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Vers un droit international économique transatlantique
Towards a Transatlantic International Economic Law

Sous la direction d'Hervé Agbodjan Prince

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Abstract

The *Comprehensive Economic and Trade Agreement between the EU and its Member States and Canada* ("CETA"), and the recently adopted *United States-Mexico-*

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récemment adopté offrent une excellente occasion de réformer les pratiques réglementaires économiques nationales ainsi que les relations commerciales et d'investissement entre des États et régions parmi les plus influents du monde afin de les rendre plus soutenables. Cet article propose une analyse de la manière dont ces accords intègrent les préoccupations environnementales à leurs objectifs économiques encore dominants. Il cherche également à souligner les similitudes et les différences entre les deux traités, à la recherche de règles communes (ou « transatlantiques ») visant la protection de l'environnement. Afin de brosser un tableau plus complet, il examine les normes de fond ainsi que les aspects institutionnels et procéduraux relatifs aux questions environnementales considérant leur interdépendance. Après avoir détaillé la montée en puissance des accords dits « méga régionaux », la deuxième partie examine les dispositions environnementales du CETA et de l'USMCA. La troisième partie se penche quant à elle sur l'examen du chapitre innovateur portant sur les bonnes pratiques réglementaires et la coopération, pour identifier ses implications importantes en matière de protection de l'environnement. La quatrième partie étudie comment ces accords clarifient et réduisent la portée des normes de fond de protection des investissements et quels sont leurs effets sur les questions environnementales. La cinquième partie aborde pour sa part certaines questions institutionnelles et procédurales relatives à l'applicabilité des obligations environnementales et leur relation avec le règlement des différends investisseur-État (RDIE). La dernière section conclut en soulignant deux tendances: une harmonisation «descendante» encore incomplète des clauses environnementales de fond et

Canada Trade Agreement ("USMCA") provide for a great opportunity to reform in a more sustainable direction the economic domestic regulatory practices as well as the trade and investment relationships among some of the most influential states and regions of the world. This study analyzes how these agreements integrate environmental concerns with their still mainstream economic objectives. Furthermore, it shows the similarities and differences between the two treaties, in search of common, "transatlantic" rules for the protection of the environment. To draw a more comprehensive picture, it examines substantive standards as well as institutional and procedural aspects relating to environmental matters in light of their interdependent connection. After describing the rise of so-called "mega-regional" agreements, the second part looks at the environmental provisions in both CETA and USMCA. The third part examines the innovative chapter on good regulatory practices and cooperation that has important implications for environmental protection. The fourth part considers how these agreements clarify and narrow the scope of substantive standards of investment protection and their effects on environmental matters. The fifth part addresses selected institutional and procedural matters relating to the enforceability of environmental obligations and their relationship with investor-state dispute settlement (ISDS). The final section concludes by showing two trends: the first one is a still incomplete "top-down" harmonization of substantive environmental clauses and investment protection standards between the examined regulatory regimes; the second one is an emerging, potentially promising and long-lasting "bottom-up" alignment on

des normes de protection des investissements entre les régimes réglementaires examinés ainsi qu'un alignement « ascendant » émergent, potentiellement prometteur et durable, sur les aspects procéduraux et la coopération en matière réglementaires des États parties.

Resumen

El Acuerdo Económico y Comercial Global entre la UE y sus Estados miembros y Canadá, (conocido como «CETA» por sus siglas en inglés), y el acuerdo recientemente adoptado entre los Estados Unidos, México y Canadá («T-MEC») brindan una gran oportunidad para reformar de una manera más sostenible las relaciones económicas entre algunos de los estados y regiones más influyentes del mundo. Este estudio analiza cómo estos acuerdos integran las preocupaciones ambientales con sus objetivos económicos aún dominantes. Además, muestra las similitudes y diferencias entre los dos tratados, en búsqueda de reglas comunes «transatlánticas» para la protección del medio ambiente. Para trazar un panorama más completo, este examina las normas sustantivas, así como los aspectos institucionales y de procedimiento relacionados con los asuntos ambientales a la luz de su conexión interdependiente. Después de describir el surgimiento de los llamados acuerdos «megarregionales», la segunda parte analiza las disposiciones ambientales tanto en el CETA como en el T-MEC. La tercera parte examina el capítulo innovador sobre las buenas prácticas regulatorias y la cooperación para determinar sus importantes implicaciones en la protección del medio ambiente. La cuarta parte considera cómo procedural aspects and cooperation on States Parties' regulatory processes.

Resumo

O Acordo Econômico e Comercial Global entre a UE e seus Estados-Membros e o Canadá (AECG), e o Acordo entre Estados Unidos, México e Canadá (AEUMC), recentemente adotado, propiciam grande oportunidade para reformar, em direção mais sustentável, a relação econômica entre alguns dos Estados e regiões mais influentes. Este estudo analisa como esses acordos integram preocupações ambientais com seus objetivos econômicos ainda convencionais. Além disso, mostra as similaridades e diferenças entre os dois tratados, na busca de uma regra «transatlântica» comum de proteção do meio ambiente. Para traçar imagem mais compreensiva, examina os padrões substantivos assim como os aspectos institucionais e processuais relacionados às questões ambientais à luz de sua conexão interdependente. Após descrever a ascensão dos chamados acordos 'megarregionais', a segunda parte se volta para as provisões ambientais de ambos, AECG e AEUMC. A terceira parte examina o capítulo inovador sobre boas práticas regulatórias e cooperação, que tem importantes implicações para a proteção ambiental. A quarta parte considera como esses acordos esclarecem e estreitam o escopo dos padrões substantivos da proteção de investimentos e seus efeitos nas questões ambientais. A quinta parte se ocupa de

estos acuerdos aclaran y acotan el alcance de las normas sustantivas de protección de inversiones y sus efectos en materia ambiental. La quinta parte aborda una selección de cuestiones institucionales y de procedimiento relacionadas con la exigibilidad de las obligaciones ambientales y su relación con la solución de controversias inversionista-Estado (ISDS, por sus siglas en inglés). La sección final concluye mostrando dos tendencias: la primera es una armonización «descendente» aún incompleta de las cláusulas ambientales sustantivas y las normas de protección de inversiones entre los regímenes regulatorios examinados; el segundo es una alineación «ascendente» emergente, potencialmente prometedora y duradera sobre los aspectos de procedimiento y la cooperación en los procesos regulatorios de los Estados parte.

questões institucionais e procedurais selecionadas relacionadas a executoriedade das obrigações ambientais e suas relações com o sistema de arbitragem entre Estado e investidor (ISDS). A última seção conclui mostrando duas correntes: a primeira é a harmonização "top-down", ainda incompleta, das cláusulas ambientais substantivas e padrões de proteção de investimentos entre os regimes regulatórios examinados; a segunda é o alinhamento "bottom-up" emergente, potencialmente promissor e duradouro nos aspectos procedimentais e cooperação no processo regulatório dos Estados-Partes.

