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Trade and Environment: Tracking Environmental Provisions in Regional Trading Agreements (RTAs) to Make Appropriate Indian Stance

Anshuman Gupta*

Abstract: Developing countries were generally not in favour of incorporating non-trade issues in trade policies- be it at a multilateral level under the World Trade Organization (WTO) or regional level under regional trade agreements. After the Seattle fiasco, the issue of trade and core labour standards was dropped and the trade and environment issue was truncated in the Doha round of WTO. Since WTO has been almost dysfunctional for a long time, there is a spurt of RTAs/FTAs, the world over. The developed countries are increasingly incorporating environmental issues in their FTAs with the developed and developing countries alike. The developing countries are also giving in for seeking market access in developed countries' economies. India, though originally not in favour of mixing trade and environmental policies, is also gradually changing its stance regarding including environmental provisions in its FTAs. However, it is still way behind the expectations of OECD countries. India is in the process of negotiating its FTAs with the EU, the UK and Canada. This paper critically analyses the recently concluded FTAs by the USA, Canada, EU and UK to ascertain their expectations concerning environmental provisions. It also studies the recently concluded FTAs by India and its evolution in regard to incorporating environmental provisions in FTAs and suggests the appropriate stance for India.

JEL Classification: F13, F15, F18

Keywords: World Trade Organization(WTO), Regional Trading Agreements, Developing Countries, Non-trade Issues, Environmental Provisions.

Introduction

After the Singapore ministerial declaration in the year 1996, the developing countries were generally not in favour of including core labour standards and environmental issues in the main agenda of negotiations under the World Trade Organization (WTO). So, there was stiff opposition especially to these issues in Seattle Meet from developing

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countries in general. Following the Seattle Meet fiasco in year 1999, the core labour standards and trade issues were removed from the agenda and the environment and trade concerns were significantly diluted in the Doha round, which started in 2001. However, the developed countries were insistent on introducing them in their international trade policies. By facing the road blockage in multilateral forum, they took the route of regional trade agreements (RTAs/ FTAs),¹ in spite of economists like Prof Jagdish Bhagwati negating the idea of mixing trade and environmental policies. The testimony is progressively more uses of environmental provisions in concluded FTAs by developed countries with developing and developed countries alike. Since WTO is largely dysfunctional or progressing at a snail pace, the developing countries are compelled to seek market access through these FTAs. Though WTO's preamble makes broad and generic reference to the environment and also recognises the importance of preserving and protecting the environment, it also acknowledges that it will be done in a manner consistent with members' needs and concerns at different levels of economic development.

Since most of the environmental agreements do not have an enforceability mechanism and hence environmental provisions in trade policies might be a viable option. WTO has dispute settlement body and many environment-related issues have been brought before it for resolution (Johnson, 2015). Likewise, many FTAs include dispute settlement mechanisms applicable to environmental provisions too. While it has the advantage in terms of increasing commitments to environmental agreements, it also has a disadvantage because it undermines the principle of common but differentiated responsibility (Jinnah and Morgera, 2013). Since developing countries are incapable of meeting environmental standards demanded by developed countries, these provisions can be used as green protectionism, a new non-tariff barrier. Moreover, it is also inconclusive whether including environmental provisions in FTAs produces the desirable results in improving various dimensions of the environment. The developing countries are diluting their positions, though gradually, in regards to including environmental provisions in their FTAs, especially with developed countries, over the years. India

is also not an exception in this regard. Its position has evolved over time. Indian FTA with South Korea signed in 2009 can be regarded as a watershed in this regard. Thereafter, India-Japan FTA signed in 2011 and the recently concluded FTA with UAE followed the same trends. However, India is still way behind the expectations of developed countries in regard to including environmental provisions in FTAs with them.

This paper attempts to map the gap between the expectations of developed countries and India's readiness to accede to environmental provisions in its FTAs. As it is in the process of negotiating its FTAs with the EU, Canada and UK, this paper will come out with some significant recommendations to prepare the appropriate stance of India in this regard.

Literature Review

There has been enough literature in regard to linkages between trade and the environment. However, not enough studies have been conducted showing the greening of FTAs/RTAs by introducing environmental provisions in these agreements and how these provisions have impacted the environment. Trade and environment are interrelated through many channels. Trade results in higher economic development via better allocation of resources, economies of scale, specialization and innovations on the premise of absolute/comparative advantage. It also leads to more demand for energy (especially fossil fuels) and other inputs, leading to the deterioration of the environment. However, International trade and investment do not only have negative impacts on environment, rather they have some positive influences as well, through the import of environmentally friendly technologies and compliance with better environmental standards (Frankel, 2008).

