

Environmental provisions in Japanese regional trade agreements with developing countries

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**Environmental Provisions in Japanese
Regional Trade Agreements with
Developing Countries**

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Abstract

With the growing interest in environmental issues in the global community, recently concluded regional trade agreements (RTAs) have introduced environmental provisions. These RTAs will help achieve sustainable development at the intersection of trade liberalization and ever-increasing environmental concerns. However, environmental provisions are not incorporated into all RTAs. For example, Japanese RTAs often incorporate environmental issues only in the preamble or relevant articles. As the first step in examining the environmental provisions in RTAs, this paper focuses on the RTAs that Japan has concluded with developing countries.

The main characteristic of environmental provisions in Japanese RTAs is that there are very few relevant provisions. All Japanese RTAs has neither environmental chapters nor side agreements. However, the attitude toward the environment in Japanese RTAs has gradually changed since the signing of the Japan-Chile EPA in 2007, in which a joint environmental statement was adopted. Although Japanese RTAs have environmental provisions, environmental problems originating from the RTAs may occur. One of the possible causes is a lack of environmental impact assessment. Japanese RTAs need to incorporate an environmental impact assessment system in order to identify environmental problems resulting from its RTAs, and to enable the country to take appropriate measures at the appropriate time.

Keywords: regional trade agreement, environmental provisions, trade and the environment

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Introduction

The General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO), have played a primary role in the establishment of international trade rules. However, in recent years, bilateral and/or regional trade agreements (RTAs) have proliferated rapidly,¹ which, in conjunction with WTO law, has resulted in complicated trade rules being applied to countries.

Characteristics of these recent RTAs are summarized as follows: (i) increasing numbers of RTAs include signatories from developing countries. Especially, the number of RTAs concluded between developed and developing countries (hereinafter referred to as “North-South RTAs”) has risen; (ii) increasing numbers of RTAs are addressing new issues such as labor and the environment. RTAs begin by assuming a tariff reduction between member countries. Therefore, their main provisions relate to trade liberalization: tariff elimination, prohibition of import quotas, safeguards, and anti-dumping. However, recent RTAs introduce new issues including those which are not part of the current WTO negotiations (Doha Development Agenda: DDA). With the DDA deadlock, many countries have sought ways to implement trade liberalization through RTAs rather than a multilateral trading system. Some developed countries, represented by the United States and Canada, actively incorporate environmental provisions into their RTAs for “promoting sustainable development through trade liberalization and making trade and environment mutually supportive,”² without waiting for an agreement in the WTO.

Arguments about the environmental provisions in RTAs are still uncommon, but they are increasing. The Organisation for Economic Co-operation and Development (OECD) has paid attention to the “trade and environment” issue in RTAs since the early 2000s (OECD 2000), and continuously afterwards (OECD 2007; Tébar Less and Kim 2008; George 2011; Gallagher and Serret 2011). Other than OECD, Colyer (2011) examined environmental provisions in all RTAs by country or region. However, few volumes have debated the environmental provisions in RTAs from the perspective of developing countries. Due to the increase of North-South RTAs, considerable attention should be given to the impacts of RTAs on the environment in developing countries. As a first step in examining the environmental provisions in North-South RTAs, this paper focuses on the RTAs Japan has concluded with developing countries. Since the beginning of the 21st century, Japan has actively negotiated and concluded agreements with many countries, most of which are developing countries.

¹ As of January 31, 2014, the number of notifications of RTAs to the GATT/WTO (counting goods, services, and accessions separately) reached 583. Among these, 377 were in force (http://www.wto.org/english/tratop_e/region_e/region_e.htm).

² Agenda 21, Chapter 2: International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies, Paragraph 3.

After the introductory section, Section 2 briefly looks at the environmental provisions in RTAs. Section 3 discusses the characteristics of environmental provisions in Japanese RTAs compared with those of the EU, United States, and Canada, which collectively have concluded a large number of North-South RTAs. Section 4 deals with the environmental problems caused by Japanese RTAs.

