co-operation provision in the C–EPA or in other provisions in the interim EPAs.

Box 1: Articles Referring to the Environment in the Cotonou Agreement

Article 32: Environment and Natural Resources

1. Co-operation on environmental protection and sustainable utilisation and management of natural resources shall aim at:

a) mainstreaming environmental sustainability into all aspects of development co-operation and support programmes and projects implemented by the various actors;

b) building and/or strengthening the scientific and technical human and institutional capacity for environmental management for all environmental stakeholders;

c) supporting specific measures and schemes aimed at addressing critical sustainable management issues and also relating to current and future regional and international commitments concerning mineral and natural resources such as:

(i) tropical forests, water resources, coastal, marine and fisheries resources, wildlife, soils, biodiversity;

(ii) protection of fragile ecosystems (e.g. coral reef);

(iii) renewable energy sources notably solar energy and energy efficiency;

(iv) sustainable rural and urban development;

(v) desertification, drought and deforestation;

(vi) developing innovative solutions to urban environmental problems; and

(vii) promotion of sustainable tourism.

Box 1: Articles Referring to the Environment in the Cotonou Agreement *(continued)*

d) Taking into account issues relating to the transport and disposal of hazardous waste.

Article 49: Trade and Environment

1. 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 the international conventions and undertakings in this area and with due regard to their respective level of development. They agree that the special needs and requirements of ACP States should be taken into account in the design and implementation of environment measures.

2. Bearing in mind the Rio Principles and with a view to reinforcing the mutual supportiveness of trade and environment, the Parties agree to enhance their co-operation in this field. Co-operation shall in particular aim at the establishment of coherent national, regional and international policies, reinforcement of quality control of goods and services related to the environment, the improvement of environment-friendly production methods in relevant sectors.

Source: European Union, http://ec.europa.eu/comm/development/body/cotonou.

2.1.2 Natural resources and the environment

The scope of environmental issues under the C–EPA environment chapter appears to be rather broad and generic; pursuant to their commitment to sustainable development, the Parties in the C–EPA are "*resolved to conserve, protect and improve the environment*".[18] The reference to "*sustainable management of natural resources and the environment*" in Article 183 recalls environment and natural resources as cross-cutting and thematic issues in the Cotonou Agreement.[19] As noted in the previous section, such sustainable management principles are to be applied and integrated at every level of the partnership between the Parties.[20] Given that the partnership concerns trade, this is an attempt to mainstream environment into all the trade relations between the EU and the CARIFORUM States. This is underscored by the caveat that the "*development of international trade [is to be promoted] in such a way as to ensure sustainable and sound management of the environment*" found in Articles 183 and 185.

In the EAC interim EPA, the focus of environment issues is also on fisheries, which are a key economic resource for the EAC partner States.[21] The EC and the EAC thus "*agree to cooperate for the sustainable development and management of the fisheries sector in their mutual interests taking into account the economic, environmental and social impacts*".[22] Co-operation between the Parties is to include fisheries management and conservation issues, vessel management and post-harvest arrangements, financial and trade measures, development of fisheries and fisheries products, and marine aquaculture.[23] It is curious that the EC has insisted that fisheries partnership agreements should be negotiated on a bilateral level with individual ACP countries. Arguably, this undermines the stated objective in the Cotonou Agreement of using EPA negotiations to strengthen regional capacity in ACP countries. In addition, from a policy coherence standpoint, key economic policy sectors such as fisheries could be better addressed within a regional framework such as the EPA where inter-linkages can be easily referenced and supported.

Forest resources and production of forestry products are priorities for the Central African region and measures for their sustainable management are therefore reflected in the

Cameroon interim EPA. While there is no mention of environmental protection measures, the implication is there.[24] Article 50 provides that the Parties "*shall work together to facilitate trade between the EC Party and the Central Africa Party in timber and forest products which come from objectively verifiable legal sources and help to achieve sustainable development*". The reference to "*forest products which come from objectively verifiable legal sources*" implies that the term "sustainably managed forest products" may be too narrow in the context of illegal and unsustainably-managed timber. In the case of the C–EPA, there is no hesitation to refer to "timber and wood products, from legal and sustainable sources" in the context of the facilitation of trade between the Parties in natural resources.[25] Forest products are also included in the scope of environmental co-operation between the CARIFORUM and EU States.

The EU has recently concluded a sustainable timber trade agreement with the Democratic Republic of the Congo (DRC). The importance of trade in forest resources in the Central African region makes it very likely that the EPA for the Central African region (*Communauté Économique et Monétaire de l'Afrique Centrale – CEMAC*) will feature forest resources. While there is a trend towards bilateral agreements on natural resources, where some strategic issues are concerned (particularly the need to address illegal logging, forest depletion and other critical issues) cross-border shipments and sustainable management of forest resources suggest that it would be sensible to address such issues within a regional framework such as the EPA. This would serve to promote regional rather than bilateral standards for environmental management.

2.1.3 Other thematic areas

Environmental standards are not only promoted in Chapter 4 of the C–EPA, but also in other chapters, such as the chapter on agriculture and fisheries (Chapter 5 of Title I), the chapter on commercial presence (Chapter 2 of Title II) and Section 7 on tourism services (Chapter 5 of Title II). Public health issues are also covered by the commitments to environmental protection.[26]

Also included in the scope of environmental issues under the C–EPA are: environmental technologies, renewable and energy-efficient goods and services and eco-labelled goods.[27] From this list (which is not exhaustive), the implication is that the scope of environmental goods and services under the C–EPA is confined to industrial products, as in the WTO. However, the reference to "eco-labelled goods" may allow consideration of non-industrial products of export interest to developing countries such as the CARIFORUM States. The preface to the provision (Art. 183 (5)) specifies that trade will be facilitated in *"goods and services which the Parties consider to be beneficial to the environment"*. This provides additional scope to ensure that the environmental goods and services (EGS) trade comes from both Parties in the C–EPA.

Environmental issues can also be found in sanitary and phyto-sanitary (SPS) measures in the C–EPA and the interim EPAs with respect to the protection of animal and plant health.[28] In the EAC interim EPA, SPS measures are a topic for future negotiation.[29]

2.1.4 General exception clauses

All the EPAs contain a general exception clause exempting measures to protect or preserve human, plant and animal health from general trade obligation. Such a clause is a minimum environmental protection provision. In this respect, the provisions either repeat the language of the General Agreement on Tariffs and Trade (GATT) Article XX or they explicitly refer to, or incorporate, it. Article XX justifies measures *"relating to the conservation of exhaustible natural resources", or measures "necessary to protect human, animal, or plant life or health"*, subject to the requirements under the chapeau of Article XX, which provides that such measures may not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. Identical

provisions in this respect are contained in the C–EPA and the interim EPAs.[30] As will be seen in the later discussion of this type of provision, other RTAs mimic the language contained in the EC Treaty.[31]

2.2 Environmental Co-operation

In the C–EPA, the Parties agree to co-operate on a range of issues where trade and environment intersect such as: support for trade in environmental products and services, compliance with relevant product and other standards in the EU market, relevant labelling and accreditation schemes, trade in natural resources such as wood and timber from legal and sustainable sources, and public awareness and education programmes related to environmental goods and services.[32] Co-operation on trade in environmental goods and services appears to spring from the EU's focus on trade in environmentally-preferable goods and services identified in the EU mandate on environment.[33] But it also seems to be a priority for the CARIFORUM countries in a bid to potentially diversify their economies.

The agreement does not specify any precise procedures or a timeframe for co-operation on environment issues. Neither does it state how the co-operation mechanisms will be developed and implemented. The extent of reporting, the involvement of specific stakeholders, and the funds to be dedicated to such co-operation all remain undefined. In particular, the article on development co-operation (Article 8) in the C–EPA prioritises only enhancing technological research capabilities in CARIFORUM States so as to facilitate development of and compliance with internationally-recognised environmental standards.[34]

In this respect, an opportunity was missed to elaborate the substance of a provision that could be used as a demonstration of positive trade instruments to support environmental protection, and to promote mutual supportiveness of trade and environment measures. Moreover, the lack of detail has implications for implementation as will be discussed in Section 5 and this is an area which merits close attention by ACP negotiators.

In the section on tourism services within the C–EPA, standards for sustainable tourism are explicitly mentioned as an area for co-operation in Article 117. Article 43 in the chapter on agriculture and fisheries also refers to co-operation on environmentally-sound agricultural practices and organic and non-genetically modified foods.

As noted above, co-operation on fisheries management and conservation is included in the EAC interim EPA, and the Cameroon interim EPA includes co-operation on forest management. There are no co-operation provisions on environmental issues in either the Pacific interim EPA or the Côte d'Ivoire interim EPA.

2.3 Reference to International Environmental Agreements

Pursuant to their commitment to sustainable development, the Parties in the C–EPA are resolved to conserve, protect and improve the environment, *"including through their participation in regional and international environmental agreements"*.[35] Further, specific reference to international and regional conventions is made in Article 185, which should be read with Paragraph 4 of Article 183 which provides that the Parties commit *"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 levels of development."*

The Parties *"recognise the importance of establishing effective strategies and measures at the regional level"*, rather than ***commit to*** establishing such strategies and measures. Where there are no national or regional environmental standards, international standards are to be the benchmark for environmental protection measures.[36] This has the effect of potentially bringing international environmental obligations into the domestic law of CARIFORUM States, despite the softening of this commitment by the phrase *"where practical and appropriate."* When

taken together with the provision in Article 189 (3) that Parties are obliged to seek advice from experts about any obstacles that may prevent the *"effective implementation of environmental standards under multilateral environmental agreements"*, this underscores the national application of international standards.

The C–EPA does not specify the precise international environmental agreements in question, leaving the provision fairly general. The implication is that it refers back to Article 183 (4): so it will be the international standards contained in the international conventions to which the countries are party. Two issues are of note: the first is what happens where CARIFORUM States are not party to a particular international convention but the EU is? Do the international standards in that particular multilateral environmental agreement (MEA) apply to the C–EPA and therefore bind the CARIFORUM States? Second, it appears that the reference to international environmental standards came at the insistence of the CARIFORUM States, which had rejected the EU proposals to use certain regional standards which were already being applied in the EU Member States as the benchmarks and which exceeded international standards.[37] The concern by the CARIFORUM States was over the subjectivity of the proposed standards and the fear that the CARIFORUM States *"would not sufficiently appreciate the content of these standards in order to be able to comply with them".*[38] The CARIFORUM States were apparently confident of being able to comply with international standards stipulated in the EPA, since they had a tradition of already doing so.[39]

Where MEAs are referred to by name, their provisions will expressly bind the Parties. The Cameroon interim EPA specifically references the Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES): Article 53 stipulates that *"trade in timber and forest products shall be governed in line with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and any voluntary partnership agreements to which signatory Central African States might adhere individually or collectively with the European Community under the European Union's action plan on forest law enforcement, governance and trade (FLEGT)"*. The EAC interim EPA mentions the UN Convention on the Law of the Sea (UNCLOS) as well as regional and sub-regional fisheries agreements.[40] The Indian Ocean Tuna Commission is mentioned in the context of appropriate limits and target levels of sustainable catch in the exclusive economic zone (EEZ) of an EAC partner State.[41]

2.4 National Laws on Environment

Most recent RTAs provide that Parties should ensure "high levels" of environmental protection under their respective domestic laws, while allowing the Parties to set their own minimum standards; and the C–EPA is no exception. The interim EPAs concluded with the Pacific countries, East, West and Central African countries do not have this provision. The term "high level" is not precisely defined, nor referenced against any precise international level of environmental protection, despite the specific reference in the C–EPA that international standards should be applied in the absence of national or regional standards. The inference is that with references made to regional and international environmental agreements, Parties will choose to apply those same high levels of environmental protection in their domestic laws. As already noted, the C–EPA does not define the term "environmental law".

Thus, CARIFORUM States undertake *"to seek to ensure"* that their national environmental and public health laws and policies provide for and encourage high levels of environmental and public health protection and will strive to continue to improve such laws and policies.[42] This commitment is tempered by the qualification that the special needs and requirements of CARIFORUM States shall be taken into account

in the design and implementation of measures aimed at protecting environment and public health that affect trade between the Parties. Such measures should not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between them.[43]

On any issue covered by the chapter on environment in the C-EPA, the Parties may agree to seek advice from the relevant international bodies on best practice, the use of effective policy tools for addressing trade-related environmental challenges, and the identification of any obstacles that may prevent the effective implementation of environmental standards under relevant MEAs.[44]

2.4.1 Enforcement

There is no general mechanism in EPAs to enforce the "high levels" of environmental protection. So for instance, the C-EPA does not oblige the Parties to enforce their national environmental laws. The exception is foreign direct investment. The commitment not to lower levels of environmental protection in order to attract investment is strongly emphasised in the C-EPA. Subject to their sovereign right to regulate, in Article 188, the EU and CARIFORUM Parties *"**agree not to encourage** trade or foreign direct investment to enhance or maintain a competitive advantage by:*

(a) lowering the level of protection provided by domestic environmental and public health legislation;

(b) derogating from, or failing to apply such legislation" (emphasis added).