There are various channels through which international trade impacts environment. One prominent channel is through increased income resulting from resource allocative efficiency and specialisation. It is a scale effect. It is found and verified empirically that at the initial stage of economic evolution, there are more concerns about livelihoods and incomes. Governments give importance to economic development with less concern for environmental quality. However, after realizing a

threshold level of income, citizens of the country start assigning value to the quality environment. So quality environment being income elastic at higher level of income, is valued more at higher per capita income. At this stage of economic development, even the political forces favour this and it makes the main agenda of the political parties in a democratic setup. Noble laureate Prof. Simon Kuznets mapped this kind of relationship between income and environment and gave the famous inverted U-shaped Kuznets curve, which was empirically verified in many studies (Frankel, 2008). A study by Grossman and Krueger (1995) estimated \$5000–\$6000 per capita income as the turning point in Kuznets' relationship in the case of sulphur dioxide. The threshold point for suspended particulate matter is estimated at \$3300–\$9600 (Pugel, 2008). The increase in income leads to this so-called Kuznets' impact. However, it has been found in many studies that trade itself does not have an unfavourable influence on local pollutants such as sulphur dioxide (SO₂), which will come down after a threshold level of income irrespective of the level of international trade and investment. However, CO₂ (carbon dioxide) will be negatively impacted as a result of international trade (Frankel, 2008). Thus, the inverted U-shaped relationship is found in the case of local pollutants with level of income. They should be dealt with legislative and administrative measures at the local level. However, dealing with the global pollutants is an uphill task. The Global pollutants generally have a rather positive rising curve for a long time until there is an absolute decoupling between economic expansion and emission due to the complete structural shifting of the economy to services and clean industries(including renewable energy) from the dirty ones. However, it is a rare possibility and the rebound effect might also work against getting complete decoupling (Turner & Katris, 2019). Moreover, in spite of the relocation of dirty industries by developed countries to poor countries on account of the loose environmental regulations there, the developed countries' production footprints might get reduced but their consumption footprints are likely to increase through imports of dirty products. Tackling global pollutants needs some global solution. Global warming caused by increased level of GHGs (mainly CO₂) is one such

issue. The Paris Agreement, signed in the year 2015, is dealing with global warming. In the same context, the problem of the depletion of ozone was tackled through the Montreal Agreement.

The second channel is through the pollution heaven hypothesis, under which many countries specialise in dirty industries and export their products to countries specializing in clean industries or high valued services. It is a composition effect. This pattern of production and trade might come from differences in environmental regulations across countries. This difference in regulations might come because of two factors- one, demand for better environmental regulation as a result of an increase in income and two, the difference in the supply of environmental quality as a result of difference in population density (Frankel, 2008).

Trade also has a positive influence on the environment. It is achieved through importing environment-friendly technologies, and complying with better environmental standards and innovations.

The Race to bottom hypothesis may be another channel through which international trade impacts the environment adversely. As per this hypothesis, the countries, in pursuit of a competitive edge in terms of price in the overseas markets, compromise on environmental front by installing substandard technologies or machines. It, in turn, also encourages the competitor countries to emulate the same, leading to race to bottom. However, that trade leads to the race to bottom is not verified conclusively empirically.

Although the Marrakesh agreement establishing the WTO gives explicit references to environmental protection and sustainable development as its objectives, its primary function is trade liberalization(Johnson, 2015). WTO/GATT has been dealing with the issues of trade and environment and their linkages since year 1970, just before the Stockholm Conference on Human Environment. WTO has a separate ‘Committee on Trade and Environment ‘dealing with these issues to achieve sustainable development through international trade and investment with adequately taking care that environmental and trade policies are mutually supportive of each other and consistent with WTO. There is not any specific agreement on the environment under