摘要

欧盟及其成员国与加拿大签订的《综合经济与贸易协定》（CETA），以及最近通过的《美加墨协议》（USMCA）为全球部分最具影响力的国家和地区之间的经济关系进行更有可持续性的改革提供了良机。本文将分析这些协议如何把环境问题纳入各国现行的主流经济目标。此外，本文比较了两份协议的相似点和不同点，寻找共同的"跨越大西洋"环保规则。为了更全面地阐释，本文根据它们的相互依存关系，考查了关于环境问题的实质标准和制度性和程序性问题。第二部分在说明所谓的跨地区协议的兴起之后，审视了CETA和USMCA关于环境的规定。第三部分考查了对环保有重大影响的良好管制实践与合作的创新规定。第四部分研究了这些协议如何明确和缩小投资保护实质标准的范围及其对环境问题的影响。第五部分设法解决关于环境义务强制执行性的部分制度性和程序性问题，以及它们与投资国争端解决的关系。最后一部分总结出两大趋势：一是本文所关注地区间的实体性环境条款和投资保护标准自上而下的协调统一仍未完成；二是有关成员国管制程序的程序规定与合作自下而上的相互对齐正走向成熟、极富前景且持久。

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There is now a well-established consensus that Free Trade Agreements liberalizing investments and trade in goods and services (FTAs) shall not aim to achieve mere economic advantages at the expense of the protection of the public interest, but instead, should be instruments to achieve sustainable development.

The *Comprehensive Economic and Trade Agreement* between the EU, its Member States and Canada (CETA),[1] and the recently adopted Agreement between the United States, Mexico and Canada (USMCA)[2] provide for a great opportunity to reform in a more sustainable direction the economic domestic regulatory practices as well as the trade and investment relationships among some of the most influential states and regions of the world.

The purpose of the present study is twofold. First, it evaluates how these agreements integrate environmental concerns with their still mainstream economic objectives. Second, it shows the similarities and differences between the two treaties, in search of common, "transatlantic" rules for the protection of the environment.

To draw a more comprehensive picture, it examines substantive standards as well as institutional and procedural aspects relating to environmental matters, in light of their interdependent connection. The analysis proceeds as follows. After briefly setting the stage by describing the rise of so-called 'megaregional' agreements, the second part looks at general and more specific provisions in CETA and USMCA related to the environment. In particular, this part considers whether the broadening of the substantive scope of these environmental provisions reflects a deepening of ambition in protecting the environment. The third part of this study examines the innovative chapter on good regulatory practices and cooperation that

1 CETA provisionally entered into force on 21 September 2017 ((2017) OJ L11/23). Entry into force follows its approval by European Member States, according to EU procedures involving the Council and the Parliament. The agreement will definitely enter into force when all states finalize their ratification procedures.

2 The renegotiation of NAFTA led to the adoption of USMCA, which entered into force on July 1, 2020. The text of USMCA is available online: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; Compared to NAFTA, USMCA, with its 34 chapters and 12 side letters, further expands the sectors of goods and services covered by the precedent regime by including digital trade, intellectual property rights, state-owned enterprises, currency misalignment and anticorruption.

has important implications for environmental protection. The fourth part considers different ways in which these agreements better specify the content of substantive standards of investment protection and their effects on environmental matters. The fifth section addresses selected institutional and procedural matters relating to the enforceability of environmental obligations, also in the context of the reform of investor-state dispute settlement (ISDS). The final chapter concludes by showing two trends: the first one is a still incomplete 'top-down' harmonization of substantive environmental clauses and investment protection standards between the examined regulatory regimes; the second one is an emerging, potentially promising and long-lasting 'bottom-up' alignment on procedural aspects and cooperation of State Parties' regulatory processes.

I. Megaregionals Agreements as Instruments of Comprehensive Regulation

There is a general trend across many regions of the world to rely on FTAs to regulate trade, services and investment liberalization. These FTAs ultimately cover wide areas of the world and aim to create comprehensive regulatory regimes and deeper economic integration.[3] These agreements bind together a variety of states and with the growing importance of emerging markets as outward investors, they leave behind the distinction between 'host' and 'home' states. As a consequence of investment flows being bidirectional, these agreements ideally need to achieve the highest level of protection for their investors abroad as well as the broadest regulatory space at home.

Many of these FTAs take into account the mounting criticisms that have either slowed down or paralyzed global institutions, such as the WTO,[4]

[3] Recent FTAs and "megaregionals" cover a wide range of sectors that include government procurement, financial services, digital trade, intellectual property rights, anti-corruption, environment and labor, which were previously considered as falling into the domestic sphere. Although there is no official definition of "megaregionals" for present purposes we include in this category, besides CETA and USMCA, the ASEAN Regional Comprehensive Economic Partnership (RCEP), the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the (draft) EU-US Transatlantic Trade and Investment Partnership (TTIP).

[4] Challenges to the WTO's smooth normative development became evident back in 2001 with the difficulties in concluding the Doha Round negotiations. In December 2019 the

or weakened and questioned the legitimacy of bilateral investment treaties (BITs) and their ISDS.[5] Albeit maintaining many of the core elements of trade and investment regimes like 'non-discrimination' or 'fair and equitable treatment', they provide for variations on those "themes" to take into account their shortcomings. They present new models that should better meet the need of combining today's increasingly integrated and globalized economic society with sustainable development goals: innovative features include substantive as well as procedural and institutional aspects.[6]

The evolution of how human rights, the environment and social matters are considered under FTAs shows that these issues, initially considered as exceptions, over time gained autonomous recognition.[7] Non-derogation provisions that expressly require states not to lower their human rights, social and environmental standards to encourage trade flows and foreign investments, are still a recurrent pattern in FTAs.[8]

functioning of the Appellate Body has been impaired by the impossibility to proceed to the election of two of its members due to the US's consistent veto on the appointment of new appellate judges on grounds of the court's 'overreach,' its undue reliance on 'precedent,' and its alleged disregard for the rules set forth under the Dispute Settlement *Understanding. On the WTO institutional crises and the ensuing reforms,* see Elisa Baroncini "Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: the EU and the Multi-Party Interim Appeal Arbitration Arrangement" (2019) 29 Italian YB of Intl L 33-52.

5 On the backlash against investment agreements and ISDS and its impact on recently negotiated FTAs, see David D. Caron & Esmé Shirlow, "Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences" in Geir Ulfstein & Andreas Føllesdal, eds., *The Judicialization of International Law – A Mixed Blessing?* (Oxford: Oxford University Press, 2018) at 159.