1. An Overview of Environmental Provisions

The attitude toward environmental issues in RTAs varies depending on members participating in RTAs. Even RTAs of the same country, the contents of environmental provisions differ by the partner countries and the time periods negotiating the RTAs. This section considers how environmental issues are handled in RTAs.

1.1 Means to Incorporate Environmental Provisions into RTAs

The means for incorporating environmental provisions into RTAs are different in each case. The most popular method is to briefly consider environmental problems in the preamble. Since the RTAs originally aimed for trade liberalization, environmental considerations were not expressed in many RTAs, especially those concluded in the 1980s. However, as the level of awareness of environmental issues has risen in the global community, more RTAs have stressed environmental protection in their preambles. Today, environmental and sustainable development considerations are found in many RTAs, particularly those that include developed countries. For example, the North American Free Trade Agreement (NAFTA) states that “[t]he Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: ...UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation.” Meanwhile, the Japan-Chile RTA affirms “that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development.”

Another strategy for introducing environmental provisions into RTAs is to create an independent chapter specifying how to deal with environmental issues. Examples include Chapter 6 of the Economic Community of West African States (ECOWAS), “Cooperation about Environment and Natural Resources,” and Chapter 17 of the Canada-Colombia RTA. In addition, some RTAs contain side agreements prescribing environmental issues. Examples of this approach include the North American Agreement on Environmental Cooperation (NAAEC), a side agreement of NAFTA, and a side agreement of the Mercado

Común del Sur (Mercosur) (Tébar Less and Kim 2008, 6).

The U.S. FTA with CAFTA-DR provides environmental provisions in two means: the side agreement called the Environmental Co-operation Agreement and Chapter 17. This shows that the U.S. CAFTA-DR FTA pays much attention to the environment. On the other hand, some RTAs, which do not have any such chapters or side agreements, only mention the environment in provisions regarding investments, standards, and economic cooperation. Most Japanese RTAs fall into this category.

1.2 Contents of Environmental Provisions

The main components of environmental provisions are environmental laws and standards, cooperation in solving environmental problems, enforcement of the domestic environmental regulations, dispute settlements, relations with other international regimes, such as multilateral environmental agreements (MEAs), and environmental exceptions.

(1) Environmental Laws and Standards

Many RTAs, especially those of the United States, require the enforcement of environmental laws and the continuation of, at minimum, the current level of environmental regulations and standards. Most of Japan's RTAs include provisions stipulating that environmental standards should not be loosened in order to facilitate trade and investment. Such commitments are necessary for preventing the environmental disruptions that might occur when trade and investment could increase with relaxed environmental standards. There are four kinds of references to environmental laws and standards in RTAs: (i) commitments to enforce environmental laws; (ii) commitments to maintain, or at least not to lower, environmental standards; (iii) commitments to improve environmental standards; and (iv) commitments to harmonize environmental standards (Tébar Less and Kim 2008, 12).

(2) Environmental Cooperation

Most RTAs include provisions regarding economic cooperation and capacity building. In some, environmental cooperation is listed as one field of economic cooperation. If the RTAs have a full chapter on the environment, environmental cooperation is usually provided for within that chapter. North-South RTAs often have provisions regarding capacity building in the environmental area. In the case of RTAs concluded by the United States or EU, a fund for cooperation is established. While some RTAs incorporate a mechanism into the agreement to ensure environmental cooperation, others have only a basic framework for cooperation, and the detailed schemes for enforcing environmental cooperation are designed after the agreement's entry into force.

(3) Dispute Settlement Procedure

Some RTAs prescribe the legally binding obligations of the contracting parties. In such RTAs, a mechanism is introduced in order to ensure the fulfillment of these obligations; that is, a dispute settlement procedure. In each RTA, several kinds of mechanisms, including state-to-state consultations, council dispute processing procedures, and arbitration, are prepared. Some RTAs allow the participation of people from the non-governmental or private sectors in the dispute settlement procedure. When an RTA includes a specific chapter on dispute settlement procedures, environmental disputes follow that procedure.