WTO. However, it includes GATT Article XX and GATS Article XIV on general exceptions, where WTO members may be exempted from GATT and GATS rules with adequate safeguards. Paragraphs b and g of article XX are important to protect environment. It also has some mentions in agreements on Sanitary and Phytosanitary Measures (SPMs) and Technical Barriers to Trade (TBT). The idea behind these clauses is restricting parties from attempting to weaken environmental standards or hinder environmental protection while liberalizing trade. However, a country applying these trade-distorting environmental measures will have to prove that these measures are science-based and the absence of these measures would harm the environment. Because of strong resistance to have a specific agreement on the environment in WTO by the developing countries in general, the developed countries have started to insert strong environmental provisions in their respective FTAs. Since WTO is either standstill or progressing at snail pace in most of areas (though it concluded recently a landmark agreement on Fisheries Subsidies in MC12), the developing countries are forging FTAs with developed countries for market access and accepting strong environmental regulations. Once they accept environmental obligations in the FTAs, they would erode their resistance even in WTO negotiations (WTDR, 2015).

There are not many studies on environmental provisions in FTAs and their impact on environment. One study by Jinnah and Morgera (2013), while studying the EU- and the US- signed free trade agreements since the mid-2000s, found that environmental provisions in FTAs have progressively moved from environmental exemptions enshrined in GATT's article XX of WTO to references and commitments to multilateral environmental agreements (MEAs) and a full separate chapter on environment addressing enforcement and implementation issues. The EU approach in regard to enforcement and implementation has generally been cooperative, while the US approach being confrontational based on sanctions.

It is also inconclusive whether including environmental provisions in WTO and FTAs produces environmentally favourable outcomes. As per a survey conducted by OECD countries, the main objective of

incorporating environmental provisions in FTAs is to avoid a race to bottom spree by weakening environmental standards (George, 2014). The environment in many dimensions worsened in Mexico after joining NAFTA (Gallagher, 2004). However, some studies find a convergence of emission levels and overall reduction of emissions in country pairs that have included environmental provisions in their FTAs (Baghdadi *et al.*, 2013). A related study finds improvement in air quality (Martinez-Zarzoso & Quelati, 2016). One study concludes that FTAs having sanction provisions perform better on environmental dimensions (Bastiaens & Postnikov, 2015). Rose (2016) does not find any positive environmental effects of FTAs when accounting for different environmental provisions. A study found that India has also moved up the scale on environmental dimensions in its recent FTAs, especially after it signed one with South Korea in year 2009 (Berger *et al.*, 2017).

This paper critically analyses the various FTAs concluded by developed countries, especially by the US, EU and UK, and analyses the variation in including environmental provisions in their FTAs. The purpose here is also to set the benchmark for environmental provisions in FTAs, which would be helpful in preparing the stance of India in the upcoming FTAs India is in the process of negotiations.

Environmental Issues in FTAs/RTAs

Countries have been progressively including environmental provisions in FTAs/RTAs. In the years between 1947 to 2021, out of 775 RTAs, 671 had at least one type of environmental provision in the agreement. The average number of environmental provisions increased from about 8 provisions in the 1990s to nearly 19 provisions in the 2000s and to almost 44 provisions in the 2010s. It has been proved by surveys, research and anecdotal evidences that RTAs with environmental provisions have had positive impacts by strengthening environmental laws and regulations; introducing new institutional arrangements; promoting co-operation on improving environmental laws and enforcement; and promoting environmental awareness. Parties can pursue environmental objectives through different chapters and articles to improve policy coherence in an agreement (OECD, 2023).

Table 1: Number of RTAs and Environmental Provisions on Average (by Year of Signature)

Year	RTAs signed	Average Environmental Provisions
2000	19	12.6
2001	23	13.8
2002	25	10.2
2003	30	12.8
2004	25	20.9
2005	17	20
2006	26	24.2
2007	19	25.6
2008	23	25.7
2009	24	22.2
2010	10	41.8
2011	19	26.5
2012	12	37.5
2013	13	50
2014	13	53.7
2015	12	40.3
2016	10	75.8
2017	8	28.8
2018	17	58.7
2019	12	29.3
2020	12	50

Source: OECD work on Regional Trade Agreements and Environment: Policy perspective (2023).

