

The environment in Canadian trade agreements

Since NAFTA, Canada and the US have included the largest number, worldwide, of environmental clauses in their trade agreements.

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The number of trade agreements that include [environmental clauses is on the rise](#). Many agreements devote an entire chapter to environmental protection and address a broad range of issues including the protection of endangered species, hazardous waste management, climate change and forest conservation. Some of these clauses are even more specific and restrictive than those in multilateral agreements on the environment.

At the same time, trade agreements are often criticized for their harmful effects on the environment. Some [nongovernmental organizations](#) are concerned that trade agreements limit a government's ability to enact environmental protection measures that run counter to the interests of exporters and foreign investors. According to them, trade agreements do not provide sufficient environmental exceptions to trade commitments.

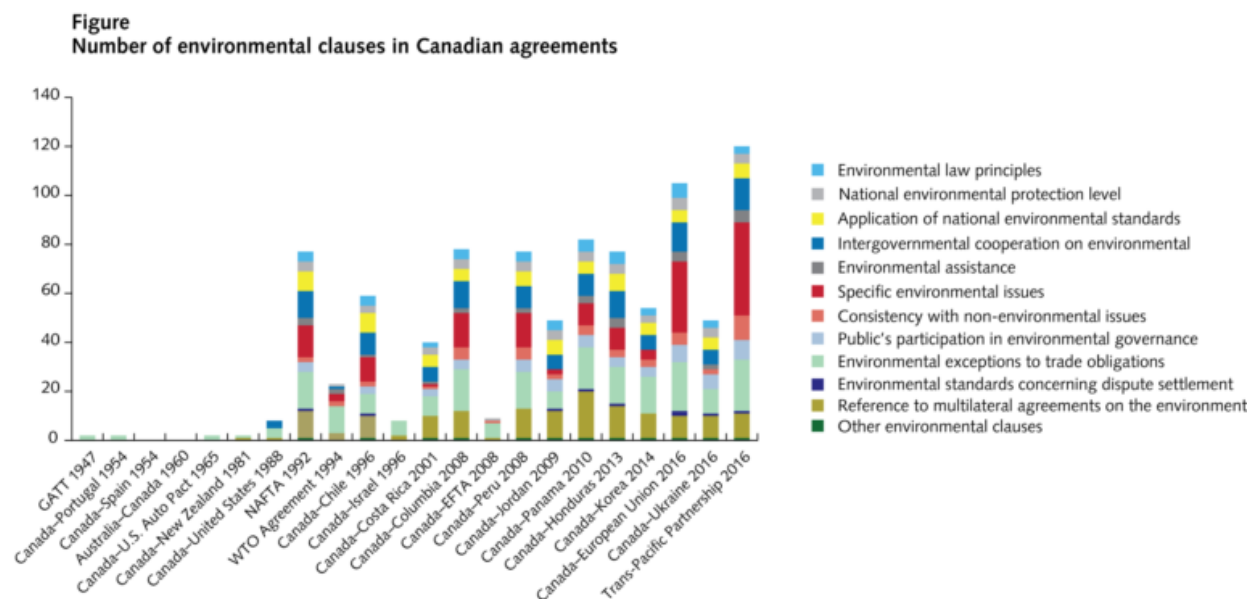
What is the Canadian practice in this regard, and how does it differ from those of other countries? To answer this question, we used the [TRade & ENvironment Database \(TREND\)](#), developed at Université Laval based on the trade agreements collected by the [Design of Trade Agreements](#) project. The TREND data set identifies almost 300 different categories of environmental provisions in approximately 700 trade agreements signed since 1947.



Our examination of that database led us to make three observations. First, Canada incorporates a large number of environmental clauses in most of its trade agreements. Second, environmental clauses differ significantly from one agreement to the next. Third, Canada could improve on the environmental portions of its trade agreements by looking at what other countries are doing. We elaborate upon these observations below.

The Canadian approach

The conclusion in the early 1990s of the North American Free Trade Agreement (NAFTA) and its parallel environmental agreement marked a turning point in Canadian trade policy. While Canadian agreements up to that time contained few environmental provisions, after NAFTA was adopted, Canadian trade policy began truly integrating environmental protection, as shown in the figure below.



In fact, since the adoption of NAFTA, Canada and the US have included the highest average number of environmental provisions per trade agreement, worldwide. These two nations have also developed the greatest number of innovative clauses, that is, environmental protection clauses that

did not exist in previous trade agreements. In particular, NAFTA was the first trade agreement that required its signatories to apply their national environmental laws, and Canada and the US can be considered pioneers in this regard.

There are five features distinguishing [NAFTA's approach](#), which Canada subsequently also followed. First, Canadian agreements have attempted to level the playing field with respect to commercial competition conditions by encouraging the maintenance of, and even improvement in, national environmental protection standards. For instance, they include a clause prohibiting the lowering of national environmental protection standards to attract foreign investment.

Second, Canadian agreements are based on an adversarial approach to ensure the implementation, application and compliance with environmental measures. This method relies on legal and political confrontation rather than informal dialogue. Most notably, Canadian agreements include mechanisms that allow individuals to report noncompliance with environmental laws.