(4) Determining levels of environmental protection and safeguard clauses

In most RTAs, environmental provisions recognize that each country has the right to make its own decisions regarding the kinds of laws, policies, measures, and standards it enforces and carries out (Tébar Less and Kim 2008, 13-14). Article 20.3 (Application and Enforcement of Environmental Laws) in Chapter 20 (Environment) of the US-South Korea RTA states “[t]he Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities.”

(5) Relations to MEAs

Even though there are many areas where trade and environmental issues overlap—and sometimes conflict—, few RTAs specify the relations between environmental provisions in RTAs and MEAs such as Basel Convention, the Montreal Protocol, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The first agreement to have a clear provision stipulating this problem was NAFTA. Article 40 (Relation to Other Environmental Agreements) of the NAAEC, which is a side agreement of NAFTA, states that: “Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.”

As specified in the NAFTA Article, in the case of conflict between RTA obligations and the MEA requirements, the latter shall prevail (UNEP and IISD 2005, 98). In addition to the NAAEC, the Canada-Chile, Canada-Costa Rica, Canada-Colombia, and Mexico-Chile RTAs have such a provision.

(6) Environmental Exception

As exceptions, international trade rules based on the GATT allow WTO member countries to deviate from their legally binding obligations. Relating to the environment, two

grounds for exemption stipulated in GATT Article XX (General Exceptions) are Paragraph (b), “necessary for the protection of human, animal or plant life or health,” and Paragraph (g), “relating to the conservation of exhaustible natural resources.”³ The same language is often adopted in many RTAs in provisions for exceptions. Some of the recently concluded US and Canadian RTAs have further provisions permitting trade-restrictive measures that extend the GATT exceptions (UNEP and IISD 2005, 97).

2. Characteristics of Japanese Environmental Provisions in RTAs

It was not until the early 2000s that Japan began to strategically use RTAs as an effective channel for trade liberalization. Following the first Japanese RTA with Singapore in 2002, Japan has concluded RTAs primarily with developing countries in Asia and Central and South America (Table 1). As of March 2014, thirteen RTAs in which Japan participated as one of the member countries were already entered into force. Japan is also currently negotiating RTAs bilaterally with Korea,⁴ Australia, Mongolia, Canada, and Colombia, and regionally with the Regional Comprehensive Economic Partnership (RCEP) and Trans-Pacific Strategic Economic Partnership Agreement (TPP). Further, Japan is in the process of a joint study with Turkey.

The main characteristic of environmental provisions in Japanese RTAs is that there are very few relevant provisions. All Japanese RTAs have neither environmental chapters nor side agreements. The environment is only mentioned in the preamble of the agreements and/or referred to in the provisions regarding investments, standards, and economic cooperation. The most typical environmental provision in Japanese RTAs is an article in the investment chapter that prohibits encouraging investments by relaxing environmental regulation. For example, Article 87 in Chapter 8 (Investment) of the Japan-Chile EPA prescribes an environmental issue as follows:

Article 87 (Environmental Measures)

Each Party recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area.

³ See the WTO homepage (http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm).

⁴ Negotiations with South Korea were launched in October 2003, but have been on hold since November 2004.