The main supporters of environmental provisions in FTAs include the USA, EU, Canada, UK and New Zealand. These developed countries have substantial environmental provisions while concluding their FTAs even with developing countries. These provisions are either part of the main text or separate side agreements. They pertain to high standards in domestic environmental laws, mechanisms of resolving environmental

disputes and principles of cooperation on environmental issues with provisions on technical assistance and capacity building. These provisions are either legally binding or non-binding, or a blend of the two. The US has a separate chapter on environment in all its FTAs negotiated after NAFTA came in force in 1994. These agreements clearly spell out obligations for the Parties to effectively enforce their environmental commitments. They also include methods of dispute settlement and public submission mechanisms. They also have a framework for environmental cooperation among the Parties. Canada also has comprehensive provisions pertaining to environment in its FTAs. EU also has progressively made stringent environmental provisions in its FTAs. Earlier, its FTAs with Mexico and Chile and Mediterranean countries had broadly worded provisions on Environment. However, It has become more comprehensive of late. Australia earlier believed that environment is important but it should be dealt with separately, not with trade agreements. However, now it has changed its stance and its FTA with the USA has elaborate environmental provisions like the USA's FTAs.

The developing countries groupings, like MERCOSUR, ANDEAN Community, ASEAN, EAC, SAARC, etc., recognize the importance of environmental issues and regional and international cooperation to tackle them. However, they generally do not make it part of trade agreements. BRICS countries, especially India, Brazil, Russia and China, have soft-worded intent statements in either preamble or broad objectives. China, however, has had some provisions on environmental issues in its FTAs with ASEAN, New Zealand, and Singapore. India has also evolved in this regard, especially with the signing of the India-South Korea CEPA in 2009.

Some Recently Concluded FTAs by the USA, Canada, the UK and the EU

United States-Mexico-Canada Agreement (USMCA)

It is a reincarnation of NAFTA. It has the strongest and most enforceable environmental obligations of any trade agreement. It has a separate chapter on environment and includes all environmental provisions in core of the

agreement. It makes them enforceable through consultations and dispute settlement mechanism, based on sanctions. The USMCA comprises commitments to implement key multilateral environmental agreements, including the Convention on International Trade in Endangered Species of Wild Flora and Fauna and the Montreal Protocol on Ozone Depleting Substances. It also attempts to address key environmental challenges arising out of illegal, unreported and unregulated fishing and harmful fisheries subsidies. It commits all three countries to cooperate and take appropriate actions to combat trafficking in timber, fish and other wildlife. Other environmental issues, like air quality, marine litter, etc., have also been addressed first time.

There are adequate provisions for public information and participation. Each party to the agreement is required to promote public awareness of its environmental commitments and their enforcement and compliance procedures by making relevant information publicly available. Each party is required to respond to written questions and comments from the persons of that party pertaining to the implementation of various provisions of the chapter and make questions, comments and responses public on an appropriate public website. It will also make use of consultative committees to solicit suggestions on implementing provisions of this chapter. This committee would comprise experienced persons from businesses and experts on different dimensions of environmental matters.

The parties will strive to promote trade and investment in environmental goods and services. They will remove any barriers, including non-tariff ones, to facilitate such trade and investment. They will also cooperate in international forums to facilitate and liberalize trade in environmental goods and services, and start collaborative projects on environmental goods and services to meet current and future environmental challenges.

There are provisions on mechanism for environmental cooperation to implement this chapter. They will increase their cooperative activities relating to environmental matters to achieve shared environmental goals and objectives. They are committed to the Environmental Cooperation

Agreement(ECA) signed by them. Activities taken under it will be coordinated and reviewed by the Commission for Environmental Cooperation included in ECA.

There are provisions for three-step consultation procedure and finally, dispute settlement mechanism to resolve any issue in regard to this chapter. After environment consultation, senior representative consultation and ministerial consultation fail to resolve the issue amicably within 75 days after the date of receipt of request or any other period as consulting parties may decide, the requesting party (aggrieved party) may request the establishment of a panel under article 31.6 of the main agreement under dispute settlement mechanism chapter.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Its members include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. It evolved from the Trans-Pacific Partnership (TPP), which was never ratified due to the withdrawal of the US. The environmental chapter of CPTPP seeks to secure a higher level of environmental protection by encouraging mutually supportive trade and environmental policies. Four countries of CPTPP belong to 17 countries recognized as mega diverse, supporting 70 per cent of biological diversity on earth.

The CPTPP encourages parties to work together to tackle many dimensions of environmental challenges related to international trade. They include protecting ozone layers, safeguarding the marine environment from ship pollution, combating wildlife trade, arresting over-fishing and illegal fishing by reducing subsidies, etc.