In paragraph 2 of Article 188, the EU and CARIFORUM States commit to not adopting or applying regional or national trade or investment-related legislation or other related administrative measures 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.

In the C-EPA investment chapter, Article 72 goes into further detail on enforcement and obliges the Parties to take the necessary measures to ensure that investors do not circumvent international environmental agreements to which the Parties are members. Article 73 furthermore declares that the Parties shall ensure that foreign direct investment is not encouraged by lowering domestic environmental or occupational health and safety legislation and standards. The provisions of Articles 72 and 73 are fully subject to the general dispute settlement procedures of the C-EPA and represent the only obligation regarding environmental issues which could theoretically lead to the suspension of trade concessions.[45]

2.5 Dispute Settlement

The general dispute settlement procedures in the C-EPA apply also to disputes on environmental issues,[46] although the environment chapter sets out a separate consultation process for resolution of environmental disputes.[47] The indication is that this process of consultation through the EU-CARIFORUM Consultative Committee should be exhausted first before recourse to the usual dispute settlement procedure in the C-EPA.[48]

The consultation process established by Article 189 of the C-EPA is not wholly comprehensive and should be taken together with the general dispute settlement provisions (Part III, Chapter 2). Consultations may be requested with the other Party on matters concerning the interpretation and application of the environment provisions.[49] These consultations should not take longer than three months and advice can be sought from relevant international bodies. In such a case, the period of consultation lasts six instead of three months. Where the matter has not been satisfactorily resolved through this initial consultative process, any Party may request that a Committee of Experts specifically provided for this purpose be convened to examine the matter in question.[50] The Committee of Experts shall comprise three members with specific expertise in environmental issues. Within three months of its composition, the Committee of

Experts, whose Chair should not be a national of either Party, should present a report to the Parties, and to the CARIFORUM–EC Consultative Committee. Parties may avail themselves of the main dispute settlement procedures under the C–EPA, only if after nine months they have failed to resolve a dispute by recourse to the processes laid out in Article 189.[51] The complaining Party may request the establishment of an arbitration panel.[52] Article 207 stipulates that the panel shall comprise at least two members with specific expertise on environmental issues. If a Party fails to notify any measure taken to comply with the arbitration panel ruling, Parties can adopt appropriate sanctions. The usual sanctions are fines, and although suspension of trade concessions is possible, they are ruled out for disputes concerning issues falling under the environment chapter.[53] This exclusion of trade sanctions as remedies for environmental disputes is a similar provision to that under the US–Chile free trade agreement (see Section 4).[54]

The separate remedy for environmental disputes, and the fact that trade sanctions are not allowed for environmental disputes, provides an insight into the lingering reservations concerning the trade and environment debate. In particular it shows that developing countries are still uncomfortable with the idea that negative trade instruments should be used to enforce environmental obligations. It further underlines that parity between trade and environment policies has not yet been achieved, and specifically not in the context of trade agreements. Indeed it throws into sharp relief the inherent limitations of trying to enforce environmental standards through trade agreements. The provisions on environment within EPAs still strongly favour negotiation and consultation over use of trade sanctions. The balance therefore remains tipped towards the use of more positive rather than negative trade instruments for the mutual benefit of environment and trade.

2.5.1 Access to justice

The C–EPA is similar to other RTAs concluded by the EU in that it does not contain rules or procedural safeguards concerning access to justice for the public in the event of violations of environmental laws.[55] The interim EPAs also contain no such provisions, and given the trend in the EU RTAs and the C–EPA, future environmental provisions within the full EPAs are unlikely to specify such clauses (see Section 4).

2.6 Lessons from the CARIFORUM–Economic Partnership Agreement and Interim Economic Partnership Agreements

Environmental issues are firmly established in the EPAs and despite the lack of substantive provisions in the interim EPAs, more detail will come in the full EPAs to be concluded with the Pacific, East, West and Central African countries. The Cotonou Agreement which already has significant references to sustainable development and environmental issues, reflects the minimum standard which these EPAs will maintain. It is likely that their environmental provisions will go further, but the degree to which they will seek to have a balance in the mutual supportiveness goal will differ from region to region. There is already a clear delineation among the interim EPAs where certain economic issues are prevalent, and competitiveness issues are paramount. For instance, the Pacific interim EPA has the bare minimum environmental provisions referencing Cotonou, whilst EAC and Central African interim EPAs build on Cotonou's standard with more substantive provisions on natural resources and an indication of more detailed provisions to follow in the full EPAs. The C–EPA is clearly an advance on Cotonou and will also be the benchmark for environmental provisions in EPAs. It contains a hybrid of binding and non-binding measures: international standards are clearly embraced, however, where enforcement of those standards are concerned, there is a hesitation in using traditional trade sanctions; instead, political dialogue and consultation are preferred, possibly as a recognition that non-

compliance with environmental standards is a result of lack of capacity or understanding of the obligations, rather than a deliberate neglect of responsibilities on environmental protection. Thus the mutual supportiveness objective is present but cautiously approached. Some differences are already apparent among the EPAs with a focus in the Central African interim EPA on a sustainable development rather than an environment chapter. Yet, the EU will likely insist on having some broadly similar provisions in order to ensure synergy among the EPAs. It also has clear objectives on environment and sustainable development in relation to RTAs as will be seen from the next section.

3. THE EUROPEAN UNION APPROACH TO TRADE AND ENVIRONMENT

The European Union believes that the trade and environment interface is a core element of sustainable development and that this is an objective which must be central to trade liberalisation negotiations, recalling that the preamble to the WTO Agreement underlines that the WTO should contribute to sustainable development. In particular the EU considers that environmental considerations should be reflected throughout any trade negotiations and especially that the WTO trade Round "*should maximise the potential for positive synergies between trade liberalisation, environmental protection and economic and social development.*"[56]

While the EU's preoccupations on trade and environment issues broadly cover trade and climate change, environmental impact assessments of EU trade agreements and disposal of non-hazardous wastes, its specific approach to the integration of environmental and trade policies can be categorised according to three main and interlinked themes: promoting sustainable development, improving environmental co-operation and pursuing an international trade and environment agenda.[57]

3.1 Promoting Sustainable Development

The EU Sustainable Development Strategy (SDS), adopted in 2001 and renewed in June 2006, sets out a single, coherent strategy on how the EU will seek to meet the challenges of sustainable development.[58] It recognises the need to move towards a more integrated approach to policy-making, reaffirms the need for global solidarity and recognises the importance of strengthening ties with partners outside the EU, including *"those rapidly developing countries which will have a significant impact on global sustainable development".*

The SDS includes seven key challenges, one of which is to actively promote sustainable development worldwide to ensure that the European Union's internal and external policies are consistent with global sustainable development and international commitments. Among the actions to achieve that objective: *"The Commission and Member States will increase efforts to make globalisation work for sustainable development by stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. In this context, the EU should be working together with its trading partners to improve environmental and social standards and should use the full potential of trade or co-operation agreements at regional or bilateral level to this end".*[59] The fact that all the RTAs concluded by the EU contain some reference to "sustainable development" illustrates the EU's bid to achieve this objective.

The promotion of sustainable development is factored into the EU's internal policy-making and is also integrated into the EU's external policies. The EU SDS stipulates that *"sustainable development concerns should be incorporated into all EU external policies, including the Common Foreign and Security Policy, inter alia by making it an objective of multilateral and bilateral development co-operation".*

3.2 Improving Environmental Co-operation

In order to avoid potential conflicts on environmental issues and recognising that many environmental issues are global,[60] the EU appears to pursue deeper environmental co-operation at bilateral, regional and international levels.

In particular, the approach towards climate change solutions clearly states the need for international co-operation in order to limit global warming to two percent.[61] Part of the action being advocated by the EU for this is to: foster renewable energy solutions (by increasing its share by 20 percent by 2020), foster energy efficiency (by reducing carbon dioxide emissions by 20 percent by 2020), globalise the carbon trade and factor environment in all its trade negotiations to address the competitiveness impact of the actions it will take within its own internal market.[62] Building

consensus around these actions helps the EU to pursue its global environmental agenda through its trade relations.

In its communication of November 2006, the Commission is adopting "Global Europe": to launch a set of negotiations on new free trade agreements. Environment is an essential part of these negotiations *"with a view to ensuring substantial commitments from both sides"*.[63] Possible market access and development assistance incentives will be used to prime these negotiations. Already the EU uses a number of instruments to push forward its trade and environment agenda. Under its GSP (Generalised System of Preferences) scheme, it offers additional trade preferences to countries undertaking to implement environmental (and labour) standards. During trade negotiations, sustainability impact assessments (SIAs) are used to assess the impact of trade measures on the environment. Each of these approaches is linked to specific funding and assistance.[64]

3.3 Pursuing an International Trade and Environment Agenda

The EU sees trade and environment as an important "horizontal theme" in international relations, and has taken an active role in all international discussions on trade and environment, particularly in the WTO. The EU's stated goal is to promote a high level of environmental protection and at the same time, ensure an open, equitable multilateral trade system.[65]

The development of global environmental policy has resulted in an increase in the use of trade measures for environmental purposes. In the EU's view, the extent to which trade measures for environmental purposes can be accommodated by the WTO rules remains to be clarified. For this reason it advocates a clearer trade-environment relationship which it insists can encourage the use of least trade-restrictive measures. In particular it has emphasised that the policy objectives it has outlined for addressing climate change in particular,[66] should be compatible with WTO rules.

The EU has therefore sought to build consensus around a range of issues touching on its core concerns about the mutual supportiveness of trade and environment measures. It has submitted a number of papers to the WTO setting out a package of ideas to feed into the current negotiations within the WTO Committee on Trade and Environment Special Session (CTESS) as to how the relationship between WTO rules and trade measures under MEAs can be clarified.[67]

Responding to concerns from developing countries about the possible market access impacts of increased use of environmental measures in trade agreements,[68] the EU has this to say: *"the answer to concerns about reduced market access is not to weaken such [environmental] standards, but rather to enable exporters to meet them"*.[69]

From this perspective therefore, the agenda on trade and environment should be organised in such a way as to meet every Party's trade interests (in particular those of developing countries) and to promote sustainable development. The EU declares that it *"understands developing countries' concerns and is ready to work and discuss on the basis that environmental requirements should be developed and applied in such a manner so as to minimise possible adverse effects on market access for developing countries, while still achieving the objectives of environmental policies"*.[70]

In this respect, under the negotiations in the CTESS on paragraph 31 of the Doha Declaration, the EU has made the following proposals:

- Open trade for environmental goods and services, i.e. no quota or tariffs on goods and services that contribute to combating climate change;
- Equal relationship between WTO rules and multilateral environmental agreements, to secure legal certainty that multilateral trade rules acknowledge environmental commitments;
- Observer status for MEAs' Secretariats in the WTO.

These approaches factor in the stance that the EU takes in its bilateral and regional trade negotiations. At the same time, the negotiations in the WTO are still ongoing and progress is slow. Many developing countries have reservations about using trade measures for environmental protection in the WTO; however, they appear to be ready to countenance such commitments in regional trade agreements as can be seen from the foregoing discussion on the C–EPA and that on other RTAs in the following section of this study. In the face of the continued stalled negotiations in the WTO, the EU is likely to press ahead with incorporation of environmental provisions within the RTAs it negotiates with developing countries. However, as will be seen from the discussion in Section 4, environmental provisions differ from region to region and there is no precise pattern with the EU approach.

4. NEGOTIATING ENVIRONMENTAL PROVISIONS IN ECONOMIC PARTNERSHIP AGREEMENTS

As integration of environmental provisions into the texts of bilateral and regional trade agreements has become fairly standard practice in recent years, a variety of models have been proposed and tested.[71] The preambles to the EPAs contain broad references to, or key statements on, environmental protection or sustainable development to set the stage for more concrete references in the body of the agreements. Some RTAs have detailed environmental provisions or a full chapter on environment, such as the C–EPA, while others include an environmental side agreement in addition to, or instead of, the chapter. One of the most well-known examples of the integration of environmental provisions into a free trade agreement is the North American Free Trade Agreement (NAFTA), which includes detailed, legally-binding environmental provisions and has, in addition, a side agreement on environmental co-operation.[72] All RTAs subsequently negotiated by the US include environmental considerations both in environmental chapters and in separate instruments, focusing mainly on environmental co-operation. This is true of the US–Chile Free Trade Agreement as well as the US–Singapore Free Trade Agreement.