Table 1 List of RTAs Concluded by Japan

		effective date	environmental provisions			
			preamble	side agreement	chapter	individual provisions
1	Japan - Singapore	2002/11/30	×	×	×	● exceptions (mutual recognition)
2	Japan - Mexico	2005/4/1	×	×	×	● investment ● investment dispute settlement ● environmental cooperation ● public comment procedures
3	Japan - Malaysia	2006/7/13	×	×	×	● investment ● environmental cooperation
4	Japan - Chile	2007/9/3	○	× Joint Statement	×	● investment ● investment dispute settlement
5	Japan - Thailand	2007/11/1	×	×	×	● exceptions (mutual recognition) ● investment ● environmental cooperation
6	Japan - Indonesia	2008/7/1	×	×	×	● investment ● energy and mineral resources (environmental consideration) ● environmental cooperation
7	Japan - Brunei	2008/7/31	○	×	×	● investment ● energy ● environmental cooperation
8	Japan - ASEAN	2008/12/1~	×	×	×	● exceptions (standards) ● environmental cooperation
9	Japan - Philippines	2008/12/11	×	×	×	● conformance of environmental standards ● exceptions (mutual recognition) ● investment ● environmental cooperation
10	Japan - Switzerland	2009/9/1	○	×	×	● environmental products ● investment ● patents
11	Japan - Viet Nam	2009/10/1	×	×	×	● exceptions (standards) ● environmental cooperation
12	Japan - India	2011/8/1	○	×	×	● levels of protection ● enforcement of environmental laws ● relationships to other international regimes ● investment ● environmental cooperation
13	Japan - Peru	2012/3/1	○	× Joint Statement	×	● general exceptions ● notification (technical regulations) ● government procurement ● environmental cooperation

(Source) Author.

In addition, an article in the standards, technical regulations, and conformity assessment chapter allows taking appropriate measures for protecting the environment, in conjunction with mutual recognition. For example, Article 44 (3) in Chapter 5 (Standards, Technical Regulations, and Conformity Assessment Procedures) of the Japan-ASEAN EPA prescribes:

Article 44 (Scope)

3. Nothing in this Chapter shall limit the right of a Party to prepare, adopt and apply standards and technical regulations, to the extent necessary, to fulfill a legitimate objective. Such legitimate objectives are, inter alia, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In pursuance of this, each Party retains all authority to interpret its laws, regulations and administrative provisions.

Other than these provisions, Japanese RTAs commonly regard the environment as just one field of economic cooperation, equal to education and human resource development, information and communications technology, science and technology, small and medium enterprises, financial services, and tourism. Unlike the RTAs of the United States and Canada, Japan's RTAs have no provisions encouraging improvements in domestic laws for environmental protection or for enforcement.

However, the attitude toward the environment in Japanese RTAs is gradually changing. The first indication was the adoption of a joint statement on the occasion of the signing of the Japan-Chile EPA in 2007. One of the four attachments⁵ of this Joint Statement, "Environment," stressed the importance of appropriately considering environmental issues and recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing pillars of sustainable development. In the attachment, it is stated that, "[b]oth governments reaffirm their intention to continue to pursue high level of environmental protection and to fulfill their respective countries' commitments under applicable international environment agreements." The attachment continues by asserting that the members must "share the view that it is inappropriate to set or use environment laws, regulations, policies and practices for the purposes of disguised restriction on international trade," and notes how important it is that nations "also share the view that it is inappropriate to relax, or fail to enforce or administer environment laws and regulations solely to encourage trade and investment."

⁵ Other three attachments are regarding anti-dumping, technical barriers to trade (TBT), and labor issues.

The Japan-India EPA, which took effect in 2011, has a provision entitled “Environmental Protection” in Chapter 1 (General Provisions). This marked the first time that Japan included such a provision into an RTA. In Article 8, each party (Japan and India) is required to ensure that it has laws and regulations providing for adequate levels of environmental protection, and to strive for continual improvement in them (Table 2).

Table 2 Environmental Provisions in the Japan-India EPA

Article 8 (Environmental Protection)
1. Each Party, acknowledging the importance of environmental protection and sustainable development and recognizing the right of each Party to establish its own domestic environmental policies and priorities, shall ensure that its laws and regulations provide for adequate levels of environmental protection and shall strive to continue to improve those laws and regulations.
2. Each Party shall take appropriate governmental action such as monitoring compliance with, and investigating suspected violations of, its environmental laws and regulations.
3. Each Party shall endeavour to: <ul style="list-style-type: none"> (a) take necessary measures to enhance public awareness of environmental policy and related matters by way of, such as, promoting education in the field thereof; and (b) encourage trade and dissemination of environmentally sound goods and services.
4. The Parties reaffirm their rights and obligations under any international agreements concerning the environment, to which both Parties are parties.