CPTPP recognises that international environmental agreements play an important role in preserving environment and so acknowledges that international trade and environmental agreements should be mutually supportive. The environmental chapter of CPTPP has provisions ensuring that the production, consumption and trade of substances depleting the ozone layer should be discouraged. It also has provisions to take measures to discourage pollution of the marine environment from ships.

The chapter requires members to use fisheries management systems based on sciences to prevent overfishing and overcapacity. It also seeks to apply port-state measures to fight against illegal fishing and illegal trade in fish products. Parties are also required to prohibit subsidies negatively affecting over-fished stocks and to those vessels engaged in illegal fishing. They are also required to conserve sharks, marine turtle, sea birds and other marine mammals by using appropriate scientific measures like limiting by-catch from fishing.

It provides the opportunity for public participation for getting inputs for implementing environmental chapter through public submission and sessions by environmental committee established to oversee the implementation of chapter. The party is required to make submissions and its responses public by posting it on appropriate website.

It also promotes cooperation in all areas of mutual interest like conserving and sustainable use of biodiversity, protection of ecosystems, encouraging access to genetic resources and sharing benefits accruing from their uses, etc. It also encourages cooperation in areas helping transition to green economies, like cooperation on renewable and clean energy, managing forests and emission monitoring.

The CPTPP members are required to identify and remove any barriers to trade in environmental goods and services and promote investment. The chapter has comprehensive enforcement mechanism. It has hierarchically three-step consultation process. If these consultations do not produce results in a given timeframe, parties can use the Dispute Settlement Mechanism provided in the main agreement.

UK-New Zealand FTA & EIA

The parties recognised the significant role of multilateral environmental agreements in protecting and preserving all dimensions of environment, including reducing loss of bio-diversity and mitigating climate change. And so they acknowledged the need for mutually supportive trade and environmental laws and policies. Each party promised to facilitate the trade and investment in environmental goods and services by removing any barrier to trade and promoting investment in these goods and services.

The parties recognized the deleterious environmental impact of fossil fuel subsidies and the need to phase them out. The parties are required to conserve and sustainably manage fisheries and marine ecosystems. Accordingly, each party would adopt a fisheries management system designed to prevent overfishing and over-capacity, reduce by-catch of non-target species and juveniles, promote the recovery of overfishing stocks and minimize adverse impacts on marine ecosystems. They also promised to phase out harmful fishery subsidies.

The parties also promised to promote sustainable agriculture by taking measures to reduce GHGs from agriculture production and promoting sustainable agriculture and trade. They also promised to adopt sustainable forest management and discourage illegal logging, illegal deforestation and associated trade, even to non-parties. The parties would promote resource efficiency and circular economy by encouraging resource-efficient product design, promoting eco-labelling, avoiding the generation of waste and encouraging relevant public entities to buy such products. They promised to discourage trade in goods using ozone-depleting substances, maintain air quality and protect the marine environment from ship pollution and marine litter. They also promised to cooperate in implementing this chapter and in multilateral forums. It has provisions for public participation for getting their insights for implementing this chapter. It has a comprehensive dispute settlement procedure including three-step consultations and finally (if consultations do not lead to resolution of dispute) requesting for panel under the dispute settlement chapter of the FTA agreement.

EU-Vietnam FTA & EIA

EU-Vietnam FTA has provisions on environmental issues for fostering sustainable development by encouraging the contribution of trade- and investment-related aspects of environmental issues. It has almost all elements of environmental provisions as in the US or UK FTAs discussed above, except it has more cooperative overtures and categorically does not apply a dispute settlement chapter to these provisions. Rather, it has elaborate procedures of consultations and a panel of experts for resolving any issue pertaining to environment.

If the initial consultations among parties fail to produce a mutually satisfactory resolution of the issue and it needs further discussion, the party may make a written request to the contact point of the other party to convene the Committee on Trade and Sustainable Development to consider the matter further. If the matter is not resolved even by the Committee on Trade and Sustainable Development within 120 days or a longer period agreed by both parties after making request for consultation, a party may request for a panel of experts to be convened for further consideration of the issue. The panel of experts first issues an interim report to parties within 90 days of its establishment. Any party may comment on the interim report within 45 days of its issuance. After considering the comments, the panel submits the final report within 150 days from the date of its establishment. The party would act and take measures on the basis of the final report and its recommendations, which would be monitored by the Committee on Trade and Sustainable Development, and domestic advisory groups or joint forum may submit their observations in this regard.

