

Environmental provisions in USMCA: regression or progression?



(<https://borderlex.eu/2020/06/29/environmental-provisions-in-usmca-regression-or-progression/2020-06-29-fishing/>)

USMCA contains provisions to protect fish stocks and tackle marine litter – but it says nothing about climate change. *The flagship USMCA trade agreement between the United States, Canada and Mexico is coming into force on 1 July 2020* How does this agreement deal with environmental issues? Bashar Malkawi and Shakeel Kazmi walk us to the key provisions in USMCA on environment – contrasting them with other trade agreements, including the European Union's.

Protecting the environment is not an extravagance. [Rising environmental issues](https://www.kpbs.org/news/2020/may/01/us-officials-confirm-massive-cross-border-spills/) (<https://www.kpbs.org/news/2020/may/01/us-officials-confirm-massive-cross-border-spills/>) leave countries vulnerable to diseases and disasters. Countries should always take steps to address sustainable development and the environment. The environmental provisions in international trade agreements – such as [the European Union EU- South Korea Free Trade Agreement](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01)&from=IT) ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514\(01\)&from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01)&from=IT)), [Comprehensive and Progressive Trans-Pacific Partnership Agreement](https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf) (<https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf>), and the United States-Mexico-Canada Agreement USMCA – play important roles in this arena.

The USMCA is a revision and replacement for the 25-year-old North American Free Trade Agreement known as NAFTA, a regional trade agreement that has [generated over billions worth of goods and services trade](https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/july/nafta-decade-trade) ([https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/july/nafta-decade-](https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/july/nafta-decade-trade)

success) among the three participating nations. The new trilateral agreement assures that duty-free and quota-free trade within North America will continue for at least 16 years.

The USMCA mostly follows NAFTA with addition of new laws on intellectual property protection, the internet, investment, state-owned enterprises and currency. Noteworthy changes in key areas include **incentives to make vehicles in North America and open Canadian markets for American dairy farmers** (<https://www.bnnbloomberg.ca/new-nafta-leaves-winners-and-losers-across-north-america-1.1361531>).

In addition, provisions are added to identify and prevent labour violations, particularly in Mexico. These new provisions require more protections for workers, and blocking imports of goods made with forced labour. The revised free trade agreement sets up an independent panel that can investigate factories accused of violating labour rights and stop shipments of that factory's goods at the border.

The USMCA also recognises a broad range of environmental topics for trilateral cooperation and introduced a separate chapter on environmental protection.

Environmental protection

When NAFTA came into effect in 1994, it was the first free trade agreement to link the environment with trade. After a series of negotiations, a parallel agreement on environmental cooperation, known as **the North American Agreement on Environmental Cooperation** (<https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec>) was signed by all parties to address the concerns of the environmental community.

The USMCA makes significant changes and additions to further strengthen and modernise environmental provisions by integrating an environmental chapter, which includes core obligations for parties to maintain high levels of environmental protection and robust environmental governance, including commitments to enforce environmental laws and to promote transparency, accountability and public participation.

The Environmental Cooperation Agreement – a parallel agreement signed by US, Canada, and Mexico – requires the retention of the Commission for Environmental Cooperation and its Montreal based Secretariat established under NAAEC.

Chapter 24 in the USMCA contains the environmental protection provisions.

The USMCA, in art. 24.3, recognises that each party has **"the sovereign right" to establish its "own levels of domestic environmental protection"** (https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter) and "the right to modify this as it sees fit". The purpose of the USMCA is not to harmonise the environment standards among the parties.

The USMCA – similar to article 13.3 of **the EU-South Korea FTA** ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514\(01\)&from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01)&from=IT)), calls on the parties to "strive to ensure" that its laws provide for "high levels of environmental protection." This language is somewhat general and soft.

Fish subsidy, whaling disciplines but no reference to climate change

The environmental provisions of the USMCA are strengthened in several respects with the inclusion, in art.24.8, of a **list of seven multilateral environmental agreements** (https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf) such as the Montreal Protocol, the Convention on International Trade in Endangered Species of Wild Fauna and Flora also known as CITES, and the UN Law of the Sea.

In the event of a conflict between the USMCA provisions and an MEA the latter will prevail. The Parties are also required to implement their obligations under these seven MEAs, and a provision enables adding additional MEAs in the future.

However, in contrast with **the EU policy** (<https://www.climatechangenews.com/2018/02/02/eu-difficult-imagine-trade-deals-countries-not-paris-agreement/>) of conditioning signing FTAs with other countries on membership of the Paris climate agreement, the USMCA fails to include any reference to **the United Nations Framework Convention on Climate Change and the Paris Agreement** (<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>).

The USMCA addresses pollution and conservation issues but there is no carbon emissions clause to address the climate crises. Only carbon storage is mentioned in the sustainable forest management section and clean technology in a non-binding section on environmental good.