In addition, the environment was considered as an important field for cooperation, and was listed in the first position. This is significant because the environment has usually been listed around seventh to tenth in importance in previous RTAs.

Furthermore, on the occasion of the signing of the Japan-Peru EPA in 2011, the Joint Statement on Trade and Environment was adopted. With almost the same wording as in Article 8 (1) of the Japan-India EPA, both governments agreed that each country has rights in regard to environmental policy. This also reaffirmed the importance of the Convention on

Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC), and sustainable forest management. Especially, in order to work together in furthering the objectives of the CBD, Japan and Peru adopted another Joint Statement on Biodiversity, Access to Genetic Resources, and Traditional Knowledge.

3. Environmental Problems Caused by the Japanese RTAs

The basic structure of Japanese RTAs is modeled after the country's first RTA, the Japan-Singapore EPA. The Japan-Philippines EPA is no exception, although it has slightly more than the basic amount of environmental provisions. There was no sharp argument between Japan and the Philippines over the environmental provisions themselves. However, the Philippines expressed concerns during the negotiations about hazardous waste. It worried that the export of hazardous waste from Japan to the Philippines might be promoted by tariff reduction. The Japanese government ruled out such risks, explaining that hazardous wastes should be controlled by the Basel Convention, of which both countries are contracting parties. In order to satisfy Philippine concerns, the two countries exchanged letters between their Ministers of Foreign Affairs, and the Japanese government confirmed it would not export hazardous wastes to the Philippines, in accordance with the Basel Convention.

The concern raised in the Japan-Philippines EPA was dispelled as a result of a mutual understanding at the ministerial level. However, the real problem has occurred because of the increasing importation of used goods, which the Basel Convention cannot control. If a certain good is imported to the Philippines as "hazardous waste," the Philippines can strictly manage its volume under the Basel Convention. On the other hand, if electrical and electronic equipment were imported as a used good, it has a possibility to lead environmental problems.

Used electrical and electronic equipment can be regular import goods in the Philippines for the purpose of re-use, repair, refurbishment, and recycling. For example, in the case of a used TV, there are two problems. Firstly, the remaining service life of a used TV is generally short, even though some of them are still in good working condition. Therefore, imported used TVs are more likely to become "electronic waste (e-waste)" immediately after import. Since a recycling system in the Philippines is not yet well established, the TVs that have become e-waste were dumped illegally and left as a big pile in an open space. There is a high risk of toxic substances inside the dumped used TVs flowing out, which would result in environmental pollution.

Secondly, large quantities of used TVs are imported to the Philippines because the

import prices of used goods are very low. For example, vendors gather available electronic components from imported used TVs in order to repair and recondition used TVs, which then have a long remaining service life. However, the remaining parts from the donor TVs become e-waste, which causes Philippine environmental disruption. The laws of the Philippines and Japan, in accordance with the Basel Convention, cannot regulate the flow of such used goods, because they are regarded as lawful import goods and are therefore exempt from regulations.⁶

Both the recycling system and the waste management system in the Philippines is underdeveloped (Atienza 2013). It is difficult for the national government of the Philippines to implement proper recycling and e-waste management because local governments have primary authority over those issues.⁷ The problem caused by increased imports of used electrical and electronic equipment, which is based on the Japan-Philippines EPA, will continue until the problem of e-waste management in the Philippines is solved.

4. Issues to Be Discussed: Lack of Environmental Assessment

Why has the above-mentioned problem occurred? Are the environmental provisions in the Japan-Philippines EPA substantial enough? Could this problem have been foreseen? It is true that Japanese RTAs lack sufficient environmental provisions to protect the environment from pollution or destruction, or to correct problems when they occur. However, another possible factor should be taken into account: the lack of environmental impact assessment in the Japanese RTAs.

While many countries introduce environmental impact assessment when designing their policies, there are few countries that do this prior to concluding RTA negotiations. Only the United States, Canada, and EU utilize environmental impact assessments.⁸ These countries recommend that partner countries in RTA negotiations carry out assessments themselves, and they even prepare the financial support for the partner countries.