Third, Canadian agreements encourage public participation in protection of the environment. They usually include provisions concerning transparency, public consultation and reliance on environmental experts.

Fourth, Canadian agreements protect the regulatory sovereignty of the parties by including various environmental exceptions to trade liberalization and investment obligations. These exceptions specifically allow parties to restrict trade to protect plants or animals and conserve natural resources. Similarly, they underscore the parties' sovereignty over establishing environmental protection standards and ensuring that national measures are applied.

Fifth, since the conclusion of NAFTA, Canadian trade agreements have generally provided that, in instances where they are incompatible with certain multilateral agreements on the environment, the latter must prevail. The multilateral agreements cited most often in Canadian trade deals are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.

Variation among Canadian agreements

There is nevertheless significant variation among Canadian agreements. As the figure shows, some agreements, such as that with the European Free Trade Association, include fewer environmental provisions than do others. There are even major differences among recent agreements that do contain a large number of environmental provisions, such as the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) and the Trans-Pacific Partnership (TPP).

CETA appears to have been inspired in part by the European model. It integrates several environmental principles that are more often found in European agreements than in North American agreements, such as the precautionary principle (whereby the absence of scientific certainty must not be a pretext for not adopting environmental measures) and the polluter pays principle (whereby the costs of pollution must be assumed by the polluter rather than by society as a whole). CETA also expressly refers to climate change; it requires parties to prioritize trade in environmental goods and services related to renewable energy sources, and to cooperate in their climate change adaptation and mitigation policies. The TPP, in contrast, does not mention "climate change" at all.

The TPP largely reflects the American approach; this is evident in its dispute resolution provisions. For instance, if one of the parties to the TPP does not respect its environmental obligations, the other parties can impose a trade benefits suspension on that party. This adversarial approach is typically American, and is absent in European agreements.

Moreover, both CETA and the TPP were innovative in that they include new provisions not found in previous agreements. CETA is the very first trade agreement to explicitly stipulate that water in its natural state is not a product or merchandise and that, consequently, trade obligations do not apply to water. And the TPP is the first trade agreement to favour the elimination of subsidies that contribute to overfishing.

The differences between CETA and the TPP should not be overemphasized, however. In many respects, [European agreements are becoming Americanized and American agreements are becoming Europeanized](#). CETA, for example, clearly specifies that environmental measures do not usually constitute indirect expropriations. Foreign investors that consider they have been harmed by an environmental measure cannot therefore claim compensation from the government that enacted the measure. This is a direct lesson from the experience of NAFTA's chapter 11, and reflects contemporary North American practices. On the other hand, the TPP borrowed from the European model the idea of addressing a series of specific environmental issues in addition to very general environmental protection rules. As well, the TPP includes clauses dealing with protection of the ozone layer, ship pollution, invasive species and biodiversity. Prior to the TPP, this sector-based approach was more typical of European trade agreements.

Inspiration for future Canadian agreements

Although Canada already includes many environmental clauses in its trade agreements, it could certainly incorporate more. Here it could take inspiration from the clauses other countries include in their trade agreements.

For instance, Canada could follow the example of Latin American and Asian countries, which include [detailed environmental norms on genetic resources](#) in their trade agreements. These agreements have adopted the Nagoya Protocol's principle on sharing the benefits that accrue from the use of genetic resources in pharmaceutical or biotechnological products. To facilitate the application of this principle, some trade agreements encourage their parties to require disclosure of the origin of genetic resources in patent applications. They also recommend that they implement a system to protect the traditional knowledge of Indigenous peoples regarding genetic resources. Given the wealth of traditional knowledge of Canada's Indigenous population, Canada should include such provisions in its agreements.

Canada could also draw inspiration from [climate change clauses](#) in certain European trade agreements. For example, its trade agreements could include reference to the principle of common but differing responsibilities, that is, those differing between developed and developing countries, which currently is completely absent in Canadian trade agreements. Canadian agreements could also impose the ratification and implementation of multilateral agreements on climate change, as do certain European trade agreements.

The TREND database reveals several other environmental clauses that other countries have developed and that Canada could incorporate in its own trade agreements. These include the essential role of women in the protection of natural resources, promotion of agro-environmental methods, protection of natural heritage sites, development of joint scientific projects, control of

mercury emissions, protection of organic food certifications and development of environmental inspection mechanisms.

NAFTA and its parallel environmental accord were indisputably important advances. However, these agreements are 25 years old. Since that time, trade agreements have continued to evolve and incorporate even more environmental protection provisions. Representatives from Canada and the United States have expressed the hope that NAFTA renegotiation will be an opportunity to further increase environmental obligations. At the very least, we expect the environmental provisions envisioned by the TPP to be incorporated into NAFTA. Hopefully, though, negotiators will be even more ambitious and make the renewed NAFTA as innovative as the original agreement was in 1992.

This article is part of the [Trade Policy for Uncertain Times](#) special feature.

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