6 The Institute for International Law and Justice has created a research project to analyse the regulatory and judicial dimensions of economic globalization brought by these large-scale economic agreements. See online: <https://www.iilj.org/megareg/>.

7 A notable exception to this approach in EU trade agreements is the 'human rights clause' expressly recognizing the importance of respecting human rights and democratic principles. This clause constitutes an essential element of the treaty and its violation could trigger the partial or full suspension of the advantages deriving from the agreement by the other party.

8 On the inclusion of public interest values by FTAs, see Lorand Bartels, "Social Issues: Labour, Environment and Human Rights", in Simon Lester, Bryan Mercurio & Lorand Bartels, eds., *Bilateral and Regional Trade Agreements. Commentary and Analysis,* 2nd ed. (Cambridge: Cambridge University Press, 2015) 364 at 368.

However nowadays, states with the endorsement of sustainable development goals are re-orienting their trade and investment policies and agreements, to better take into account their environmental and social impacts.[9] Embracing this new approach, recent FTAs, like CETA and USMCA, include substantive provisions that require states to promote sustainable development by enhancing coordination of their respective labour, environmental and trade policies and to enhance enforcement of their respective environmental laws as well as the implementation of multilateral environmental agreements (MEAs).[10]

Megaregionals have their opponents, who consider them to be instruments that export values of the more powerful states and widen their influence, threaten state equality and lead to fragmentation, at the expense of global institutions like the WTO and the UN.[11]

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9 In September 2015 the UN General Assembly adopted a plan of action setting 17 Sustainable Development Goals (SDGs), specified by 169 targets. See "UNGA, Transforming our world: the 2030 Agenda for Sustainable Development" (2015), online: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>. On the SDGs, see Duncan French & Louis J. Kotzé, eds, *Sustainable Development Goals. Law, Theory and Implementation*, (Cheltenham, UK: Edward Elgar Publishing, 2018).

10 *Comprehensive Economic and Trade Agreement*, 30 September 2016, Sustainable Development Chapter, art 22.1.3(a) and (c) (provisionally effective 21 September 2017) [*CETA*]; *United States-Mexico-Canada Agreement*, 10 December 2019, art 24.2.3. and art 24.4 (entered into force 1 July 2020) [*USMCA*]. For an assessment of CETA sustainable development provisions, see Angelica Bonfanti, "Domestic Policy Space and the Settlement of Trade Disputes Under the EU-Canada Comprehensive Economic and Trade Agreement," (2016) TDM 1. For a comprehensive analysis on these developments, see (2014) 15 J World investment & Trade.

11 For an account of the criticisms moved to international economic agreements, in general, see Nicolas Lamp, "How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements" (2019) 30:4 Eur J Intl L at 1359-1397. More focused on megaregionals, see Eyal Benvenisti, "Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law" (2015) Global Trust Working Paper 08. Minimizing some of the alleged negative aspects with regard to environmental matters, see James Hollway, Jean-Frédéric Morin & Joost Pawelyn, "Structural conditions for novelty: The introduction of new environmental clauses to the trade regime complex" (2020) Intl Envtl Agreements 61 [Hollway]. The study argues that: "while there are a few well-known examples of novel clauses that have been introduced by or with powerful actors, power does not always lead to novelty being introduced and novelty is often introduced without the presence of power asymmetries."

On the other side of the spectrum, others welcome them as treaties that, by ensuring greater and more comprehensive regulatory cooperation, could potentially better achieve sustainable development objectives like enhancing environmental protection and promoting labour and human rights standards.[12]

Taking a middle ground, mega-regionals, as will be shown hereinafter, may result in useful tools that achieve state consent also on progressive and cutting-edge non-trade related matters, serving as front-runners and exercising a pull with regard to multilateral negotiations.

II. Environmental Protection in CETA and USMCA: A Comparative Perspective

From a structural point of view, FTAs used to be quite different depending on whether they were agreed by the EU or by American states, such as Canada or the United States.

On the American side, the *North American Free Trade Agreement* (NAFTA), with its two side-agreements requiring the parties to adopt domestic laws and policies to enhance labor (NAALC) and environmental standards (NAAEC), was the leading model.[13] Keeping with the American tradition, USMCA maintains the side agreement on environmental matters, the Agreement on Environmental Cooperation (ECA) that will supersede the NAAEC.[14] At the same time USMCA innovates with respect to the NAFTA model and follows the European model by including an environmental chapter: environmental protection between the three USMCA Parties

12 Rafael Leal-Arcas, "Mega-regionals and Sustainable Development. The Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership" (2015) Renewable Energy L & Policy Rev 248. The authors consider that these agreements are more efficient tools to promote sustainable development objectives compared to multilateral treaties, like multilateral environmental agreements.

13 The North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAAEC) and the North American Agreement on Labor Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAALC).

14 On November 30, 2018, Canada, Mexico and the United States adopted the *Agreement on Environmental Cooperation* (ECA) that will take effect when USMCA comes into force.

is regulated by the combined provisions of the ECA and of USMCA environmental chapter.

CETA also endorses the 'European model' by envisaging chapters devoted respectively to sustainable development, the environment and labor. As we will see in the coming paragraphs, these differences in the models do not lead to major divergences.

Also from a substantive perspective, the European and North American FTAs started from different models but they are now converging. From the US and Canadian Model BITs in 2000s, North American models were pioneers, for instance, in narrowing the content of certain investors' protection clauses and in broadening public policy space. These elements were not found in contemporaneous European agreements.[15] In 2009, with the Lisbon Treaty, the competence to negotiate agreements including foreign direct investments passed from the Member States to the EU. This change has been accompanied by a policy shift towards more sustainable agreements.[16]

CETA and USMCA's environmental chapters are very similar and their convergence appears at first glance to include even the numbering of many provisions of their respective initial parts. Both environmental chapters start by addressing general issues of the trade-environment nexus. For instance, both refer to general principles – like mutual support, public participation in environmental decision-making – and recognize the importance and their relationships with other sources of law, like multilateral environmental agreements (MEAs) and international standards. A major

15 On the different approach on environmental issues across FTAs and investment agreements, see Rafael Leal-Arcas, Marek Anderle, Filipa da Silva Santos, Luuk Uilenbroek & Hannah Schragmann, "The contribution of free trade agreements and bilateral investment treaties to a sustainable future" *Zeitschrift für europarechtliche Studien* (December 2019) at 18: "The EU's approach to the inclusion of environmental provisions in its FTAs with third countries differs from the USA's approach. Rather than perceiving its trade partners as competitors with whom a level playing field should be established, the EU traditionally aims to achieve greater coherence between its trade, environmental and developmental objectives".