Still, environmental impact assessments are not a condition for concluding RTAs in the respective domestic laws, nor are they a requirement in international trade rules. The basis of these assessments lies in individual national laws. For example, the United States carries out its environmental assessments based on the National Environmental Policy Act (NEPA) of 1969 and Executive Order 13141. Canada's legal basis for assessment is the Cabinet

⁶ Interview with experts on environmental policies of the Philippines, December 2012.

⁷ As a temporary expedient, the national government can regulate the importation of used electrical and electronic equipment by limiting to those with a remaining service life of, for example, five years or more (Interview with a government official for environmental policies of the Philippines, December 2012).

⁸ Canada makes the prior environmental impact assessment a condition to conclude bilateral investment treaties (BIT).

Directive on the Environmental Assessment of Policy, Plan, and Program Proposals (1999) and the Framework for Conducting Environmental Assessments of Trade Negotiations (2001). The Sustainability Impacts Assessment (SIA) of the EU puts foundations in the guidelines named Communication from the Commission on Impact Assessment, which the European Commission announced in 2002 (Tébar Less and Kim 2008, 8; UNEP and IISD 2005, 98; Ministry of the Environment of Japan 2004).

On the other hand, New Zealand provides a subsequent environmental impact assessment, the so-called National Interest Analysis. In some cases, it can be included in a feasibility study of the RTA itself. As an example, the New Zealand-China RTA took the influence on the environment into account when it carried out the feasibility study of the RTA prior to negotiations (Tébar Less and Kim 2008, 9).

The current system of environmental impact assessment can be divided into three groups: a prior assessment carried out before concluding agreement, a subsequent assessment carried out after the conclusion of RTAs, and a periodical assessment for follow-ups (Tébar Less and Kim 2008, 7). The prior environmental impact assessment is more likely to be reflected by the negotiations of the agreement, and it is effective in raising awareness of the environmental concerns of the agreement. The subsequent and follow-up assessment might lead to a revision of the details of the relevant RTA by examining the real influence of the agreement on the environment. If the Japan-Philippines EPA had a prior environmental impact assessment system, the problem caused by the increasingly used electrical and electronic equipment imports might have been recognized before the agreement was concluded. At the least, Japanese RTAs must incorporate a subsequent or follow-up assessment system in order to identify environmental problems resulting from the RTAs, which will allow the appropriate measures to be taken at the appropriate times.⁹

Concluding Remarks

Considering the fact that RTAs have proliferated rapidly and played a substantial role in establishing rules on international trade, the environmental provisions in the RTAs are important elements to discuss in regard to “trade and the environment” problems. The detailed environmental provisions introduced into the RTAs of the United States and Canada have raised the level of knowledge and awareness about environmental issues, at least among the governmental officials of the partner countries, particularly in developing

⁹ The Ministry of Environment studied the environmental impact assessment system on RTAs of other countries and recommended to introduce such a system to Japan. Also Japanese RTAs include a regular review system and some RTAs were amended. However, the periodical review system does not work well on the issue of environmental problems.

countries. Negotiation on environmental provisions provides an opportunity for reviewing trade liberalization policies from an environmental perspective. In this sense, RTAs could help achieve sustainable development at the intersection of trade liberalization and ever-increasing environmental concerns. However, environmental provisions are not incorporated in all RTAs. Japanese RTAs are an example of RTAs that incorporate environmental issues only in their preambles, or in relevant articles. Some have no environmental provisions whatsoever. With the increasing need for environmental protection, the effective framework of environmental provisions in RTAs should be discussed.

Even more problematic, the detailed environmental provisions in the RTAs cannot always prevent the environmental disruption caused by the RTAs themselves. As described in the above section, the increasing flow of goods that are inevitably expected after the adoption of RTAs result in environmental problems in developing countries. In order to avoid these problems, an effective environmental impact assessment should be carried out before concluding RTAs.

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