Based on the trend in incorporating environmental issues in RTAs, some questions present themselves related to: the location of the environmental issues (should they be in the body of the agreement or in a side agreement?), the type of environmental commitments to be taken on (non-binding, binding or a hybrid), the references to international environmental standards that they contain, and to what extent the environmental commitments are enforceable and/or subject to dispute settlement. Institutional issues are also important since they foretell how the process of negotiation will ensue.

4.1 Treatment of Environmental Issues in Regional Trade Agreements

Provisions on environmental issues can be incorporated into trade agreements in different ways. Provisions in the body of the agreement tend to be clauses dealing with environmental co-operation between the Parties or a detailed chapter covering a broad range of environmental issues, including emission of pollutants, handling of toxic substances, protection of natural areas, or environmental goods and services.[73] This is the approach taken in the EPA between the CARIFORUM countries and the EU, where the chapter on environment details the relations between the two Parties on environmental issues. Regional trade agreements containing narrow environmental provisions usually limited to GATT Article XX style exception clauses to the general obligations on trade liberalisation can be found at the other end of the spectrum. All the interim EPAs between the African, Caribbean and Pacific States and the EU contain this kind of provision. In between these two extremes are the RTAs which contain broad co-operation clauses dealing with a narrow set of environmental issues. Such is the case for the association agreement between the EU and Chile (EU–Chile Free Trade Agreement (FTA)),[74] the Economic partnership agreement between the EU and Mexico (EU–Mexico FTA),[75] the collective agreements between the EU and the Mediterranean countries (Euro–Med Agreements),[76] and the Trade Development and Co-operation Agreement between the EU and South Africa (EU–South Africa TDCA).[77]

4.1.1 Types of environmental commitments

Most environmental provisions in the recent RTAs have been couched in "best endeavour" rather than prescriptive language, e.g. "seek to encourage" or "promote". The RTAs with the EU reflect this trend, and usually provide for broad co-operation activities on environmental issues. By contrast, since the NAFTA, the trade agreements with the US contain legally-binding environmental provisions. This can be seen in the US–Chile FTA, the US–CAFTA–DR (US – Central America Free Trade Agreement – Dominican Republic) and the US–Jordan FTA. They all provide

for obligations to effectively enforce domestic environmental laws and provide mechanisms to enforce this commitment, including dispute settlement and public submissions to the Commission Secretariats.[78]

In the RTAs involving the EU, the background to the environmental provisions depends on the relationship it has with the specific region or country. The stance taken by the EU appears to be a desire to deal with environmental issues in tandem with economic integration. This seems to be the approach taken with the Mediterranean countries. The EU's association agreements with the Mediterranean countries explicitly aim to bring peace, stability and security to the Mediterranean region and in that context *"recognise the importance of reconciling economic development with environmental protection"*. This approach contributes to the establishment of the strategic neighbourhood partnership the EU seeks with these countries.[79] There are ambitious goals to facilitate increased prosperity in these neighbouring States, given the regional effects that such prosperity will have in terms of stability, increased trade, reduced immigration pressure and other elements.[80] The focus of the EU's relations with the Mediterranean countries in the association agreements is therefore extremely broad; environmental issues are only a few of the many areas of co-operation under the new neighbourhood policy.[81] That said, such statements are important in signalling the intentions of the Parties, and provide an enabling legal framework within which more specific objectives on environmental protection can be realised.

Similarly, the approach taken towards political and economic relations with Mexico shapes the types of commitments found in the EU–Mexico FTA.[82] The focus of the agreement, which was the EU's first RTA foray into Latin America, is on political, economic and social ties, and sustainable development and environment issues appear to be ancillary to these broader objectives. Thus, as will be seen in the following sections, the commitments on environment in the Euro–Med Agreements, the EU–Mexico and EU–Chile FTAs are fairly loose and general.

4.2 Contents of Environmental Provisions

Given the range of relationships between trading partners, the potential range of environmental provisions that can be included in RTAs is fairly wide. These are reviewed below.

4.2.1 Declarations and statements on the environment

Key statements on the environment usually come in the preamble to the trade agreement. Here the Parties usually "recall", "consider" or "recognise" sustainable development or environmental principles.[83] In addition or alternatively they may "undertake" or "promote" environmental protection measures, laws and regulations.[84] It is worth noting that the same language used in the preamble to the US–Chile FTA is repeated again in sub-section 3 of Article 183 of the C–EPA, thereby providing it with more force in the C–EPA.[85] In addition, there may be further declarations on environmental principles and approaches inserted into the trade agreement. The EPAs predominantly use "sustainable development" rather than "environment", while other EU RTAs include some reference to the environment.

The US–Chile FTA specifically defines "environmental law", which excludes health and safety regulations and legislation on exploitation of natural resources.[86] This contrasts with agreements involving the EU, which include management of natural resources in the scope of environmental matters but, as already noted, provide no specific definition of "environmental law".[87]

In negotiating environmental provisions within RTAs, countries may look at precedents from other RTAs or at the environmental standards each country has committed to at regional and international levels. In this regard, the EU is likely to consider the commitments developing countries have included in their regional integration treaties, or in their bilateral or regional trade agreements with other OECD countries. In the case of the Andean and Central American countries, the EU may be guided by the fact that such countries already

have existing trade agreements with the US, which contain fairly advanced provisions on environmental issues. It may either seek to use those precedents or follow its own broad environmental or trade objectives in its relations with such countries.[88] In the case of the Andean and Central American countries, the EU's ambitions include the conclusion of a trade agreement which will reinforce political, social and economic stability, help to create conditions for reducing poverty, as well as ensure "*an appropriate balance between economic, social and environmental components in a sustainable development context*". It therefore has a level of comfort that such countries will be obliged to implement "high levels" of environmental protection, including enforcement of domestic environmental laws, thus there may be no need to include similar kinds of environmental provisions in its own trade agreement with the same countries. In the case of the CARIFORUM countries, only the Dominican Republic is part of the US–CAFTA–DR, thus a full environment chapter is deemed necessary.

Regional Economic Communities (RECs) such as MERCOSUR, *(Mercado Común del Sur)*, COMESA (Common Market for Eastern and Southern Africa) and ECOWAS (Economic Community of West African States) all have substantial environmental provisions in their trade agreements and the EU may point to this in pushing for environmental provisions in the forthcoming EPAs and RTAs. As already noted in Section 2, the Cotonou Agreement provides a minimum benchmark for environmental provisions in the EPAs.

4.2.2 Environmental co–operation

Some RTAs' main environmental provisions are clauses about co-operation on environment issues. The EU–South Africa TDCA, the EU–Mexico FTA and the EU–Chile FTA all have such provisions dealing with the environment and natural resources, but differ in the specific list of environmental issues for co-operation between the Parties. Some have agreed on broad co-operation, covering a wide range of issues, while others have adopted specific issues for their co-operation based on mutual interest. The RTAs also reflect differences in co-operation on purely technical environmental issues and co-operation on trade and environment issues.

The Euro–Med Agreements have the narrowest list of issues on which the Parties will co-operate: soil and water quality, the consequences of development (particularly industrial development), monitoring and preventing pollution of the sea.[89] Of this group of trade agreements, the EU–South Africa TDCA has the widest range of areas for co-operation, ranging from urban development and land use, to issues surrounding the reduction of greenhouse gas emissions. Fields range from the relationship between poverty and the environment in the EU–Chile FTA,[90] to stimulating the use of economic incentives to promote compliance in the EU–Mexico FTA.[91] The environmental issues appear to cover the traditional preoccupations, such as waste and chemical management, control of pollution, or management of river basins. The relationship with trade might be considered in the environmental impact of economic activities identified in the EU–Chile FTA or the consequences of industrial development noted in the Euro–Med (Morocco) Agreement. While the environmental objectives of their co-operation ventures are outlined in the Euro–Med Agreements[92] or the EU–South Africa TDCA,[93] the others are silent and merely list the areas for co-operation between the Parties.[94] Most of the areas identified for co-operation appear to have been chosen based on mutual interest between the Parties. Generally in RTAs involving the EU, the principles and areas for environmental co-operation are established in the agreements themselves as a cross-cutting theme, and cover a wide range of issues but without going into specific detail about funding or institutional arrangements for implementation.

In contrast, the US–Chile and US–CAFTA–DR go into detail about the implementation arrangements for co-operation, or mechanisms

for funding, reviewing the areas of co-operation in the future and monitoring and assessing the co-operation efforts. Indeed, as examined below, the US–CAFTA–DR is one of the few RTAs which sets out fairly detailed procedures, including institutional arrangements, for co-operation on a range of environmental issues between the Parties.

In the US–Chile FTA, detailed co-operation between the Parties on environmental issues is set out in a separate annexe and reference is made to a future "US–Chile Environmental Co-operation Agreement".[95] Co-operation is not just restricted to environmental co-operation within the context of the FTA but also extends to co-operation outside the agreement.[96] Specific projects are identified for environment co-operation between the Parties including: creation of a Pollutant Release and Transfer Register (PRTR), a reduction in methyl bromide emissions, an increase in the use of cleaner fuels, improving agricultural practices, improving wildlife protection and management and a reduction in mining pollution.[97] The Environmental Co-operation Agreement (ECA) will establish a formal institutional framework that will guide co-operation activities. It will establish procedures for work programmes which set priorities for co-operative activities, promote effective implementation of multilateral environmental agreements to which both countries are party, promote collection and publication of each Party's environmental regulations, indicators and enforcement activities, provide for regular consultations with the Environment Affairs Council and provide for consultation and review of the work programme on co-operative activities.[98]

One of the more innovative approaches to environmental co-operation between Parties in an RTA, can be found in the ECA signed in conjunction with the US–CAFTA–DR, which provides a comprehensive framework for environmental co-operation between the countries that builds on previous environmental capacity building in the region.[99] In the body of the RTA, in language reminiscent of the Rio Declaration provisions, the Parties *"underscore the importance of promoting all possible forms of co-operation and reaffirm that co-operation on environmental matters provides enhanced opportunities to advance common commitments to achieve sustainable development for the well-being of present and future generations"*.[100]

Priority areas for co-operation under the ECA include: reinforcing capacity to implement and enforce environmental laws, promoting implementation of obligations under certain multilateral environmental agreements such as CITES, improving conservation of natural resources and increasing transparency in their pricing and regulation, and promoting clean technologies and environmentally-friendly goods and services.[101] Going into further detail on this issue than other RTAs, funding mechanisms are established in the ECA.[102]

Environmental co-operation in RTAs typically spans not merely mutual efforts at environmental management, but can also cover technical assistance and exchange of information or capacity building. Information is a critical part of establishing comparable methodologies and common indicators for the effective monitoring and response to environmental problems.[103] The EPAs and other EU agreements with developing countries highlight such elements, emphasising the need to build and strengthen scientific, technical, human and institutional capacity for environmental management or the provision of *"technical assistance and capacity building, in particular to the public sector, in the implementation and enforcement of multilateral environmental agreements, including with respect to trade-related aspects"*.[104]

Provisions may be incorporated in RTAs which expand the approach to environmental co-operation, or provide elements to ensure that co-operation does not remain a "best endeavour" element.[105] These may include obligations on public participation and access to information on ongoing co-operation efforts and on environmental effects (see Section 4.3 below).

4.2.3 Environmental laws and standards

While the C–EPA contains provisions linking domestic environmental performance with standards in international environmental agreements, the EU–Chile FTA, the EU–South Africa TDCA, the EU–Mexico FTA and the Euro–Med (Morocco) Agreement make no reference to multilateral environmental agreements.