16 On the substantive and procedural innovations of this 'new generation' of EU Agreements, see Catharine Titi, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements" (2015) 26:3 Eur J Intl L 639.

difference is the express recognition of the precautionary principle only by CETA.[17]

The following parts address selected specific environmental issues; and the final parts deal with institutional matters regarding the implementation of the previous provisions.

A. General Environmental Substantive Provisions

1. The definition of 'environmental law'

Both environmental chapters start by defining 'environmental law.' Picking up almost verbatim the definition found in NAAEC and other FTAs,[18] USMCA defines "environmental law" as:

> a statute or regulation of a Party, or provision thereof, *including any that implements the Party's obligations under a multilateral environmental agreement (italic* added, not in NAAEC*),* the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through: (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.[19]

This definition appears rather narrow and sectorial. First, because it includes only regulatory measures, whose 'primary' purpose is environmental protection. Although this provision refers to the human rights pillar of sustainable development, it fails to embrace an integrated approach that includes the economic dimension of sustainable development and a

17 Innovative research on the introduction of novel environmental clauses into trade agreements shows that trade agreements are more likely to introduce novel environmental clauses when the parties have diverse backgrounds in earlier trade negotiations and when they are committed to environmental agreements and unconstrained by existing shared trade agreements. See Hollway, *supra* note 11.

18 *North American Agreement on Environmental Cooperation*, (entered into force 1 January 1994) at art. 45.2(a) [*NAAEC*]; See also *Comprehensive and Progressive Agreement for Trans-Pacific Partnership,* 8 March 2018 at art. 20.1 (entered into force 30 December 2018).

19 See *USMCA* at art. 24.1.

more comprehensive notion of environmental matters. For instance, it excludes topical matters like the sustainable management of natural resources, such as water, soil, forests, etc. Explicitly outside the scope of this notion of 'environmental law' are provisions related to worker safety or health as well as those managing the subsistence or aboriginal harvesting of natural resources.

The interpretation of this notion has been controversial in the implementation of NAAEC: the expansive interpretation held by the CEC Secretariat has been consistently opposed by States Parties, individually or jointly within the CEC Council, who recognized a more limited scope to this notion. Under NAAEC, submissions relating to the impact of air emissions on human health, environmental crimes such as the illegal disposal of hazardous waste, the release of genetically modified organisms and the allocation of water rights have been considered outside the scope of 'environmental law.' A further example of the easily criticized narrow and formalistic reading upheld by Mexico in the Transgenic Maize case was that only laws enforced by environmental authorities were covered by the category of environmental law.[20] This reading should be reformed in order to take into account the principle of integration of environmental matters with other sectors of regulation. An integrated approach requires due consideration of environmental concerns across the different horizontal regulatory sectors (economic, administrative, labor, industrial, etc.) and vertical governance levels (international, regional, national and local) and is essential for effective and comprehensive environmental protection.[21]

In comparison to NAAEC, USMCA's definition, by adding "including any that implements the Party's obligations under a multilateral environmental agreement", may provide for a significant expansion of the scope of environmental law. In fact, laws implementing MEAs may go beyond the list of subject matters covered by the definition of environmental law.

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20 For a critical and thorough account on the interpretation of 'environmental law' under NAAEC, see Paolo Solano, "Choosing the Right Whistle: The Development of the Concept of Environmental Law under the Citizen Submission Process" in Hoi L. Kong & L. Kinvin Wroth, eds., *NAFTA and Sustainable Development. History, Experience, and Prospects for Reform* (Cambridge, UK: Cambridge University Press, 2018) at 75.

21 Cf Rio Declaration, principle 4: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

Instead CETA opts for a broader definition, which covers a law or other legally binding measure whose purpose, although not necessarily its primary one, is the protection of the environment.[22]

Similarities continue as both environmental chapters illustrate their scope and objectives by recognizing the importance of the environment as an 'integral element' and as a 'fundamental pillar' of sustainable development[23] and affirm the need to strengthen cooperation in environmental matters to 'complement the objectives of this Agreement.'[24] The recognition of the interdependence and mutually reinforcing relation between trade and environmental policies promotes the complementarity and integration of economic rules with provisions focused on human rights and environmental protection.[25]

A different position that reflects a longstanding controversy before WTO dispute settlement bodies in the trade-environment transatlantic relationship is found with regard to the precautionary approach.[26] While USMCA is silent on the matter, CETA Parties "acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[27] This formulation endorses the high threshold with regard to the nature of the potential harm as well as the cost-effectiveness requirement, both required by Principle 15 of the Rio Declaration. While international courts have carefully avoided taking

22 See *CETA* at art. 24.1.

23 See *USMCA* and *CETA* at arts 24.2.

24 *Ibid*.

25 On the principle of mutual support between trade and human rights and environmental regimes, see Laurence. Boisson de Chazournes & Makane Mbengue, "A propos du principe du soutien mutuel – Les relations entre le protocole de Cartagena et les accords de l'OMC" (2007) 111:4 RGDIP 829; Riccardo Pavoni, "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?" (2010) 21:3 Eur J Intl L. 649.

26 WTO, Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, Doc. WT/DS26/AB/R- WT/DS48/AB/R, paras. 123-125; WTO, Reports of the Panels, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Doc. WT/DS291/R WT/DS292/R WT/DS293/R, 29 September 2006 at 97.

27 See *CETA* at art. 24.8.2.

a clear position on the matter,[28] European law and jurisprudence consistently recognize the customary nature of the precautionary principle.[29]

2. Obligation not to lower and to enhance environmental standards

Another matter on which there is alignment between the two treaties is the reaffirmation of states' parties' sovereign right and discretion to set their own priorities and to establish their levels of protection on environmental matters, linked, under both megaregionals, to the commitment not to lower the levels of environmental protection to encourage trade and investment flows.[30]

This obligation finds a parallel formulation in the respective investment chapters of CETA and USMCA. In this context, two CETA provisions are relevant. With regard to investments, Article 8.9 in the investment chapter states that:

> 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

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[28] Cf the timid approach of the International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* at para.164: where it only recognizes that "a precautionary approach may be relevant in the interpretation and application of the provisions of the statute." Recently, the European Court of Human Rights (*Tatar v. Romania* No 67021/01, [2009] ECHR 61 at paras.125-135) and the International Tribunal on the Law of the Sea showed an open attitude towards the recognition of the precautionary principle. (ITLOS Seabed Dispute Chamber, Advisory opinion, *Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area,* 1 February 2011 at paras. 125-135)

[29] See, for instance, the cases before the European Court of Justice: *Pfizer Animal Health SA v. Council* T-13/99, [2002] ECR II-03305 at para.139; *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute* C-77/09 [2010] ECR I-13533 at paras 75-76; *Blaise and others*, C-616 [2019] at para. 43.