EU-Singapore FTA & EIA

The Parties recognize the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems, and they stress the need to enhance the mutual supportiveness between trade and environment policies, rules and measures. In this context, they will consult and cooperate as appropriate with respect to negotiations on trade-related environmental issues of mutual interest. It also has more supportive and cooperative propositions in regard to the conservation and sustainable management of forest, conservation and management of fish stock in a sustainable manner, etc. It will promote trade and investment in environmental goods and services. In case of disagreement on any matter arising under this Chapter, the Parties shall only have recourse to Government Consultations and Panel of Experts. Chapter Fourteen (Dispute Settlement) and Chapter Fifteen (Mediation Mechanism) do not apply to this Chapter.

Indian Experience

India-Japan CEPA

Though India has always been wary about including environmental issues in its FTAs, India-Japan CEPA, signed and came into force in year 2011, is the most ambitious among all Indian FTAs in this regard. In their paper, Berger *et al.* (2017) mapped the environmental provisions in FTAs of emerging economies - China, India, Indonesia, Brazil and Mexico- on 9 dimensions, including reference to environmental goals in the preamble or other chapters; environmental exceptions; references to multilateral environmental agreements; inclusion of a whole chapter on the environment or sustainable development; obligations to uphold environmental law; incorporation of the right to regulate in environmental matters; cooperation in environmental matters; transparency in environmental matters; and public participation in environmental issues. They put a score of 6 out of 9 to the India-Japan CEPA. It is very high in comparison to 1, 2 or 3 score for its initial FTAs. Besides reference in the preamble of the agreement, in the Chapter on General Provisions of the India-Japan agreement, article 8 acknowledges the importance of environmental protection and sustainable development. It recognizes the right of each party to establish its own domestic environmental policies and priorities, ensuring that its laws and regulations provide for enough level of environmental protection and striving to continue to improve these laws and regulations. It also has reference to monitoring of compliance and investigation of any violation of environmental laws by government action. It also promotes public awareness of environmental policy through education. It encourages trade in environmental goods and services. The parties in the agreement also reaffirmed their rights and obligations they undertook in various international environmental agreements.

In the Investment Chapter, article 99 of agreement discourages parties from weakening existing environmental laws and regulations to encourage foreign investment. It is to avoid carbon leakages or obviating relocation of environmentally sensitive industries. Chapter 13 focuses on

the need of cooperation in addressing environmental issues by exchanging information and experts, promoting training and capacity building of human resource, promoting cooperation in international forums, etc. The dispute settlement chapter 14 of the agreement does not apply to chapter 13 on cooperation. This agreement is still way behind the US and EU FTAs, which have separate chapters devoted to almost all dimensions of environment.

India-South Korea CEPA

India-South Korea FTA has also covered many dimensions of environmental issues and scored 5 points out of 9 dimensions of environment discussed above (Berger *et al.*, 2017). Besides giving reference in the preamble, the parties reaffirm their existing rights and obligations under various agreements to which both are party. In the event of any inconsistency between any provision of this agreement and other agreements, the party shall instantly consult with other party and strive to find mutually agreed solution. It gives more priority to health, safety and environment and maintains that nothing in this agreement would stop a party from adopting, maintaining and enforcing any measure consistent with this agreement to meet health, safety and environmental concerns. It also categorically discourages weakening any environmental law and regulation to promote foreign investments, to avoid carbon leakages or relocation of environmentally hazardous industries. Chapter 13 on bilateral cooperation, also encourages bilateral cooperation in renewable energy resources by cooperating in the research, design and development of various renewable technologies like solar, wind, bio-energy and others. However, dispute settlement provisions of chapter 14 of the agreement do not apply to disputes arising out of provisions in chapter 13. It means they are non-binding.

India-Mauritius CECPA

It came into being in the year 2021. It has very few references and provisions in the realm of environment. Besides reference in the preamble, it includes the provisions of general exceptions in regard to protecting human, animal and plant life health and conservation of

exhaustible natural resources in conformity with articles XX and XXI of GATT 1994. In the chapter on General Economic Cooperation , it has references about Blue Economy and renewable energy cooperation in areas of combined research and exchange of expertise. It will also collaborate on ascertaining the impact of marine aquaculture on biodiversity, including sharks. It is more to promote investment and trade in these areas, besides collaborative research and development activities. However, dispute settlement provisions of the main agreement do not apply to provisions of this chapter.