On the other hand, the US–Chile FTA not only makes reference to MEAs, but also refers to the negotiations under Article 31 (i) of the Doha Ministerial Declaration on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.[106] The Parties are to *"consult on the extent to which the outcome of the negotiations applies to [the FTA]"*. The US–CAFTA–DR also recognises the importance of MEAs and the Parties shall continue to seek means to enhance the mutual supportiveness of both multilateral environmental agreements and trade agreements to which they are all party.[107] Negotiations on MEAs within the WTO do not go as far as the US–Chile FTA. Parties *"may consult, as appropriate, with respect to ongoing negotiations in the WTO regarding multilateral environmental agreements".*[108]

Differences among countries' environmental standards can be perceived as leading to unfair competitive advantages. Thus environmental standards should be maintained and enforced. In effect the ultimate aim is to achieve a level competitive playing field between the Parties as regards environmental standards. All the trade agreements involving the US have such provisions although, in some instances, the agreements with the EU contain stronger language. For instance, the provision in US–Chile and US–CAFTA–DR only calls for Parties to *"recognise that it is inappropriate"* to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. The Parties are to then *"strive to ensure"* that they do not waive or otherwise digress from such laws in such a way as to weaken or reduce the protections afforded in the environmental laws.[109] In the C–EPA, the language is much stronger: the Parties *"agree not to encourage"* trade or foreign direct investment to enhance or maintain a competitive advantage.[110]

In addition to provisions addressing environmental standards, the US agreements incorporate language on voluntary instruments and mechanisms that can contribute to enhancing the environmental performance of the Parties. For instance, US–CAFTA–DR contains a detailed list of complementary or voluntary mechanisms to enhance environmental performance. In the C–EPA, voluntary and market-based instruments are included in the areas of co-operation between the CARIFORUM States and the EU.[111]

4.2.4 Enforcement and dispute settlement

Even the most perfect environmental laws will be of little use if they are not effectively enforced, therefore where an RTA contains binding obligations relating to the environment, it will also contain enforcement provisions. When negotiating trade agreements, developing country negotiators should examine carefully the kind of enforcement provisions that would be appropriate in each case. For instance, if the RTA provides a limited clause on environmental issues, it would be inappropriate for such provisions to be subject to formal detailed enforcement mechanisms.

The post-NAFTA US RTAs have all included trade-related enforcement of their environmental provisions, by incorporating a clause along these lines: *"A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction,* ***in a manner affecting trade between the Parties****, after the date of entry into force of this Agreement"* (emphasis added).[112] This type of provision is absent in the trade agreements with the EU. Instead, co-operation and consultation mechanisms appear as essential complements to the commitment not to lower environmental standards. As already discussed, this appears to be a more practical approach taken in the EU agreements. Developing countries should be mindful of this twin approach to environmental enforcement in their negotiations with the EU as such an

approach may be more in line with their capabilities on environmental protection.

The right to establish respective levels of domestic environmental protection and to modify environmental laws accordingly, while seeking to reach *"high levels of environmental protection and strive to improve those laws"* is common to the C–EPA and the recent FTAs involving the US but totally absent in the EU–Chile FTA.[113] This kind of specific statement about Parties' prerogative on levels of environmental protection and the accompanying pledge, is likely to find its way into more regional trade agreements.

In the US–Chile FTA, non-compliance with domestic environmental laws triggers dispute settlement measures, as does a Party's failure to effectively enforce its domestic environmental laws.[114] However, where a Party has used reasonable discretion or has made a *bona fide* decision to allocate resources to enforcement, this will not constitute non-compliance. Moreover, each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory and compliance matters, and to make decisions regarding the allocation of resources to enforcement for environmental matters. Paragraph 3 of Article 19.2 then cautions that: *"Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party"*. The same provisions can be found in the US–CAFTA–DR.[115] This type of provision appears to be a safeguard of territorial sovereignty.

Formal dispute settlement procedures are common to all the RTAs, but like the C–EPA, in US–Chile and US–CAFTA–DR, detailed procedures for resolution of environmental disputes are laid out, starting with consultations.[116] There are no special environmental dispute provisions in the EU–Chile FTA or the Euro–Med Agreements. Thus the general dispute settlement provisions will apply. In the US–Chile FTA, there is an express warning: neither Party may use the normal dispute settlement procedures in the FTA without having first attempted to resolve the dispute through the environmental consultation process established by Article 19.6.[117] The US–Chile FTA and the US–CAFTA–DR are among the few trade agreements which stipulate that failure to effectively enforce domestic environmental laws will trigger dispute settlement proceedings. The C–EPA did not follow this model and it is unlikely that the EU would push for this kind of provision in the agreements it is negotiating with groups of developing countries.

For the US–Chile FTA, if the dispute concerns a Party's failure to effectively enforce its domestic environmental laws, and it remains unresolved after consultations, it is then dealt with under the Chapter 22 dispute settlement provisions. Either Party can make a written request for consultations through the provision of specific and sufficient information.[118] Where consultations do not resolve the matter, the Environment Council may be convened.[119] In the case of issues not involving non-enforcement of domestic environmental law, this is the final stage of dispute settlement. In cases involving a failure to effectively enforce domestic environmental laws, where consultations have not resolved the matter, within sixty days of an initial request for consultations, the complaining Party can invoke the provisions of Chapter 22 dispute settlement.[120] In such cases, the complaining Party should first use either consultations under Article 22.4 or a meeting of the Commission under Article 22.5 before it can use the other dispute settlement provisions of Chapter 22.[121] The last resort for resolving disputes after consultations under Article 22.4 is an arbitration panel, for which panellists are chosen from the "Environment Roster". The arbitration panel must deliver an initial report within 120 days of being established. Monetary fines are part of the sanctions available to the panel; however, it cannot impose a fine greater than USD 15 million. The Party found to be in breach of its obligations pays the fine into a fund which must be used for environmental programmes.[122] Suspension of trade concessions in disputes involving failure to effectively enforce domestic environmental laws is intended as a penalty of last resort and is not routinely encouraged. It is to be used only after a Party fails to pay the fine determined by the arbitration panel and

no other alternative is available that is less harmful to the Agreement's goal of eliminating trade barriers.[123] Similar provisions exist in the US–CAFTA–DR.[124]

4.2.5 Environmental exceptions

The recognition of countries' right to take action necessary to protect the environment is a theme that runs through RTAs involving both the EU (including the EPAs) and the US, and is likely to continue to be incorporated into future RTAs. The clauses which have been used in most RTAs, including all the interim EPAs, are standard phrases drawn from the language of GATT Article XX or from Article 30 of the Treaty Establishing the European Community, last updated through the 1998 Amsterdam Treaty (hereafter referred to as "EC Treaty")[125] with only a slight amendment in the wording depending on the particular trade agreement.

The text of Article 30 of the EC Treaty differs from that of GATT Article XX in that it requires that exceptions be "justified" on specified grounds; such terms are not found in Article XX of GATT. However, Article 30 includes language similar to that used in the chapeau of Article XX: the admonition that such measures should not be discriminatory or disguised restrictions on trade. In contrast with Article XX, Article 30 does not contain a specific exception relating to the conservation of natural resources. However, it does include an exception relating to health and, additionally, to "public policy" (among others).

Reference to the conservation of exhaustible natural resources found in the EU–Chile FTA, EU–South Africa TDCA and other RTAs which follow the language of Article XX, is absent from the general exception clause in the Euro–Med agreements; they follow the language in the EC treaty.[126] Some RTAs specifically incorporate GATT Article XX wholesale and make it part of the agreement, as has been done by US–Chile FTA, US–CAFTA–DR and other FTAs involving the US. Both the general exception clauses used in the US–Chile FTA and the US–CAFTA–DR contain further provisions setting out what the Parties understand by the measures contained in GATT Article XX (b) and (g).[127] Such provisions have not been thought to be necessary for inclusion in the EPAs.

4.3 Public Participation

The issue of public participation in environmental decision-making and policy-making has become significant in the last several years, especially as the relationship between trade and environment has become increasingly controversial. The rationale for consultative and participatory processes in trade negotiations is that they may enhance the quality of content and implementation of the RTAs by facilitating the input of information and expertise.[128] Public participation is also seen as vital in building public and political support for the RTA. Some governments allow for participation of the public through consultative processes, in negotiation and implementation of RTAs, as well as through *ex-ante* and *ex-post* environmental impact assessments. For instance, the EU uses sustainability impact assessments as tools for public comment and consultation around trade agreements so that civil society organisations can directly input into the preparation of these assessments. This practice has not yet evolved into a strict legal obligation but is supported by the Communication on Impact Assessment issued by the EU Commission in 2002 which has the legal status of a policy guideline. It requires the Commission to execute environmental, economic and social impact studies for different types of major regulatory initiatives.[129] In the US, the framework for conducting Environmental Reviews (ERs) of trade agreements is provided by Executive Order 13141 "Environmental Review of Trade Agreements" (1999) and the Guidelines for Implementation of Executive Order 13141 (2000).[130]

Some mechanisms for consultation with experts on environmental issues may be warranted during the negotiations or implementation of the RTA. Detailed and wide-ranging pubic participation provisions are contained in the US–Chile FTA and US–CAFTA–DR. In the US–Chile FTA, the public is to be consulted in co-operative activities between the Parties, and in the design and implementation of work programmes for

such co-operation. In the US–CAFTA–DR, there are institutional arrangements for public participation in environmental planning and issues related to the environmental chapter.[131] In the C–EPA there is merely a reference to public and mutual consultations including consultations with the private sector.[132] In the EU–Chile FTA, the public is encouraged to keep the Parties informed about the implementation of the agreement and gather suggestions for its improvement.[133]

Public participation provisions can be used to improve environmental performance by the Parties. For instance, in the US–Chile FTA, an Environment Affairs Council is established to discuss implementation of the commitments in the environment chapter and to address environmental issues which the public considers significant.[134] The Council should provide space for public participation in the development of Council activities, including allowing the public to help create agendas for its meetings.[135] As has already been noted, the C–EPA contains a provision where the state Parties may seek advice from the relevant international bodies on best practice.[136] The inclusion of this kind of provision seeks to avoid the eventuality of non-performance of environmental obligations. The trade agreements with the EU take this sort of dispute avoidance approach in their tone and substance.

Public participation in dispute settlement procedures is also encouraged. First, there is a trend for experts to be consulted in the resolution of environmental disputes. For instance, the C–EPA, the US–Chile FTA and US–CAFTA–DR all establish rosters of environmental experts that can be called upon in settling environmental disputes.[137] This type of provision is useful and is likely to be repeated in some form in other RTAs and EPAs. Second, there are provisions on submissions by members of the public on issues regarding enforcement of the environmental provisions. In the US–Chile FTA and the US–CAFTA–DR, there is a commitment to provide for procedural safeguards to allow interested persons the right to pursue legal remedies for violations of domestic environmental law.[138] Such proceedings should be fair, equitable and open to the public.[139] Paragraph 3 of Article 17.7 specifically recognises the procedure laid down in the North American Agreement on Environmental Co-operation (NAAEC) for submissions from the public in the US to the NAAEC Commission, and avoids conflict with that process by providing that only members of the public from another Party in the agreement can file a submission with the secretariat in the case of violations of US law under the US–CAFTA–DR.[140] Appropriate and effective remedies or sanctions for violations of domestic environmental laws should be provided; these include fines, imprisonment, injunctions, closure of facilities and cost of clean-up.[141] It is interesting to note that the US–CAFTA–DR includes a clause providing that *"…nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a Party's judicial, quasi-judicial, or administrative tribunals have appropriately applied that Party's environmental laws."*[142]

Unlike most FTAs with the USA, neither the C–EPA nor the EU–Chile FTA provides space for such access to justice provisions where members of the public may bring an action against the State. However, the EU–Chile FTA does provide that panel hearings may be open to the public if both Parties agree (except for confidential business information). The Agreement also specifies that the Panel may receive *amicus curiae* submissions, unless the Parties agree otherwise.[143]

Table 1: Types of Environmental Provisions in Selected RTAs

Type of environmental provisions	EU-Chile FTA	C-EPA	EU-Mexico FTA	EU-South Africa TCDA	Euro-Med Agreements	US-Chile FTA	US-CAFTA-DR
Environment or sustainable development in preamble	Yes	Yes	Yes	Yes	No	Yes	Yes
Environment in RTA or environmental side agreement	RTA	RTA	RTA	RTA	RTA	Both	Both
Obligation to enforce domestic environmental law	No	No	No	No	No	Yes	Yes
Environmental standards	No	Yes	No	No	No	Yes	Yes
Environmental co-operation	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Relationship with MEAs	No	Yes	No	No	No	Yes	Yes
Consultations or exchange of information on environmental issues	No	Yes	No	Yes	No	Yes	Yes
Exceptions related to environmental protection	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Formal environmental dispute settlement mechanism	No	Yes	No	No	No	Yes	Yes
Public participation in environmental affairs	No	No	No	No	No	Yes	Yes

Source: OECD 2007.