[30] See *CETA* at art. 24.5; See *USMCA* at art. 24.3. The wording of this USMCA provision is weaker compared to the precedent NAAEC formulation in that it requires parties to "strive to ensure" instead of requiring that they "shall ensure" that their environmental laws provide for high levels of environmental protection**;** Cf *NAAEC* at art. 3 'Levels of Protection.'

> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

With regard to trade in goods and services, reproducing the chapeau of GATT art. XX, art. 28.2 (b) of CETA confirms that:

> (…) subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary: (…) (b) to protect human, animal or plant life or health.

The parallel USMCA provision found in the investment chapter provides that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.[31]

The "location" of these provisions in the investment chapters adds strength to the principle they envisage, even though their alleged violation is not justiciable before USMCA investment tribunals.[32] USMCA envisages a noteworthy clarification with regard to the content of awards by limiting the forms of relief a tribunal might order to a respondent state by expressly preventing tribunals from amending, repealing, adopting or implementing any law or regulation.[33]

The USMCA version provides greater discretion to states to exercise their regulatory powers on environmental matters by requiring that the measure is "appropriate" instead of the CETA threshold, which requires it to be "necessary" to the public policy objective pursued. This broader concession that makes the regulatory measure more likely to pass the test can

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31 See *USMCA* at chap. 14, art. 14.16: Investment and Environmental, Health, Safety, and other Regulatory Objectives.

32 Cf *USMCA* at Annex D specifically limiting arbitration to claims regarding national treatment and most favorable nation treatment.

33 *Ibid* at chap. 14.

be read as backed up by the specific procedural safeguards that USMCA sets on state domestic regulatory practices.[34] Furthermore, being a "self-judging" clause, the State enjoys broader discretion to determine what measures it considers appropriate.

Going beyond the mere recognition of states' regulatory space in the public interest, both agreements commit to enhancing environmental protection. These provisions, although drafted with soft wording,[35] reflect the no regression principle that is developing in international environmental and investment law.[36] According to this principle, states commit in a one-way direction to be more ambitious and to enhance their environmental standards of protection.

3. Relationship with Multilateral Environmental Agreements (MEAs)

CETA contains only generic and declaratory references to MEAs, recognizing their importance to address environmental problems of a transboundary and global nature and reaffirming the Parties' commitments to effectively implement them at the domestic level.[37] On the other side of the ocean, USMCA goes beyond the mere recognition of MEAs' importance and envisages an autonomous obligation for state parties to "adopt, maintain and implement law, regulations and all other measures necessary to fulfil" obligations under specific MEAs: the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on ozone

34 See *infra* at para. III.

35 See *CETA* at preamble: "Parties (…) determined to implement this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters;" *CETA* at art. 24.3: "Each Party shall *seek to ensure* that those laws and policies provide for and encourage high levels of environmental protection, and shall *strive to continue to improve* such laws and policies and their underlying levels of protection." (italic added). Similarly the parallel *USMCA* provision, at art. 24.3, reads: "Each Party shall *strive to ensure* that its environmental laws and policies provide for, and encourage, high levels of environmental protection, and *shall strive to continue to improve* its respective levels of environmental protection." (italic added)

36 Andrew D Mitchell & James Munro, "No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law" (2019) 50:3 Geo J Intl L 625. In the environmental context, this principle is one of the central elements of the Paris Agreement on climate change (see, notably art. 4.3; 4.5; 4.11).

37 See *CETA* at art.24.4.

layer protection, the 1978 Protocol on the prevention of pollution from ships, the Ramsar convention on Wetlands, the Convention on the conservation of the Antarctic Marine Living Resources, the Whaling Convention and the Convention on the Establishment of the Inter-American Tropical Tuna Commission.[38] Failure to comply with these obligations may end before a USMCA dispute settlement mechanism.[39] This event is contingent upon certain conditions. First, the alleged violation must affect trade or investment between the parties.[40] Favouring recourse to dispute settlement, the impact on trade and investment is presumed, unless the respondent state proves otherwise. The second condition to be met requires that the complaining state shall also be a party to the MEA whose compliance is under review.[41] If these conditions are met, USMCA establishes an important institutional linkage with MEAs' bodies by requiring that in disputes involving the interpretation of matters covered by MEAs, "the panel of experts should seek views and information from relevant bodies established

38 See *USMCA* at art. 24.8.4.

39 Under the precedent NAFTA regime, trade measures incorporated in listed MEAs shall prevail in the event of inconsistencies with NAFTA. *North American Free Trade Agreement*, art. 104 [*NAFTA*] lists as covered MEAs: the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Another condition, which proved determinant in practice, applied: where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party must choose the alternative that is the least inconsistent with NAFTA. These issues have been at the center of the NAFTA case *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award of 11 November 2000 [Myers]. For a description and comment of the environmental dimension of the case, see Saverio Di Benedetto, *International Investment Law and the Environment*, (Cheltenham, UK: Edward Elgar Publishing, 2013) at 93 [Di Benedetto].

40 This first requirement is once again carefully described learning from previous experience under NAFTA, whose case law showed the complexities that might arise when deciding these matters in practice. In order to avoid discretion in interpreting this clause, USMCA clarifies that this requirement is met if it involves "(i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party." Cf *USMCA* at art. 24.8 footnote 6.

41 See *USMCA* at art. 24.8 footnote 6.

under these agreements, including any pertinent available interpretative guidance, findings, or decisions adopted by those bodies."[42]

4. Reference to International Standards

A common feature of the examined agreements is the recognition of the importance of relevant international standards that should inform the adoption and implementation of regulatory measures, particularly those of a technical nature.[43]

Reference to international standards is addressed in broad terms in the environmental chapter of both treaties but is more specifically regulated by the chapters on regulatory matters and on technical barriers to trade. Here, substantive convergence, albeit with minor differences, may be found by the incorporation of the relevant provisions of the WTO TBT Agreement and its further normative developments, achieved through the TBT Committee decision-making.[44] In the WTO regime, in particular under the SPS and TBT Agreements, State Parties are required to take into account international standards developed by international specialized agencies like the Codex Alimentarius and the International Standardization Organization (ISO) to address potential trade barriers with regard to their health and technical regulations.[45] Reaffirming the NAFTA approach on this matter, USMCA parties "recognize the important role that international standards, guides, and recommendations can play in supporting greater regulatory alignment and good regulatory practices, and in reducing unnecessary

[42] See *CETA* at art.24.15.9; See *USMCA* at art. 24.15.9. Similar provisions are found in investment agreements to which the US is a party. See, for instance, *US-Peru*, Art. 18(12)(8)(a); *US-Colombia*, Art. 18(12)(8)(a); *US-Panama*, Art. 17(11)(8)(a); *US-Korea*, Art. 20(9)(6)(a).