India-UAE CEPA

Besides reference to environmental protection in the preamble and reaffirming their rights and obligations under other agreements to which they are party, Chapter 14 on Economic Cooperation spells out provisions on environmental cooperation. Both parties recognise the importance of mutually supportive trade and environmental policies for achieving environmental protection and sustainable development. And in doing so, it acknowledges the Parties' sovereign right to establish their own domestic environmental priorities and level of protection and make laws accordingly to this effect. Each party shall endeavour with discretion to enforce its environmental laws. The parties recognize that multilateral environmental agreements, to which they are parties, are important to protecting environment. So parties reaffirm their commitments to implement these agreements. The party can undertake enforcement of environmental laws if a course of action reflects a reasonable exercise of discretion. However, nothing in this section shall be construed to empower a party's authorities to undertake environmental law enforcement activities in the territory of the other party. A Committee on Economic Cooperation would be constituted for the purpose of effective implementation and operation of this chapter. The dispute settlement chapter 15 will not be implemented to the provisions of this section, implying they are non-binding.

Table 2: India’s PTAs/FTAs/RTAs and Their Score on Environmental Dimensions

Name of Agreement	Year of Signature	Year in force	Partner Country	Score
India-Bangladesh	2006	2006	Non-OECD	0
SAFTA	2004	2006	Non-OECD	1
India-Sri Lanka	1998	2000	Non-OECD	1
India-Bhutan	2006	2006	Non-OECD	1
India-Thailand	2003	2003	Non-OECD	2
ASEAn-India	2010	2010	Non-OECD	2
India-Singapore	2005	2005	Non-OECD	3
India-Malaysia	2011	2011	Non-OECD	3
India-South Korea	2009	2010	Non-OECD	5
India-Japan	2011	2011	OECD	6
India-Mauritius	2021	2021	Non-OECD	3
India-UAE	2022	2022	Non-OECD	4

Source: Berger *et al.*(2017) and Author.

Although India has gradually changed its stance in regard to incorporating green provisions in its FTAs, especially after India-S.Korea CEPA in the year 2009, they are mostly non-binding in nature. Among all FTAs thereafter, India-Japan CEPA has been the most ambitious one, as Japan being a developed country is more conscious and demanding about environmental issues. However, Indian FTAs are no close to the EU and USA’s FTAs, which have a separate chapter on environment covering almost all dimensions of it. They have comprehensive dispute settlement provisions for them - the US, sanction-based and the EU, through consultations and monitoring, though recently the EU has also started having more stringent dispute settlement provisions based on sanctions after EC’s recommendations for greening its FTAs.

Way Forward

India experienced its major economic reforms after year 1991, when it faced major economic crisis on the balance of payment(BOP)'s front. Thereafter, it progressively opened its economy to the world economy. Initially it gave precedence to multilateralism over regionalism. However, as a result of slow progress of multilateral route, it has also started giving more importance to regional route, though with a cautious note keeping its interests at centre. India always believed that environmental protection is an important objective, but it should be dealt with separately in a different forum. It should not be mingled with trade policies neither in WTO nor in free trade agreements because of lack of expertise of these institutions to tackle these technical problems.

India is planning to become US\$ 5 trillion economy by 2026 and developed economy by year 2047, the centenary of Indian independence. It cannot achieve it without penetrating export markets and becoming part of global / regional value chain, for which, becoming part of dynamic FTAs is significant.

There are broadly three models available in regards to incorporating green provisions in FTAs -one, USA- styled FTAs having separate comprehensive chapter on all aspects of environment and sanction-based dispute settlement mechanism; two, EU-styled FTAs having separate chapter on sustainability and dispute settlement mechanism based on consultation and monitoring; and three, Indian-like or maintaining status quo. The EU has also started following more stringent dispute settlement mechanism based on sanctions after EC recommended recently for more tight measures for greening its FTAs. Its new FTA with New Zealand has sanction- based dispute settlement mechanism. Generally Indian approach should be to follow the earlier incarnation of EU FTAs. India is committed to Paris Agreement and announced year 2070 for going net zero. It has done satisfactory work on most of dimensions of environment and in some cases, it is leading. It is starting carbon trading market very soon to avoid the carbon border adjustment mechanism (CBAM) in EU.

However, it needs to take following precautions while signing a FTA with developed country.