4.4 Lessons from Incorporating Environmental Provisions in Regional Trade Agreements

From the discussion above, it is clear that environmental provisions in RTAs come in various forms and include a range of types of provisions depending on the relationship between the Parties and their objectives in entering into trade relations. Broad environmental co-operation provisions tend to predominate in the EU's trade relations and the C–EPA represents the first time that the EU has incorporated a whole chapter on environment within an RTA. In some cases, environmental issues were not part of the original agenda for trade, but have managed to find their way onto that agenda by necessity, because of concerns about intra-regional competition and the need for a level playing field. For instance, it is clear that in relation to trade agreements with Mexico, Chile and the Mediterranean countries, there were ongoing initiatives that were subsequently formalised or integrated as environmental provisions in the text of the trade agreement. In the case of the C–EPA, the EU is clearly starting from scratch in terms of balancing trade and environment provisions within a trade agreement with this group of countries, thus it has gone broader than the environmental provisions found in the Mexico or Chile trade agreements where there already were prior economic relations. With some regions like the Andes and Central America, the EU is likely to take account of the types of environmental provisions contained in the RTAs with other OECD countries and either take some comfort from the fact that the environmental provisions are enforced through those agreements or seek to use those environmental provisions as precedents for its own RTA with the region in question.

Developing countries now negotiating with the EU may wonder which approach will be followed by the EU. Will it continue the trend of broad environmental co-operation as it has done in the EU–Chile FTA or will it seek to incorporate specific environmental issues in a full chapter as has done in the C–EPA? Given the EU's policy approach towards the Andean Community and Central American countries, it is likely to pursue a broad co-operative approach towards environmental issues in a future agreement with these countries. For the African, Caribbean and Pacific countries, it is fairly certain that the EU will adopt the approach taken in the C–EPA to have a full chapter on environment with a hybrid of binding and non-binding provisions while adopting a softer approach (a mix of dialogue and consultation) to enforcement than the RTAs involving the US. The exception may be in the Central African region where the chapter emphasises sustainable development rather than purely environmental issues, however it is likely to be the same mix of binding and non-binding measures.

5. IMPLICATIONS OF ENVIRONMENTAL PROVISIONS IN ECONOMIC PARTNERSHIP AGREEMENTS

There are a number of implications related to incorporating various types of environmental provisions in EPAs. Some RTAs seek to be consistent with the trade and environment provisions in other international agreements such as MEAs. How is this relationship borne out in the particular RTA and other regional and international agreements, and how will the relationship be managed by policy-makers? In particular, how can any potential conflicts be managed and handled? These issues will be considered in this section.

5.1 Management and Coordination

As countries expand their regional and bilateral trade deals, and RTAs proliferate, developing countries in Africa, the Pacific and Latin America are faced with the increasingly complex problem of managing various processes of negotiation, different levels of environmental commitments, and implementing different types of environmental provisions under a range of RTAs to which they are party. This problem needs careful management. It will require developing countries to have in place some basic structures for coordination between trade and environment government institutions, as well as between government and private sector agents. It will also involve significant human financial and technical resources for negotiation and implementation of provisions which may have a multidisciplinary feature, particularly where scientific or technological issues are involved, for instance for SPS or environmental goods and services.

The process of negotiating regional trade agreements is just as important as the substance and therefore the mandate and responsibilities given to particular government departments will shape the outcome of the negotiations.[144] The incorporation of environmental provisions in EPAs or other RTAs may help along the required coordination between environment and trade officials, or it may focus the developing country partner on the required process for the implementation of its own environmental laws. In such a case, environmental co-operation could help to harness the resources and institutional platforms necessary to address shared environmental concerns between the trading partners; and in some cases, the trade agreement may help to provide the resources for such coordination. However, this becomes a circular process because the success of the environmental co-operation activities demands some initial level of institutional development within the developing country partner. Generally, coordination of environmental policies tends to work better within highly integrated groups such as the EU or NAFTA where the supporting institutional structures are present and functioning well.

Thus, at the very least, a basic level of institutional coordination between trade and environment ministries is required in developing countries in Africa, the Pacific and Latin America negotiating with the EU, first to ensure a successful and efficient negotiating process, and then to make sure that implementation proceeds as planned. The more complex the negotiation process, the more the institutional systems for managing and coordinating the process will need to be elaborate.

5.2 Implementing Environmental Provisions

Consideration also should be given to how the implementation process will progress once the provisions are given effect in the RTA. Will new laws and regulations need to be enacted or can existing laws be adequately amended for the purpose? Will new institutional frameworks be necessary? Are there any additional administrative burdens arising from the inclusion of environmental provisions within the RTA? All these are important conside-rations for developing country negotiators and policy-makers. In effect, the aim should be to ensure that environmental provisions

are workable and do not place additional burdens than are necessary for the particular developing country.

As has been seen, in the EU–South Africa TDCA, the Euro–Med Agreements, and to some extent the EU–Mexico FTA, the scope of environmental co-operation is left open in the agreements and may be determined during the implementation phase through discussions among environmental officials. In the Euro–Med agreements, the article on regional co-operation broadly identifies "environmental matters" as an area for the Parties to *"foster all activities which have a regional impact or involve third countries."*[145] The EU–South Africa TDCA provides that *"there will be dialogue on the identification of environmental priorities."*[146] In the EU–Mexico FTA, a future sectoral agreement on the environment and natural resources is forecast.[147]

Where specific priorities for co-operation are identified, activities are developed on the basis of mutual interest and needs, and the capability to meet those needs. This more general approach to environmental co-operation allows for an ongoing assessment of needs by the developing country partner. It may provide a strong basis for ongoing development and consolidation of relationships between the partner countries. At the same time, the failure of the agreements to identify more concrete projects and to create specific institutions to advance co-operation activities could prevent such comprehensive provisions from being implemented. Nevertheless, the provisions incorporated in these agreements implying common areas for required action, as part of the economic and trade links between the Parties, may already be defining the priorities for future co-operation, and thereby the process of implementation.

5.2.1 Fostering environmental co–operation through implementation

In trade agreements which broadly aim at regional integration (such as the EPAs), the co-dependence created by close economic and cultural ties, and, in the case of the Euro–Med partnerships, that created by geographical proximity, brings with it another dimension of environmental co-operation.[148] In such cases, the idea behind interlinking environmental co-operation and trade measures in the same agreement is that the economic growth that could result from such trade liberalisation needs to be sustainably managed, yet in many countries the necessary institutions and expertise to manage such growth are poorly developed. Environmental co-operation is therefore seen as a way of mitigating or addressing potential negative environmental impacts which may arise from the implementation of trade measures – impacts which may be shared where countries are more or less neighbours or have close migration ties. Here the importance of building on economic co-operation through social and environmental collaboration is a distinct strategy.[149] The EU–Chile agreement, for instance, refers to co-operation on the relationship between poverty and environment, environmental impact of economic activities, projects to reinforce environmental structures and policies, exchanges of information, environmental education and training, technical assistance, and joint regional research programmes. Similar areas for co-operation are identified in the C–EPA and in the EU–South Africa TDCA. In the case of the C–EPA, specific reference is made to environmental goods and services and environmentally-sound technologies.[150] In the case of the US–CAFTA–DR, reference to co-operation on *"developing and promoting environmentally beneficial goods and services"* is contained not in the body of the agreement but in its side agreement, because the environmental co-operation arrangements between the US and the Central American countries are so detailed.[151] Exactly what "developing and promoting" entails, is not spelled out, although it may involve product development, and therefore the issue of distinguishing between products based on their process and production methods may be the subject of discussion and negotiation between the CAFTA–DR States and the US.[152]

In the CAFTA–DR the outline of the institutional structures for co-operation and the details

of financing of such co-operation activities, provide a solid basis for implementation, in contrast to the open-ended approach to environmental co-operation adopted in the C–EPA, the EU–South Africa TDCA and others.

5.2.2 Institutional arrangements for implementation

Some level of institutional arrangement will be required in order to implement regional trade agreements. Some RTAs establish joint institutions with a mandate spelled out in the agreement, such as the EU–CARIFORUM Consultative Committee under the C–EPA. Alternatively, the Parties may establish a joint forum for regular meetings to discuss implementation issues arising from the agreement. Moreover, they may designate new or existing national institutions to supervise implementation at the domestic level. In the US–CAFTA–DR, the existing Secretariat for Central American Economic Integration (SIECA) has been given the responsibility of receiving public submissions by citizens from all the Parties, except US citizens who should bring submissions before the Commission for Environmental Co-operation (CEC) established under the NAAEC. The reporting lines and mechanisms to be followed by these institutions will also be important elements to consider by the Parties.

The agreements concluded by the EU do not entrust particular institutions with environmental co-operation, though the body overseeing the implementation of the Agreement – typically an Association Council or Co-operation Council – is also entitled to create sub-bodies to deal with specific issues.

5.3 Relationship with International Agreements

5.3.1 Multilateral environmental agreements

The relationship between trade rules and the provisions of MEAs has been one of the core issues in the trade and environment debate at the multilateral level, particularly the WTO Committee on Trade and Environment (CTE). As already noted, only the C–EPA makes specific reference to multilateral environmental agreements;[153] the interim EPAs contain no such references. The other RTAs involving the EU also do not contain specific references to MEAs, but may refer broadly to international environmental standards. In contrast, not only do the US–Chile FTA and the US–CAFTA–DR make specific reference to MEAs, but they also provide for possible accommodation of the outcome of negotiations in the WTO on the relationship between trade and environment. In the US–Chile FTA, Article 19.9 provides that the Parties *"shall consult on the extent to which the outcome of the negotiations [on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements] applies to this Agreement"*. In the US–CAFTA–DR, the Parties will consult on the ongoing negotiations in the WTO.[154]

Where environmental provisions have made mention of multilateral environmental agreements, the implication is that the RTA standards will attempt to ensure consistency with the trade and environment provisions in those MEAs or regional environmental agreements. The question arises as to how potential conflicts on trade and environment issues between those international commitments and the RTA will be handled.

None of the recent RTAs go as far as the NAFTA in providing a specific savings clause that would exempt MEA-related measures from the trade agreements' rules and obligations.[155] And it is unlikely that such a clause would find its way into the EPAs and other RTAs being negotiated by the EU with developing countries. It seems that there has been a deliberate choice to use the forum of the MEAs themselves to pursue improved environmental performance, demonstrating again the balance to be struck between environment and trade provisions in RTAs. Having said that, the effect of the reference to MEAs in the C–EPA is to bind the CARIFORUM States to international environmental standards, whether or not they are party to such MEAs. Both this and the provision in the C–EPA requiring Parties to seek advice about obstacles

to meeting environmental standards in MEAs is easily replicated in future EPAs and needs careful consideration by developing country negotiators and policy-makers.

5.3.2 High international standards versus domestic standards

The significance of the references to environmental laws and standards contained in recent RTAs, including the EPAs, lies in the implications for the levels of protection and the enforcement mechanisms applied. Reference to international standards or high standards in the context of domestic laws may lead to higher levels of protection than the domestic law prescribes in the developing country. This has implications for implementation and enforcement: developing countries may find that they are enforcing higher environmental standards through their laws than they have the human, technical or financial capacity to implement.[156]

5.3.3 WTO rules on sanitary and phytosanitary standards and technical barriers to trade

All the RTAs involving the EU include provisions relating to both sanitary and phytosanitary measures, and technical barriers to trade (TBT). These can have important environmental implications as many environment and health-related measures qualify as TBT or SPS measures. Regional trade agreements with the US and EU have extended the application of their general exception clauses relating to trade in goods to also cover the chapters or provisions on SPS and TBT. Such provisions are contained in the US–Chile FTA[157] and the US–CAFTA–DR.[158] These provisions recognise the Parties' rights to impose SPS and TBT measures subject to certain conditions. In addition, specific SPS and TBT provisions aim to facilitate the application of SPS and TBT rules under the WTO. Some provisions affirm WTO rules or pursue a common understanding of the existing WTO provisions. In effect, they rely on existing rights and obligations in the WTO's SPS and TBT agreements to also be applied in the RTA. This is the case for the EU–Chile FTA,[159] the EU–Mexico FTA[160] and to some extent the C–EPA.[161]

5.4 Enforcement of Domestic Environmental Laws

Both the US–Chile FTA and the US–CAFTA–DR contain a clear commitment by the Parties to *"effectively enforce"* their domestic environmental laws.[162] At the same time, they also recognise that Parties retain the right to exercise discretion in enforcement matters, and specifically with respect to investigatory, prosecutorial, regulatory and compliance matters, and to make decisions regarding the allocation of resources to enforcement.[163] As already noted, this provision is absent from the EU RTAs.