[43] See *CETA* at art. 24.8. which requires parties to take into account relevant scientific and technical information and related international standards, guidelines, or recommendations when preparing and implementing measures aimed at environmental protection that may affect trade or investment between the parties.

[44] See respectively *CETA* at chap. 4 and *USMCA* at chap. 11. The USMCA chapter provides for detailed provisions that deal with cases of multiple standards being applicable or with the opposite case of no applicable standards (art. 11.5.3 and 4). On the legal nature of standards in international economic law, see Jan Wouters, "Le Statut Juridique des Standards Publics et Privés dans les Relations Économiques Internationales" (2020) 407 Académie de Dr Intl de la Haye, Recueil des cours 9 at 59.

[45] See, for example, *SPS Agreement*, art. 3.2 and Annex A.

barriers to trade".[46] Arguably, rules that incorporate international standards beside being a powerful convergence tool, also enjoy a presumption of conformity.[47]

Other international standards to which both treaties refer are the *OECD Guidelines on Multinational Corporations*, in the context of enhancing corporate social responsibility (CSR). Under CETA and USMCA the recognition of the importance of promoting CSR initiatives on behalf of companies of the respective states' nationality is found in the preamble and in operative parts of the treaties, in both cases framed in rather generic language.[48] Other FTAs make reference to specific instruments, such as the OECD Principles of Corporate Governance, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ISO 26000 guidelines or the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[49]

46 See *USMCA* at art. 11.4.1.

47 See *NAFTA* at art. 905: "Use of International Standards: "1. Each Party shall use, as a basis for its standards-related measures, relevant international standards (…) 2. A Party's standards-related measure that conforms to an international standard shall be presumed to be consistent with Article 904(3) and (4). 3. Nothing in paragraph 1 shall be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard."

48 See *CETA* at preamble: State parties "Encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct."; See *USMCA* at art. 14.17: Corporate Social Responsibility: **"**The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption."

49 See, for instance, recent EU FTAs with Ukraine (art. 422) and Moldova in 2014, and the proposed TTIP (Sustainable Development Chapter, art. 20) that refer to specific internationally recognized instruments. On corporate social responsibility clauses in FTAs and their potential evolution towards more stringent standards, see Francesca Romanin Jacur, "Corporate Social Responsibility in Recent Bilateral and Regional Free Trade Agreements: An Early Assessment" (2018) 23:4 Eur Foreign Aff Rev 463.

B. The protection of natural resources through the promotion of sustainable trade and investments

Beyond addressing the general aspects of the interface between trade and the environment, the CETA and USMCA Environmental Chapters deal with more specific environmental matters. A first category of provisions of both agreements promote trade and investment in environmentally friendly goods and services. While CETA takes a groundbreaking position by expressly acknowledging that these goods and services could benefit from reduced non-tariff barriers, hence not considering them as similar ("like") to their polluting or "unsustainable" substitutes,[50] USMCA more timidly delegates the Environment Committee the task to consider similar issues.[51] This approach, especially the CETA version, marks a determinant step forward towards the differentiation between goods, services and investments according to their process and production methods (PPMs) and their environmental impact. In fact, under WTO law, the notion of "non-product related PPMs" – namely PPMs of which there is no trace in the final product and as a consequence cannot be easily identified – is still very controversial among the parties.[52]

A second category of provisions considers the sustainable management of forests, fisheries and biodiversity, including wildlife flora and fauna. While CETA opts for a general approach without entering in the details for each environmental matter, USMCA provides for specific provisions.

USMCA and CETA recognize the value and critical role of forests as ecosystem services that provide for economic, environmental and social benefits for present and future generations, including for Indigenous people, and commit to promote trade in forest products that have been legally harvested from sustainably managed forests and conversely to combat illegal logging and associated trade.[53] These provisions may serve as powerful

50 These are, for instance, goods and services produced through processes that entail high negative externalities, such as greenhouse gas emissions.

51 See *CETA* at art. 24.9.1; See *USMCA* at art. 24.24.2 and 3.

52 On PPMs in WTO law see: Steeve Charnovitz, "The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality" in Asif H. Qureshi, ed., *International Economic Law*, vol. 3 (Abingdon-on-Thames: Routledge, 2011) 350; Jason Potts, "The Legality of PPMs Under the GATT. Challenges and Opportunities for Sustainable Trade Policy" (2008), online: <https://www.iisd.org/system/files/publications/ppms_gatt.pdf>.

53 See *CETA* at art. 24.10; See *USMCA* at art. 24.23.

complementary tools that strengthen the effectiveness of programs to reduce deforestation. They may also bolster programs for the sustainable management of forests, known as REDD+, adopted in the framework of international climate change and biodiversity regimes.[54]

USMCA follows this regulatory approach also with regard to sustainable management of fisheries and promotes trade in legally harvested fish and fish products.[55] Almost citing exactly WTO jurisprudence on the requirements that must be met by trade restrictive measures adopted by an importing country for environmental purposes, USMCA codifies the criteria set by the WTO Appellate Body by expressly requiring that these measures meet three requirements. First, they must be based on the best available scientific evidence. Second, they must be tailored to the conservation objective or, in other words, not generic or broad. Finally, the measures must be implemented after the importing Party has consulted with the exporting Party and provided her with an opportunity to address the issue.[56]

Moreover, Parties undertake obligations to prevent overfishing, reduce by-catch of non-targeted species and juveniles and protect the marine habitat. Although these commitments are mainly of a due diligence type and hence require best efforts by states' parties, their content is specified and strengthened by referencing standards and other indications set by MEAs or other international organizations like the FAO.[57] These linkages to external

54 REDD+ is the acronym for Reducing Emissions from Deforestation and Forest Degradation. See *Decision 1/16* (2010) adopted by the Conference of the Parties of the *UN Framework Convention on Climate Change*; See also Harro van Asselt, "Integrating Biodiversity in the Climate Regime's Forest Rules: Options and Tradeoffs in Greening REDD Design" (2011) 20:2 RECIEL 169.

55 See *USMCA* at art. 24.18. These obligations are 'anchored' to best available scientific evidence and to internationally recognized best practices of the sector. Far-reaching and very precise are the commitment not to use poisons and explosives for commercial fishing, the prohibition of shark finning, and the killing of specifically identified species of great whales.