This is in contrast with other specific provisions, such as art. 13.6, included in the recent **EU-Mercosur trade pact** (<https://ec.europa.eu/trade/policy/in-focus/eu-mercator-association-agreement/>) promoting “domestic and international carbon markets” and “energy efficiency, low-emission technology and renewable energy”.

Similar to **EU FTAs** (<https://ecdpm.org/wp-content/uploads/2013/11/IB-6J-Comparing-EU-Free-Trade-Agreements-Fisheries-2006.pdf>), the USMCA, in art. 24.20, includes extensive **disciplines on fishery subsidies** (https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf).

The USMCA includes vessel operators in the scope of the prohibition on fisheries subsidies and commits all parties to work towards addressing those subsidies in the WTO, which is particularly significant given that **WTO Members** (https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm) have been working for eighteen years on an agreement on fishing subsidies and illegal fishing.

The USMCA also includes commitments to adopt restrictions on whaling, consistent with existing international conventions and in a manner recognizing the special importance of whaling in indigenous communities.

The USMCA provides for new obligations regarding combating **marine litter**. The agreement requires, in art. 24.12, the parties to **take action prevent and reduce marine litter** (https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf). Marine plastic litter enters marine life through a variety of land and sea-based actions. Examples of such marine plastic litter include water bottles, plastic bags, and fishing gears.

Process and production methods

The USMCA addresses, in art. 24.17.2, the **distinction between standards regulating a final product and standards regulating the process of production of that product**

(https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf).

The standards regulating the process of production of a product are known as process and production methods. Such PPMs specify criteria for how a product is manufactured, harvested, or taken. Terms such as “made with”, “produced by”, and “harvested by” signify a PPMs standard.

All PPM standards apply to the production stage, for example before a product is placed on the market for sale. These standards specify criteria for how a product is produced or processed. However, the PPM standard may address the environmental effects of a product all during its life-cycle, for example effects which may emerge when the product is produced, transported, consumed or used, and disposed of.

Environmental impact assessments

The USMCA introduces, in art. 24.7, a requirement to conduct **environmental impact assessments**

(https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf) for central government projects that may have an effect on the environment. Parties are required to undertake environmental impact assessments of proposed projects that may cause significant effects.

Although this language appears to be a new addition to trade agreements, excising laws in many countries already require environmental impact assessments for new projects. Moreover, several countries such as the **EU adopts impact assessments** (<https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/>) in their trade negotiations and trade agreements.

Dispute settlement

The EU FTA with Japan

(http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=440), in article 16.17, for instance does not place the provisions on environment under the jurisdiction of the dispute settlement mechanism between members. The EU policy is one based on cooperation and dialogue.

In contrast, according to art. 24.32 of the USMCA, parties to the agreement are to bring **environmental disputes**

(https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf) to the same dispute settlement system applicable to all USMCA commitments. In the event that the parties cannot resolve the dispute after a panel ruling, complaining parties can impose proportional trade measures against the violating party in the same manner authorised for other violations.

Despite subjecting environmental disputes to the same dispute settlement mechanism of other USMCA violations, **such disputes, according to art. 24.4, can be brought only if the lowering of government standards creates a trade or investment advantage**

(https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf).

The violation is done in a manner that affects trade. This requirement determines what violation is actionable or non-actionable.

Only sustained action or inaction that “affects” trade is actionable. Therefore, environmental obligations are linked to trade in a manner that would otherwise be considered an intrusion into the domestic arena of the parties.

Moreover, to measure whether parties of the USMCA have failed to “effectively enforce” their environmental laws, the agreement provides a test. This test requires a “sustained or recurring” course of action or inaction in a manner affecting trade between the parties. The USMCA does not define the terms “sustained or recurring.”

Can do better

All three parties to the new North America Trade Agreement acknowledge the importance of the conservation, protection and enhancement of the environment in their territories.

NAFTA was the first free trade agreement of its type to specifically address the concerns of the environmental community. However, there has been a significant concern about the extent to which these environmental provisions have lived up to their potential.

Unfortunately, the USMCA fails to address climate change, the biggest challenge of our time, even if inclusion of seven multilateral environmental agreements in the USMCA will bring a positive change. The provisions related to carbon emissions, climate change commitments, and renewable energy collaborations are crucial as USMCA is expected to serve as the new template for future trade agreements as did its predecessor NAFTA in the past. We can do better for the environment and sustainability.



(<https://borderlex.eu/2020/06/29/environmental-provisions-in-usmca-regression-or-progression/2020-06-29-bashar-malkawi/>)Bashar Malkawi is Director of Knowledge Management at the Government of Dubai, Legal Affairs Department. Prof. Malkawi holds LLM in International Trade Law from University of Arizona and SJD from American University, Washington College of Law.



(<https://borderlex.eu/2020/06/29/environmental-provisions-in-usmca-regression-or-progression/2020-06-29-shakeel-kazmi-2/>)Shakeel Kazmi is Professor of Practice in Legal Studies at New York University Abu Dhabi. Prof. Kazmi holds LLM from American University, Washington College of Law and SJD and LLM in Environmental Law from Pace University.