At a minimum, the signal to effectively enforce national environmental laws has the value of reflecting the importance that Parties to the RTA attach to environmental matters. For developing country Parties, entering into such commitments may constitute a challenge. However, it may also prove to be an opportunity to have a closer look at their own environmental regulation and enforcement systems, and enhance their effectiveness.[164] Of course, the right to exercise discretion could be abused and could thereby frustrate the obligation to effectively enforce environmental laws: a country could simply excuse itself by pointing to its priorities and limited resources to implement environmental provisions.[165] However, to reduce the burden of this provision, the US RTAs clarify that a Party is in compliance with the obligation to effectively enforce laws where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.[166]

Although these mechanisms have not been followed in the EU RTAs, they are nonetheless pioneering from the international environmental legal perspective in that they focus not on the State's compliance with international legal obligations, but rather on its enforcement of purely domestic law.[167] They are aimed at one or both of two basic objectives: to strengthen the environmental regulatory regime of the agreement's trading Parties and to level the playing field for competing industries by ensuring that, at a minimum, the environmental laws on the books are effectively enforced.[168] In effect,

the latter objective could have a beneficial effect on developing countries by increasing the chances that their environmental statutes are enforced. However, the EU RTAs have sought other means to ensure this objective; the focus is more on a co-operative than on a litigious approach to enforcement.

5.5 Settlement of Environmental Disputes

Most RTAs involving the EU subject their environmental provisions to the general dispute settlement procedures in the agreement by not providing specific processes for settlement of environmental disputes. However, the C–EPA and those RTAs involving the US, provide for a consultation process under which *"a Party may request consultations with the other Party regarding any matter arising under [the environment chapter]…the Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seek advice or assistance from any person or body they deem appropriate".*[169]

If the consultations fail to resolve the matter, Parties can generally go a step further and request that a specific body be convened to resolve the matter expeditiously. Dispute resolution can then take the form of consultations with governmental or outside experts, good offices, conciliation and mediation. In the event that the Parties fail to resolve the question at issue, they may initiate formal dispute settlement proceedings (the normal procedures applicable with respect to trade obligations). However, (at least for US RTAs), it is an option of last resort where there is an alleged failure by a Party to effectively enforce its own environmental laws (even then, it is only available where a defending Party has failed to pay the imposed fine). It is not available for alleged violations of other environmental obligations under the agreements, such as the obligation not to weaken environmental standards or to provide for minimal procedural guarantees. The clear signal is therefore that all issues arising under the environment chapter must be addressed under the special consultation process established by the chapter for this purpose.[170] As discussed in Section 4, the implication is that there is a delicate balance to be struck in the mutual supportiveness of trade and environment measures under the RTA – in other words, some enforcement can be achieved through co-operative approaches or with the use of more positive trade measures.

5.6 Strengthened Environmental Capacity

Civil, administrative or criminal enforcement of environmental laws requires, *inter alia*, strong institutions, trained judiciary, extensive financial resources and qualified personnel. However, in African, Pacific and Latin American countries, authorities are faced with limited resources and competing demands leading to limitations in their capacity to effectively enforce their laws.

Efforts in regional trade agreements to improve environmental management may therefore involve provisions aimed at building capacity for environmental management in RTA partners. In some instances, simply incorporating substantial environmental provisions in the RTA in itself increases domestic attention to improved environmental management. The OECD cites the example of Chile, which thoroughly overhauled and codified its environmental legislation during ongoing trade negotiations with Canada and the United States. Prior to that, its environmental legislation had been scattered among numerous pieces of legislation and regulations. The negotiations with the US and Canada involving the detailed environmental provisions provided the "external" impulse to make changes which may not have otherwise occurred, or might have occurred at a later stage.[171]

In other respects, technical assistance and capacity building may be aimed at sharing and exchanging information or strengthening institutions charged with environmental management responsibility. Most such efforts involve developed countries undertaking capacity-building efforts in less-developed partner countries, which are perceived to have critical gaps in this area. In particular, the environmental co-operation provisions in the RTAs usually outline the specific technical

assistance activities to be undertaken by the Parties.

It is often in the interest of the developed country partner in an RTA to assist the process to improve environmental management within the developing country partner. Often neighbours which share ecosystems need to ensure that unmanaged growth across the border does not get out of hand. The same rationale can extend beyond border relations, to include spillovers from global environmental damage caused by trading partners in such environmental policy areas as climate change, ozone depletion and biodiversity loss.[172] For example, the memorandum of understanding (MOU) on co-operation between the EU and Chile, signed in 2001, defines multi-annual guidelines for co-operation programmes for the period 2000–06. That MOU includes a "Programme of Integrated Management of Natural Resources", which highlights that the *"economic growth model of the country based on raw material export produced pressure on the natural resources, especially at the level of the non-renewables, which can endanger the viability of the various ecosystems in the future."* To address this problem, the MOU sets out various strategies and specifies the forms of technical and financial assistance to address the perceived problems.

This improved environmental capacity can be a distinct benefit for African, Caribbean and Pacific countries negotiating the full EPAs with the EU (see Section 6.1 below). They should therefore ensure that the environmental co-operation arrangements specify how capacity may be targeted and enhanced.

6. IMPLEMENTING ENVIRONMENTAL PROVISIONS IN ECONOMIC PARTNERSHIP AGREEMENTS: COSTS AND BENEFITS

Having negotiated substantive environmental provisions in a particular regional trade agreement, whether it takes the form of a dedicated chapter or a single article, developing countries need to be aware that such commitments may present a number of procedural and substantive benefits and challenges.

6.1 Benefits Arising from Environmental Provisions in Regional Trade Agreements

From a substantive point of view, the inclusion of provisions aimed at the mutual supportiveness of trade and environment may lead to a number of positive outcomes, including: increased enforcement of environmental laws, the raising of environmental standards, the establishment of environmental co-operation, and the enhancement of public participation in environmental matters. Other additional benefits may flow from such action.

One such additional benefit is improved coordination among trade and environment officials as well as increased interaction between government and civil society. Countries from the OECD have become accustomed to negotiating environmental provisions in RTAs, thus this type of negotiation does not present any challenges for negotiators from these countries and coordination between trade and environment bureaucrats usually happens seamlessly. However, in many developing countries the chief negotiators in a trade agreement come from the trade or foreign affairs ministry. As a result, due to a lack of inter-ministerial coordination, trade and environment policy-makers might find themselves co-operating on the same issue for the first time during negotiations of environmental provisions. Such collaboration could have a lasting effect, leading to improved coordination on other trade and environment issues at the regional or international level. Moreover, it may contribute greatly to developing capacity and understanding of trade and environment linkages for the relevant officials involved in the negotiations.

For some countries, the negotiation of an RTA that includes environmental commitments is a driver for reform, or the acceleration of internal processes. This may have the general effect of increasing the profile of trade and environment issues in the countries concerned. In Morocco, for example, the negotiation of the RTA with the US accelerated the adoption of several pieces of environmental legislation that had been pending for years. The case of Chile has already been cited earlier where numerous acts and regulations were codified into a single piece of environmental legislation in anticipation of the regional trade negotiations with the US and Canada.[173]

Another positive outcome may be enhanced regional cohesion in environmental matters. For Central American countries involved in the negotiations of the US–CAFTA–DR, the experience of working on common "regional" positions in preparation of the negotiations with the US, enhanced regional cohesion and facilitated discussions on environmental and trade issues among national experts.[174]

Environmental co-operation provisions in RTAs may also have positive economic impacts. Co-operation on environmental issues of regional concern, for example, might avert environmental damage that has tangible economic impacts such as loss of fisheries species in countries dependent on such resources, devastating soil erosion or desertification affecting agricultural productivity or livestock farming, or loss of wildlife that may impact on tourism and related revenues and local incomes.[175] Thus, improved environmental management through co-operation activities may have positive effects on some economic activities linked to the state of the environment and natural resources.

Capacity-building to improve environmental management can support domestic management of national environmental priorities as well as

regional environmental co-operation on issues of shared interest. Since increased efficiency and innovative processes are the bedrock of economic progress, some consider strong environmental regulation to be a driver for innovation and economic growth.[176] Thus, environmental co-operation that involves technology-sharing might also have economic benefits. Of course, it is important that such co-operation be specifically targeted in the RTA, as for instance in the C–EPA where environmental technologies are listed as an area for co-operation between the CARIFORUM States and the EU.

Curiously, the OECD study has not been able to distinguish successful environmental co-operation under an RTA from co-operation outside the framework of a trade agreement. Thus, although there appears to be a general sense that improved environmental management results from environmental provisions in regional trade agreements, there is no concrete evidence that such is the case.[177]

Overall, it may be difficult to draw general conclusions about the positive impacts of environmental provisions in RTAs. Clearly, more time and empirical evidence is needed to analyse the economic impacts of trade-related environmental provisions in these agreements. Such impacts will depend on a multitude of factors, including the characteristics of the countries involved, and the nature and level of ambition of the provisions in question, as well as the nature of environmental co-operation activities undertaken by the Parties.[178] In this respect, the sustainability impact assessments promoted by the EU may be useful tools for providing the empirical evidence necessary to demonstrate some aspects of this causal link.

7. CHALLENGES TO NEGOTIATING AND IMPLEMENTING ENVIRONMENTAL PROVISIONS

Countries engaged in negotiating several RTAs (such as Chile, Morocco, or the Central American countries) or participating in different co-operation programmes, need to make an effort to manage these negotiating processes and co-operation programmes efficiently. As already indicated in Section 5.1, a level of institutional coordination is therefore called for, which may be lacking in some small and least-developed countries. Usually trade or commerce ministries, or those dealing with foreign affairs, will be actively involved in the negotiation of RTAs. The extent to which the government institution with responsibility for environmental issues is involved in the negotiations depends on the level of awareness about environmental issues, the importance attached to them, the mandates given and the extent of inter-institutional coordination within the respective governments. In addition, liaison between governmental authorities and the private sector and business organisations will also determine the outcomes of the negotiation processes, particularly where the environmental provisions have implications for the national industries.

Some EPA processes have recognised this aspect of increased administrative burden on already overstretched bureaucrats and have sought to provide financial resources for management and coordination. In addition, funds are also earmarked for implementation of provisions. However, some *ex-ante* aspects of negotiating environmental provisions, such as planning and coordination among the government and private sector, and intra-governmental facilitation, may not be covered by such assistance which may be limited to delegation attendance at negotiation meetings.

Even environmental capacity-building efforts may face problems of coordination, both with existing capacity-building programmes outside the context of RTAs, such as official development assistance (ODA), and with RTA-driven capacity building carried out by international agencies or international non-governmental organisations (NGOs).

A strong legal and judicial framework is a fundamental feature and is key to the effective enforcement of environmental laws. Strengthening the legal and judicial environmental framework for implementation can therefore pose significant challenges to ACP countries since it requires sufficient human, financial and technical resources.

Establishing the appropriate level of environmental protection and related standards may pose challenges for both developing and least-developed countries. They not only have the challenge of establishing high environmental standards which may not have been on their statute books prior to the RTA, but they also face the formidable challenge of improving and maintaining their environmental frameworks.[179] They will also have to help their industry to adapt to new competitive environments wrought by the implementation of these high standards under domestic laws. This will be a particular challenge for economies dominated by small and medium enterprises (SMEs).

Moreover, access to technology required for meeting more stringent standards may require significant investments that SMEs or nascent local industries may find difficult to finance, particularly where there are problems with access to finance and capital. For this reason, there are fears that environmental provisions, particularly standard-related ones, impose excessive economic burdens on ACP countries, where SMEs predominate the economy. An appropriate package of technical assistance, capacity building and environmental co-operation measures will be needed to help such industries adjust to new operating and trading environments, and particularly to meet environmental challenges.

8. SYSTEMIC AND OVERARCHING ISSUES

Apart from the specific issues raised by the incorporation of environmental provisions within RTAs already dealt with in the foregoing discussion, there are some issues that cut across all negotiations of bilateral and regional trade agreements and may be considered by negotiators in continuing EPA and other RTA processes.

8.1 Policy Coherence and Synergy

One of the objectives of the move to ensure mutual supportiveness of trade and environmental policies is coherence and synergy between policies at national, regional and international levels. As already discussed, policy coherence at the inter-sectoral level is also an important consideration, especially in sectors such as fisheries where fisheries access agreements with the EU are being negotiated at the bilateral level while all other economic sectors fall under the EPA.[180] In addition, at the macro level, it will be important to ensure policy synergy between the environmental provisions of the WTO and the EPAs.

8.2 Financing

Some trade agreements specifically address financing of environmental commitments or co-operation efforts. For instance, the US–Chile FTA provides that financing for capacity-building activities determined by the Commission under the Environmental Affairs Council will be provided *"according to legislation and availability of resources in each party".*[181] Co-operation and capacity building for the Euro–Med agreements are financed and managed by the EU's traditional aid delivery bodies. This is also the case for the C–EPA, where European Development Fund (EDF) resources will be used and is likely to be the same for the EPAs being concluded this year. It will be important to determine the level of adequate funding for implementation of the environmental commitments in the agreement, which efforts may need ongoing funding to ensure compliance with obligations, and/or whether there is a need to establish a recurring budget for the environmental co-operation implied by the RTA.