56 See *USMCA* at art. 24.17.3. Cf the WTO Appellate Body case, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, (2012), *WTO* Doc WT/DS381/AB/R ('US-Tuna II (Mexico)'); Aaron Cosbey and Petros C. Mavroidis "Heavy Fuel: Trade and Environment in the GATT/ WTO Case Law" (2014) 23:3 RECIEL 288.

57 For instance, a specific tool to prevent overfishing is the reduction and eventual elimination of all subsidies that contribute to overfishing, such as the ones provided to vessels that are included in the 'black list' of the FAO, which combats illegal, unreported and unregulated fishing (the so-called IUU). See, for example, the 2001 FAO International

and multilaterally-agreed benchmarks strengthen coherence between the regulatory approaches of the parties and support their legitimacy, as their substantive content can be traced back to the authority of highly competent institutions in the sector. All of these elements strongly reduce the risk that state measures will be qualified as discriminatory.

With regard to biodiversity, USMCA provisions recognize the main objectives of the international biodiversity regime, namely the conservation, sustainable use of biodiversity and access to genetic resources and benefit sharing, but mainly rely on state parties' domestic laws. It should be highlighted that USMCA art. 24.15 recognizes – and thereby allows as compatible with USMCA – that the national laws of "some" Parties, notably Mexico, which is the only Party that ratified the Nagoya protocol,[58] implement its cornerstone principles relating to access to genetic resources. This requires prior informed consent of the providers of genetic resources and mutually agreed terms regarding how the benefits deriving from their use shall be shared between providers and users. The wording does not clearly identify who the "providers" and "users" are. In other words, according to the Nagoya Protocol and the UN Declaration on the Rights of Indigenous People (UNDRIP), prior informed consent shall be granted from the individuals and local communities who own the resources.[59] Likewise, the terms of benefit sharing should involve them as well. In the absence of specific reference to them, the USMCA provisions will most likely be interpreted as referring to state parties' consent. These biodiversity provisions, although falling short compared to standards of conventional international law, serve to legitimize and justify the Mexican laws against potential challenges claiming their negative impacts on trade or investments.

Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IUU IPOA).

58 This provision reflects the different positions of the state parties with regard to the *Convention on Biological Diversity* (CBD) and its *Nagoya protocol*: only Mexico is a party to the CBD and the Nagoya Protocol; Canada is a party only to the CBD; The United States did not ratify any treaty of the biodiversity regime.

59 *Nagoya Protocol*, art.6.2: "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources."; *United Nations Declaration on the Rights of Indigenous Peoples*, art. 28.1.

CETA has no specific provision on biodiversity nor on the protection of wildlife and flora. In this regard, once again, USMCA is particularly detailed and ambitious with regard to the illegal take and trade in wild fauna and flora, going beyond the implementation of CITES and its resolutions. Parties reaffirm their commitments to strengthening their domestic institutional apparatus as well as their cooperation, but probably the most far-reaching commitment is to take measures, including sanctions and penalties, to prevent and combat trade of wild fauna and flora that have been illegally taken abroad, in violation of the host country's law.[60] The extraterritorial reach that considers the origin and the way in which natural resources are obtained reaffirms the regulatory approach of tracking and giving relevance to illegal practices that occurred abroad and in early stages of the process. Showing deference to the host country, the illegality must be assessed according to its domestic law.[61]

Last but not least, a cutting-edge provision requires states to take measures to prevent and reduce marine litter. This provision is particularly progressive because it contributes to advance a global concern, especially considering that there is no established global response on the matter yet.[62]

III. Good Regulatory Practices and International Regulatory Cooperation

The European Union and the North American countries deal with environmental protection matters at home by adopting fairly diverse regulatory approaches, depending on the specific environmental issue at stake.[63]

60 This provision addresses the worrying phenomenon of the grabbing of natural resources that occurs mainly in countries rich with natural resources but with weak enforcement capacities due to government corruption or illegal practices taking place in remote areas far from central government eyes. For a comprehensive account on these matters, see Francesca Romanin Jacur, Angelica Bonfanti & Francesco Seatzu, *Natural Resources Grabbing: An International Law Perspective* (Leiden: Martinus Nijhoff Publishers, 2016).

61 See *USMCA* at art. 24.22.4.

62 *Ibid* at art. 24.12.

63 The most striking example is climate change: the EU has taken the lead in climate change negotiations at the international level and is adopting comprehensive climate change regulations. As of December 2020, the US has no comprehensive climate change legislation in place, with the Climate Action Plan, enacted during the Obama administration, being fairly diluted during the Trump administration. In response to this government failure to tackle climate change, there has been a rising number (more than 800) of

This is one of the reasons why improving regulatory practices and strengthening cooperation on these matters both play a crucial role in effectively combining the promotion of economic interests, namely trade and investments, and the state's ability to pursue its public interests objectives, including health and environmental protection[64]. The *double face* importance of establishing good regulatory practices at home and effective regulatory cooperation with other states' parties is recognized from the outset in the relevant chapters of both agreements.[65]

Recent mega-regional FTAs include provisions setting guidelines for the adoption of regulatory measures within the parties and set obligations to strengthen reciprocal cooperation in this area. While other FTAs only provided for generic cooperation, the examined megaregionals include far more detailed frameworks setting due process requirements with regard to the adoption of regulatory measures. This strengthening of procedural safeguards leads to positive developments in terms of transparency, predictability and mutual understanding and, if adequately implemented, will increase convergence and reciprocal confidence of state's parties. It will also help parties to build trust with their investors with regard to the counterparties' adoption of public interest regulations, in particular those of a technical nature.[66]

As the respective titles of their relevant Chapters show, CETA and USMCA, although pursuing the same objectives, choose different approaches:

climate change-related cases brought to domestic courts to raise awareness and influence regulation.

64 On these innovative provisions with regard to trade in services under CETA, USMCA and CPTPP, see Federico Ortino & Emily Lydgate, "Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP, and USMCA: Revolution or Timid Steps?" (2019) 20 J World Investment & Trade 680 [Ortino].

65 According to *USMCA* at art. 28.1: "(…) regulatory cooperation means an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection."; See also *CETA* at art. 21.3 which identifies as the main objectives of regulatory cooperation its contribution "to the protection of human life, health or safety, animal or plant life or health and the environment," together with building trust, deepening mutual understanding of regulatory governance and facilitating bilateral trade and investment in a way that "reduces unnecessary differences in regulation".

66 Besides the regulatory chapters, also the respective TBT chapters contain relevant provisions on regulatory cooperation with regard to technical aspects.

CETA is more focused on the outward dimension of international cooperation on regulatory matters while USMCA, in addition to the international dimension, dedicates particular attention to domestic good regulatory practices by providing for stringent and enforceable procedural requirements.