- India should not succumb to pressure to commit something which has long term consequences, not only for India but for the whole South world. For example, India should not commit formerly in the agreement regarding Carbon Border Adjustment Mechanism(CBAM) or European Union Deforestation Regulation (EUDR),parts of EU's green deal. There are lot of uncertainty involved with these regulations having trans-border developmental consequences for developing and least developed countries, which have to meet their maximum SDGs from lower bases. Their compatibility with WTO provisions is also questionable, besides their being against the principle of common but differentiated responsibility.
- Another problem is financial help having been promised collectively by OECD countries (for example, annual US \$ 100 billion by 2020), whereas the environmental commitments have to be implemented by individual countries. It is difficult to blame individual country whether it is meeting its part of obligation in regard to financial help, whereas an individual county can be caught for not meeting its commitments on environmental front. How to reconcile it at the FTA level is a ponderable issue. India can initiate this process by institutionalizing some formula for ascertaining individual country's financial commitments and monitoring provisions in its FTAs, linked with meeting binding environmental provisions.
- The carbon budget is becoming very scarce. As per latest estimate, we are left with 250 GtCO₂, which will be exhausted within 6 years as per current global emission rate. As the developed countries are in the spree of utilizing this remaining carbon space, the poor countries, especially LDCs, will be left with hardly any space for development. Thus it is of utmost importance to earmark the remaining carbon space to each country judiciously. Though it should be done in a better way in multilateral forum (like UNFCCC), some reference to this

daunting issue can be made in FTAs with OECD countries to make a momentum to take this issue at multilateral forum more seriously.

- There is a need to rewrite IPR rules to ease the transfer of green technologies. The green technologies should be regarded as public goods. They should be co-developed with public money. Even private sector can be involved on the cost-plus basis. Or, a share of profit or tax collection from businesses deploying new technologies may be promised to innovators. An open access patent pool can also be suggested. A beginning can be initiated to start this process at the FTA level. Collaborative efforts can be taken in regard to research and development projects in green technologies. The resultant technologies can be jointly patented and shared with domestic players of countries involved in FTAs with a reasonable formula. The existing technologies can also be shared in the same way.
- The countries involved in FTAs can initiate joint carbon trading market and joint green financial instruments, like green bonds. They can develop common taxonomy for green projects to help the investors recognize easily the green projects. It would deepen both markets – the carbon and financial markets- and help discover the better price for carbon and reduce the cost of green funds.
- Certain safeguards can be inserted in FTAs, which can be used in emergency, such as COVID like pandemic or war like situation. In fact, signing a FTA is a binding commitment, which is difficult to violate at the time of emergency. However, if some safeguards are explicitly incorporated in this regard, it would give additional assurance to India to renege on commitments, including environmental ones, in case of emergency.
- The agreement on trade in environmental goods could not be concluded under WTO on account of no clarity on definition of environmental goods and inflexible approaches of negotiating parties, especially China. The FTA including trade in environmental goods and services can open market access for negotiating countries and prove to be beneficial in combating climate change and climate

adaptation. It will open market access for India as well, as India is creating new supply capacities in these areas of late under GOI-initiated incentives, including production-linked incentive (PLI) schemes.

- India can exploit some flexibilities provided by OECD countries in their FTAs with other countries. Australia-Indonesia FTA, concluded in 2020, does not have chapter on environment. Same can be done in the case of ongoing negotiations for India-Australia CEPA. Canada has excluded many provinces to being subject to the agreement initially. These flexibilities can be used by India to extract better deals. EU generally uses layered-ratification system, which it uses to exert pressure at the later stage. First agreement is ratified at the EU level and then it also warrants to be ratified by individual states. We should be aware of this possibility and prepare how best it can be tackled effectively at the negotiation level.
- The composition of the negotiating team is important to secure a better deal, as FTA is a specialized subject overlapping with many disciplines. It does not mean that negotiations must move into the hands of highly technically qualified people, as it is sometimes misunderstood. Rather, it must be done by more seasoned negotiators irrespective of their background. A panel of specialized people in different areas, from within the ministry and across India, can be set up to assist the chief negotiator. In regard to negotiating the environmental provisions in FTAs, besides a trade economist, an environmental economist should also be included in the negotiating team.

Endnote

- ¹ Regional Trading Agreements and Free Trade Agreements (RTAs/FTAs) have been used in this paper interchangeably to represent any preferential trade agreement.

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