The revised Cotonou Agreement contains preliminary conclusions on a multi-annual financial framework for co-operation, including a European commitment to maintain its aid effort to the ACP countries at a certain level, without prejudice to the eligibility of ACP countries to additional resources.[182] At the same time, the EU has announced that financial support will be available for the negotiation and implementation of future EPAs with the ACP countries. In the C–EPA, reference is made to the financial provisions of the Cotonou Agreement as well as the EDF and the general budget of the EU.[183] However, there are no specific figures registered for environmental co-operation or implementation. It would be incumbent on each ACP group to determine and outline which areas should receive financial support or technical assistance, particularly which environmental industries or sub-sectors should be assisted.

8.3 Monitoring and Evaluation

It is important to establish proper monitoring and evaluation (M&E) of the RTA to ensure that implementation is proceeding according to the intention of the Parties.[184] This helps to ensure that the objectives of the RTA are being achieved and provides a basis for updating and amending the agreement. Issues to consider in this respect include: whether the M&E will include all or merely selected aspects of the environmental provisions in the agreement, at what stage of implementation should M&E kick in, how frequently should M&E assessments be carried out, who should carry out the assessments, how should they be paid for and who should the reports be submitted to, should ex-post assessments be carried out, and if so, how should the results be fed into

the review of co-operation efforts, and in turn into the review of the RTA itself. So far, only the NAAEC has been subject to an *ex-post* M&E assessment.[185]

Among its many comprehensive features, the ECA, under the US–CAFTA–DR, includes provisions for establishing benchmarks to identify short, medium and long-term goals for improving environmental protection in the region. The ECA also provides for independent, outside monitoring of progress in meeting the benchmarks. Future co-operative projects will be set out in a work plan that will be developed by the Environmental Co-operation Commission established in the ECA. The Commission may also consider recommendations on appropriate capacity-building activities developed through the public submission process established under the US–CAFTA–DR.

Without greater efforts to assess past actions, and without informed benchmarking and indicators of success to guide future efforts, it will be difficult to assess the state of play in implementing regional trade agreements, much less to improve it. There is a clear need for objective measures of success. This sort of measurement is inherently difficult but, given the amount of resources currently devoted to trade-related environmental capacity-building efforts, best efforts would seem to be the minimum requirement.

8.4 Capacity Building

As already discussed above, capacity-building programmes are usually part of the package of assistance under environmental co-operation in RTAs, and are now common in EPAs. This springs from the mutual interest in ensuring that environmental standards are achieved and maintained. Despite the coordination challenges, such capacity building is likely to benefit ACP countries and may result in improved institutional structures, human and technical resources capabilities.

Paragraph 33 of the Doha Declaration recognises *"the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them".* African, Caribbean and Pacific countries could use this provision as a tool to seek further funding to support implementation of environmental provisions within their EPAs. Thus, capacity building is another area where these countries can make the environmental provisions in the EPA work for them.

In most cases, the procedure for defining a capacity-building programme begins with scoping exercises. This sort of demand-driven exercise is also typical of the US and EU approaches. In the US–CAFTA–DR negotiations, for example, each Central American country submitted a capacity-building report identifying its priorities.[186] The African, Caribbean and Pacific countries currently negotiating EPAs with the EU are conducting similar exercises. For instance, West African countries are defining their EPA Development Programme (PAPED). Substantial capacity building may be important in easing the tensions and building consensus among constituents, particularly the private sector, around difficult negotiating texts, and may assist in building support for the EPA.

8.5 Harmonisation of Environmental Standards

Harmonisation of environmental standards may be one way of avoiding the inequalities which may arise from the application of different environmental measures. It helps to create a level playing field and may seek to prevent a "race to the bottom" of weak environmental standards. Typically harmonisation of standards occurs where there is a move towards regional integration. Where the EPAs seek to promote and deepen regional integration, ACP countries could argue for increased harmonisation of environmental standards as a way of ensuring that there is a sustained attempt at gradual raising of standards at a level which is appropriate for their stage of development.[187] In such cases, gradual harmonisation could contribute to the implementation of international environmental standards at the same time as ensuring

enforcement of domestic environmental laws. Otherwise, the huge differences in environmental legislation, standards and compliance levels between the EU and the ACP countries, as well as the attendant costs of improving weak institutional and weak human resource capacity, may make harmonisation very difficult, or even impossible.

9. CONCLUSIONS AND RECOMMENDATIONS

Environmental provisions in RTAs run from bare minimum environmental exceptions to fully-fledged environmental chapters or environmental side agreements. They may contain binding or non-binding provisions backed by comprehensive dispute settlement provisions to resolve environmental disputes between the Parties to the agreement.

It is clear that environmental provisions will continue to be incorporated, to varying degrees of detail, into bilateral and regional trade agreements. This approach is seen as a strategic policy intervention by members of the OECD, particularly in the absence of substantive progress on this issue in the WTO. Some developing countries have accepted the inclusion of environmental provisions in RTAs while continuing to resist their incorporation into the WTO. Generally, among developing countries, there continues to be a sentiment that environmental requirements constitute barriers to trade. They emphasise the importance of ensuring that environmental requirements in RTAs are balanced, and point to the need for a "positive environmental agenda" which would help limit the potential conflicts between trade and environmental requirements. This includes coupling strong provisions – such as those aimed at enhancing environmental standards or ensuring enforcement of environmental laws – with co-operation mechanisms and support for capacity building.

A comparison of the EU and US approaches to incorporation of environmental provisions into RTAs demonstrates conceptually and substantively different approaches to the notion of mutual supportiveness of trade and environment measures. While the US RTAs effectively place trade and environmental issues and commitments on an equal footing, the EU's approach is more co-operative, political and diplomatic with trade and environment seen as mutually supportive but not quite equal.

Even as the EU focuses on broader sustainable development and co-operative approaches to its trade and environment relations with developing countries, it takes different approaches depending on the region or country in question. Wherever the EU is negotiating with a region or country which already has fairly stringent environmental commitments in an existing EPA (e.g. the US or Canada) it does not push for such stringent environmental provisions in its own FTA with that country or region. Free trade agreements with the Andean and Central American countries are therefore likely to be modelled on the looser co-operative approach of the EU–Chile FTA.

The general trend adopted by the EU to incorporating environmental provisions into EPAs is to reflect the environment provisions in the Cotonou Agreement. The C–EPA provides a further benchmark for the EU in its continuing negotiation with ACP countries; however, although it may incorporate a chapter on the environment in upcoming EPAs, the provisions are likely to differ in substance and procedure. What emerges is a general trend towards some sort of environmental provisions, ranging from environmental exceptions modelled on the GATT Article XX or the EC Treaty, to environmental co-operation and dispute settlement provisions. The extent to which environmental provisions are detailed will always depend on the economic and political relationship which the EU has with the country or region in question.

Incorporating environmental provisions within RTAs may present some benefits to developing countries, including increased enforcement of environmental laws and the raising of environmental standards. At the same time, developing countries should try to mitigate certain challenges associated with negotiating and implementing environmental provisions in RTAs including managing complex and different negotiating processes at the same time, lack of coordination between trade and environment

ministries, and added administrative and legal burdens. Moreover, the need to establish and maintain appropriate levels of environmental protection and related standards may pose particular challenges for public and private sector institutions in developing countries. Appropriate packages of technical assistance, capacity building and environmental co-operation measures will be needed to help countries adjust to meet new environmental challenges.

Recommendations

Developing countries (including African, Caribbean, Pacific, Andean and Central American countries) wishing to continue their negotiations with the EU should keep the following issues in mind:

- Place the negotiation of environmental provisions in the RTA within the broader context of their environmental protection priorities as well as their export interests. The identification of specific export interests should be based on sound economic analysis. Issues could include compliance with SPS and TBT requirements, environmental goods and services, and management of natural resources.

- Manage and coordinate the process of negotiation in order to ensure the intended outcome. This will entail coordination among government institutions as well as between the government and private sector (business community), and the government and civil society.

- Use *ex-ante* and *ex-post* environmental impact assessments as a tool for (a) ensuring that all potential environmental and sustainable development implications of the EPA are considered, and (b) allowing adequate stakeholder involvement into the design and implementation of the EPA.

- Ensure the incorporation of as much detail as possible in the RTA text on provisions for environmental co-operation priorities to secure effective implementation, including provisions on funding for such activities.

- Incorporate adequate provisions on technical assistance and capacity building targeted at improvements in environmental standards and strengthening of institutions for monitoring and enforcement of such standards. These could include financing of adjustment costs for SMEs to new environmental standards, access to new or existing technologies for improved environmental performance, financing for adaptation to new market access requirements, etc.

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ENDNOTES

1 As at the time of writing (May 2009).

2 In this study the term "regional trade agreements" and "RTAs" is used to refer in a generic sense to bilateral, regional and free trade agreements.

3 This objective is contained in numerous political statements including the 1992 Rio Declaration.

4 This argument has been used in the debate surrounding "pollution havens" and the discussion about the "race to the bottom".

5 See Von Weizsacker *et al* 1997.

6 See e.g. Article 42 of the interim EPA between the EU and Pacific Island States and Article 40 of the interim EPA between the East African Community and the EU.

7 Comment obtained from an official in the Directorate-General for Trade of the European Commission (DG Trade).

8 Partnership Agreement between the members of the African Caribbean and Pacific (ACP) States on the one part, and the European Community and its Member States on the other part (found at http://ec.europa.eu/comm/development/body/cotonou).

9 CARIFORUM EPA, Article 3.1.

10 Interim Agreement between Pacific States on the one part and the European Community on the other. Joint text initialled on 23rd November 2007 in Brussels (hereinafter "Pacific interim EPA").

11 Agreement establishing a framework for an Economic Partnership Agreement between the East African Community Partner States and the European Community and its Member States (hereinafter "EAC interim EPA"), Preamble, Article 2 (a).

12 Pacific interim EPA, Article 3 states that: *"the Parties reaffirm that the objective of sustainable development shall be an integral part of the provisions of this agreement, consistent with the overarching objectives and principles set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development".*

13 Stepping Stone Economic Partnership Agreement between Côte d'Ivoire on the one part and the European Community and its Member States on the other part (hereinafter "Côte d'Ivoire interim EPA").

14 Côte d'Ivoire interim EPA, Article 44.

15 Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Members States on the one part and the Central Africa Party on the other part (hereinafter "Cameroon interim EPA"), Title IV, Chapter 5, Sustainable Development.

16 There is however, indication that the commitments are likely to include environmental ones with the reference to *"international environmental standards"* as relating to those commitments. See Cameroon interim EPA, Article 60 (2) (b).

17 See EAC interim EPA, Article 37 (Areas for future negotiations). The EAC partner States and the EC have agreed to conclude a comprehensive EPA by 31st July 2009.

18 Ibid, Article 183 (3).

19 This is placed in the context of broader sustainable development principles by Article 183.1.

20 C–EPA, Article 183 (1).

21 A whole chapter (III) is dedicated to fisheries, and includes marine and inland fisheries and aquaculture development.

22 EAC interim EPA, Article 25 (2).

23 Ibid, Article 32 (1).

24 Côte d'Ivoire interim EPA, Articles 50ff.

25 C–EPA, Article 190 (2) (d).

26 Article 184 refers to *"domestic environmental and public health protection and …sustainable development priorities"* in the same context, thereby linking them to each other.

27 See Article 183.5. The Parties are resolved to make efforts to promote such trade.

28 E.g. C–EPA, chapter 7 (Articles 52–59) ; Côte d'Ivoire interim EPA, Title III, chapter 4 (Articles 36–43); Cameroon interim EPA, Chapter 4 (Articles 40–47); Pacific interim EPA, chapter 5 (Articles 33–41).

29 EAC interim EPA, Article 37 (c).

30 See C–EPA, Article 183; Pacific interim EPA, Article 42; EAC interim EPA, Article 40; Cameroon interim EPA, Article 89; Côte d'Ivoire interim EPA, Article 68.

31 See Section 4.2.5.

32 See C–EPA, Article 190.

33 See EU Sustainable Development Strategy

34 Article 8.1 (v).

35 C–EPA, Article 183.3.

36 Article 185.2.

37 This assertion comes from Audel Cunningham, Legal Advisor to the Caribbean Regional Negotiating Machinery, in Schukat 2008.

38 Schukat 2008

39 Ibid.

40 EAC interim EPA, Articles 28, 31 (1) (d);

41 Ibid, Article 32 (2).

42 Article 184.1.

43 Article 184.3.

44 C–EPA, Article 189.3.

45 See Section 4 for a comparison with RTAs involving the US on this issue.

46 See C–EPA, Article 203.1: *"This part shall apply to any dispute concerning the interpretation and application of this Agreement."*

47 See C–EPA Article 189.

48 Ibid, Article 204.

49 C–EPA, Article 189.4.

50 Ibid, Article 189.5.

51 C–EPA, Article 204. In such a case, the consultation process in Article 189 replaces that set out in Article 204.

52 C–EPA, Article 206. Parties could also opt for mediation under Article 205.

53 Ibid, Article 213.2: "…In cases involving a dispute under Chapter 4…of Title IV, appropriate measures shall not include the suspension of trade concessions under this Agreement…"

54 See US–Chile FTA, Article 22.16. Only if the defending Party fails to pay the fine can a suspension of tariff benefits be applied.

55 See Section 4 below for a comparison with RTAs involving the US.

56 See European Union website: www.ec.europa.eu/trade/issues/global/environment

57 Ibid.

58 European Union 2006 (Sustainable Development Strategy, hereinafter "EU SDS").

59 See EU SDS, p.21.

60 For instance, climate change or biodiversity loss.

61 See: "The EU Approach to Trade and Environment", presentation made at the OECD Regional Workshop on RTAs and the Environment, 19–20 June 2007 in Tokyo, Japan, available at www.oecd.org (hereinafter, "The EU Approach to Trade and Environment")

62 The EU Approach to Trade and Environment.

63 Ibid.

64 Ibid.

65 See EU SDS, p.5, available at: www.ec.europa.eu/trade/issues/global/environment

66 For instance, liberalise environmental goods and services, seek a global market for carbon emissions trading, increase sustainable trade in biofuels, foster trade co-operation to improve

energy efficiency, reverse deforestation through voluntary partnership agreements. See EU Approach to Trade and Environment, supra note 56.

67 See the range of EU submissions on this topic to the CTE Special Session at www.wto.org.

68 Particularly through the application of the precautionary principle and labelling schemes.

69 See EU DG Trade 2004.

70 Ibid.

71 See US–Chile, US–Singapore, US–Jordan, EU–Chile, EU–Med RTAs, all of which include differing levels of environmental provisions.

72 North American Free Trade Agreement, North American Agreement on Environmental Co-operation, Sept. 14, 1993., 32 ILM 1480 (1993).

73 Environment and Regional Trade Agreements, OECD 2007.

74 Agreement establishing an association between the European Community and its Member States on the one part and the Republic of Chile on the other part (hereinafter, "EU–Chile FTA")

75 Economic Partnership, Political Coordination and Co-operation Agreement between the European Community and its Member States on the one part, and the United Mexican States on the other part (hereinafter, "EU–Mexico FTA"), OJ L 276/45, 28.10.2000.

76 Euro–Mediterranean Agreement establishing an association between the European Community and its Member States on the one part and the Kingdom of Morocco on the other part (hereinafter "Euro–Med (Morocco)"), OJ L 70/2, 18.3.2000.

77 Agreement on Trade, Development and Co-operation between the European Community and its member states on the one part and the Republic of South Africa on the other part (hereinafter "EU–South Africa TDCA"), OJ, L311/3, 4.12.1999.

78 See e.g. US–Chile FTA; US–CAFTA–DR; US–Jordan FTA….

79 See EU–Morocco Action Plan, available at www.ec.europa.eu.

80 Ibid, p. 2. Cross border co-operation and shared responsibility for the establishment of an area of peace and stability, including crisis management and the prevention and resolution of conflicts in the region are key objectives.

81 This will include promotion of "measures to integrate environmental considerations into other policy sectors: industry, energy, transport, agriculture and regional policies". EU–Morocco Action Plan, p. 11.

82 Mexico is the EU's second largest trading partner (after MERCOSUR) in Latin America.

83 For instance, preamble to EU–Chile FTA.

84 See NAFTA, preamble: the Parties *"…undertake each of the preceding in a manner consistent with environmental protection and conservation… promote sustainable development; strengthen the development and enforcement of environmental laws and regulations".*

85 Supra, note 17.

86 Article 19.11 defines environmental law as *"any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:*

(a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas, in the party's territory."

87 Supra, Section 2.4.

88 Central America and Andean Community - Commission proposes negotiating directives for Association Agreements, Brussels 6 December 2006.

89 Euro–Med Agreement (Morocco), Article 48, Environment.

90 EU–Chile FTA, Article 28 (2). Co-operation on environment is the main environmental provision and is to extend to "the relationship between poverty and environment; the environmental impact of economic activities; environmental problems and land use management; projects to reinforce Chile's environmental structures and policies; exchanges of information, technology and experience in areas including environmental standards and models, training and education; environmental education and training to involve citizens more; and technical assistance and joint research programmes".

91 EU–Mexico, Article 34 (2).

92 Euro–Med (Morocco) Agreement Article 48 states that the aim of co-operation shall be to prevent deterioration of the environment, to improve the quality of the environment, to protect human health and to achieve rational use of natural resources for sustainable development.

93 EU–South Africa TDCA, Article 84.

94 E.g. C–EPA (Article 190), EU–Chile FTA (Article 28), EU–Mexico (Article 34).

95 See US–Chile FTA, Article 19.5 and Annex 19.3.

96 Ibid, Article 19.5 (1) (b).

97 US–Chile FTA, Annex 19.3.

98 US–Chile FTA, Annex 19.3 (2)

99 See Environmental Co-operation Agreement (February 18, 2005).

100 US–CAFTA–DR, Article 17.9 (1).

101 US–CAFTA–DR, Environmental Co-operation Agreement, Article V.

102 US–CAFTA–DR, ECA, Article VII.

103 The OECD has mapped a range of examples of environmental co-operation in RTAs. See OECD 2007

104 C–EPA, Article 190 (2) (c).

105 OECD 2007.

106 US–Chile FTA, Article 19.9.

107 US–CAFTA–DR, Article 17.12 (1).

108 Ibid, Article 17.12 (2).

109 US–Chile FTA, Article 19.2 (2); US–CAFTA–DR, Article 17.2 (2).

110 C–EPA, Article 188.

111 C–EPA, Article 190 (2) (b).

112 See US–Chile FTA, Article 19.2 (1).

113 US–Chile FTA, Article 19.1; US–CAFTA–DR, Article 17.1.

114 US–Chile FTA, Article 19.6 (8): "Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 19.2 (1) (a)."

115 US–CAFTA–DR, Article 17.2 (3); Article 17.3.

116 US–Chile FTA, Article 19.6; US–CAFTA–DR, Article 17.10.

117 US–Chile FTA, Article 19.6 (9).

118 Ibid, Article 19.6 (2).

119 The Environment Council, which must have members with expertise in environmental law, can use good offices, mediation or conciliation in order to resolve the dispute, as well as consult with governmental or outside experts.

120 US–Chile FTA, Article 19.6 (6); US–CAFTA–DR, Article 17.10 (6).

121 See US–Chile FTA, Article 19.6 (6); Articles 22.4; 22.5. The provision under the US–CAFTA–DR is similar: Article 17.10 (6).

122 Ibid, Article 22.16 (4).

123 Ibid. Article 22.16 (5). In the case of nullification or impairment of benefits a Party expects to gain under other areas covered by the agreement, the complaining Party may suspend benefits after the final report is received and the Parties fail to agree on appropriate compensation. See Article 22.15 (1), (2).

124 See US–CAFTA–DR, Articles 17.10, Articles 17.11, Article 20.17 (4).

125 Article 30 provides: "The provisions in Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on grounds of public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

126 See for instance, EU–Med (Morocco) Agreement, Article 28.

127 See e.g. US–Chile FTA, Article 23.1.

128 OECD 2007.

129 See http://www.trade-info.cec.eu.int.

130 See http://www.nepa.gov/nepa/regs/eos/eo13141.html (1999 Executive Order 13141); http://www.ustr.gov/ (2000 Guidelines).

131 US–CAFTA–DR, Article 17.6.

132 C–EPA, Article 187. There are, however, other more detailed provisions on public participation in the rest of the agreement.

133 EU–Chile FTA, Article 11.

134 US–Chile FTA, Article 19.3. (1).

135 Ibid, Article 19.3 (2).

136 C–EPA, Article 189 (3).

137 C–EPA, US–Chile FTA, US–CAFTA–DR….

138 US–Chile FTA, Article 19.8; US–CAFTA–DR, Article 17.7 (1): any person from either party to the agreement may file a submission (in writing) asserting that a Party is failing to effectively enforce its environmental laws.

139 US–CAFTA–DR, Article 20.11: *"[a] party that is not a disputing party on delivery of a written notice to the disputing parties, shall be entitled to attend the hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing parties in accordance with the Model Rules of Procedure. Those submissions shall be reflected in the final report of the panel".*

140 US–CAFTA–DR, Article 17.7 (3).

141 Ibid, Article 19.8 (1); US–CAFTA–DR, Article 17.3 (1).

142 US–CAFTA–DR, Article 17.3 (6).

143 EU–Chile FTA, Article

144 See the discussion in Section 6.2.

145 Euro–Med (Morocco) Agreement, Article 45.

146 EU–South Africa TDCA, Article 84 (2).

147 If deemed appropriate by the Parties. See EU–Mexico FTA, Article 34 (4).

148 OECD 2007.

149 OECD 2007.

150 See C–EPA, Articles 183 (5) and 190 (2) (e), (f).

151 See US–CAFTA–DR, Environmental Co-operation Agreement, Annexe 17.9 (h).

152 The issue of the consideration of process and production methods (PPMs) as a way of distinguishing between similar products has traditionally been very controversial in the WTO. See Jha *et al.* 1999; Mbirimi *et al* 2003.

153 The Parties are "*resolved to conserve, protect, and improve the environment, including through multilateral and regional environmental agreements to which they are parties"* (Article 183 (3)); and co-operation between the Parties extends to *"implementation and enforcement of multilateral environmental agreements, including with respect to trade-related aspects"* (Article 190 (2) (c)).

154 US–CAFTA–DR, Article 17.12 (2).

155 Article 104 of the NAFTA provides that in the case of inconsistency between its provisions and the specific trade obligations set out in certain multilateral and bilateral environmental agreements, such environmental obligations will prevail as long as the Party involved has chosen the least consistent among equally effective and reasonably available means of complying with such obligations.

156 This issue is similar to that discussed with reference to the C–EPA in Section 5.4.1 above.

157 See US–Chile FTA, Article 23.1 (General Exceptions).

158 See US–CAFTA–DR, Article 21.1 (1).

159 See EU–Chile FTA, Articles 24 and 89.

160 See EU–Mexico FTA, Articles 5, 18 and 21.

161 See C–EPA, Articles 54 and 55.

162 US–Chile FTA, Article 19.2; US–CAFTA–DR, Article 17.2.

163 Ibid.

164 OECD 2007.

165 Ibid.

166 See US–Chile FTA, Article 19.2 (1). The obligation to effectively enforce the Parties' environmental laws is often coupled with an obligation to provide for adequate procedural guarantees and with specific dispute-settlement mechanisms available to the Parties.

167 OECD 2007.

168 The OECD study has noted that the literature on the issue of competitive advantage through lowering standards has found that the lack of enforcement in many developing States is due more to a lack of capacity than to a strategic use of low standards to gain competitive advantage.

169 See US–Chile FTA, Article 19.6 (1), (2). See also C–EPA, Article 189 (2).

170 In this respect, only the US–Jordan FTA is an exception. It subjects all provisions in the FTA to the same consultation procedure and the same formal dispute resolution mechanism. That said, the commitments are phrased fairly loosely as "strive to" commitments which limits their enforceability.

171 OECD 2007.

172 OECD 2007.

173 See Section 5.6.

174 See Organisation of American States, Department of Sustainable Development, www.oas.org

175 For instance, any environmental co-operation provisions in the EPA with COMESA countries will have to include wildlife management objectives.

176 The so-called Porter hypothesis. See OECD 2007.

177 OECD 2007.

178 Ibid.

179 Ibid.

180 See Campling 2008

181 US–Chile FTA, Article 193.4 (5).

182 See European Union, http://ec.europa.eu/comm/development/body/cotonou

183 See C–EPA, Article 7.3, which notes that supporting the implementation of the agreement is one of the EU budget priorities.

184 See OECD 2007.

185 In 2004, an independent Ten-year Review and Assessment Committee (TRAC) was formed to review the NAAEC and provide an assessment of the programmes undertaken by the Commission for Environmental Co-operation (CEC).

186 Organisation of American States, www.oas.org

187 See the Revised ECOWAS Treaty in which Article 3 calls for "harmonisation and coordination of policies for the protection of the environment".

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