Good regulatory practices aim at ensuring that the domestic processes are conducted in a transparent framework that allows interested persons – including nationals of other parties – to participate at an early stage in the decision-making process.[67] USMCA promotes regulatory quality by enhancing objective analysis on the basis of the best available information, accountability and predictability. This extends from the early planning phase, to the adoption and review of regulations. From the early planning phase, USMCA requires parties to publish annually the necessary information regarding the regulations they intend to adopt in the following year, including their potential impacts on trade and investment.[68] In the next phase of designing the regulation, states must explain the objectives and how the planned regulatory act achieves them, as well as any major alternatives. Although it is not a mandatory requirement, parties are encouraged to carry out a regulatory impact assessment to evaluate the need for and the potential impacts of the proposed regulations and minimize unnecessary divergences.[69] Once finalized, the regulation will be published and kept under periodic review in order to consider whether adjustments are required due to changes in the relevant circumstances.[70] Deadlines and timeframes are also carefully defined throughout the whole process to

67 See *CETA* at art. 4.4; See *USMCA* at art. 11.7. With respect to the other parties, it provides for procedural guarantees for their participation in the process and for cooperation to ensure whenever possible the compatibility and mutual recognition of their respective regulatory measures.

68 See *USMCA* at art. 28.6.

69 See *CETA* at art. 21.4(a), 21.4(g)(i); See *USMCA* at art. 28.11.2. and art. 11.5.1. The regulatory impact assessment shall consider: "(a) the need for a proposed regulation, including a description of the nature and significance of the problem the regulation is intended to address; (b) feasible and appropriate regulatory and non-regulatory alternatives (…), including the alternative of not regulating; (c) benefits and costs of the selected and other feasible alternatives, including the relevant impacts (such as economic, social, environmental, public health, and safety effects) as well as risks and distributional effects over time, recognizing that some costs and benefits are difficult to quantify or monetize; and (d) the grounds for concluding that the selected alternative is preferable."

70 See *CETA* at art. 21.4(o); See *USMCA* at art. 28.13. Technical regulations should be periodically reviewed in order to assess the evolution of relevant international standards,

ensure that the interested parties are able to submit comments and the regulatory authority can respond.[71]

As for international cooperation, the two treaties provide for similar, weak pledges on how parties should cooperate throughout their regulatory process.[72] While recognizing the sovereign right of parties to freely choose their own preferred regulatory approaches, both treaties encourage regulatory convergence and compatibility.[73] Notably, CETA requires that states' parties "shall, when appropriate, consider the regulatory measures or initiatives of the other party on the same or related topics."[74]

In order to minimize unnecessary regulatory divergences, consultations and exchanges of technical and scientific information should start at an early stage[75] and explore possible common regulatory approaches. In particular, both agreements should favor regulatory approaches based on performance requirements[76] rather than on design features. Furthermore, they should both encourage the use of relevant international standards "as the basis for regulations, testing and approval procedures".[77]

Both agreements establish a body in charge of monitoring the implementation of these obligations and domestic contact points.[78]

confirm that no major divergences emerged and reconsider the existence of any less trade-restrictive approaches. See also *USMCA* at art. 11.5.2.

71 For draft regulations that have a significant impact on trade, at least 60 days should be granted for public comment from the date of publication, while for other regulations no less than four weeks. Cf *USMCA* at art. 28.9.2, art. 28.9.4 and art. 28.9.5.

72 On limits of cooperation provisions due to their soft character, see Ortino, *supra* note 64 at 702: "Despite the fact that regulatory cooperation envisaged in USMCA is in principle subject to the general dispute settlement mechanism, such cooperation remains a soft obligation as the relevant provisions are casted in non-mandatory language (…). This suggests that international regulatory cooperation in the context of USMCA, as well as CETA and CPTPP, will actually take place only if, and to the extent, the contracting parties are willing to pursue it".

73 See *USMCA* at art. 28.17.

74 See *CETA* at art. 21.5.

75 CETA suggests cooperation starts 'as early as possible' (art.21.4(a)); USMCA, art. 28.17.3(a).

76 See *CETA* at art.21.4(n)(v); *USMCA* at art. 28.17.3(c).

77 *Ibid* at art. art. 21.4(r); See *USMCA* at art. 28.17(g).

78 The Committee on Good Regulatory Practices under USMCA (art. 28.18); and the Regulatory Cooperation Forum under CETA (art. 21.6).

These good regulatory practices and cooperation provisions represent a promising approach in reducing the divergences between the different regulatory approaches adopted by the parties.[79] If domestic public interest regulatory measures respect common procedural requirements, the likelihood of disputes challenging their adoption and implementation for negatively affecting trade or foreign investment is greatly reduced, if not eliminated altogether. In fact, if these measures will be effectively enforced, they could ease the inherent tension between domestic public policy space and the protection of investors' rights in many ways. First, they require states to declare in advance what kind of initiatives they are adopting. Second, they provide for the possibility to participate in the decision-making process. And finally, they strengthen cooperation at an early stage and increase transparency and accessibility of information. All these elements should prevent protectionist challenges, because potential conflicts or critical aspects should emerge and be dealt with in a preventive way without resorting to ex post dispute settlement.

As WTO case law shows, many trade-related environmental regulatory measures have been at the center of controversial cases.[80] Similarly, investor-state arbitration has also engaged and struggled with the rights of investors being allegedly violated by state measures aimed at protecting the environment, that were declared illegitimate because adopted or implemented in a discriminatory way, or because they did not adequately respect due process requirements.

IV. Clarifying the content of substantive standards of trade and investment protection

Traditionally, investment protection standards are drafted in very broad terms: "non-discrimination," "national treatment," "fair and equitable treatment," and "indirect expropriation." They also include broad requirements, such as "necessity," "disguised restriction," or "protectionism" and,

79 Concerns have been raised relating to the fact that the 'export' of 'Western-style' regulatory models could impose too demanding standards on developing countries and undermine their autonomy in choosing their own procedures. See Ortino, *supra* note 64 at 697.

80 See, for instance: *WTO, Panel Report, US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) (US—Tuna II (Mexico).

as such, are open to inconsistent readings. These standards have been referred to as "incomplete contracts" because their content is a matter of interpretation on a case-by-case basis and requires an adjudicating body to "complete" the contract by filling the gaps and determining whether the regulatory measure under scrutiny meets the requirements and if it is legitimate or not.[81] The lack of legal certainty deriving from the unpredictable interpretations of these substantive notions undermines the trust of investors and of host countries in the adjudicatory bodies and weakens the legitimacy of the entire system. In fact, one of the criticisms moved to environmental-related investment as well as trade disputes relates to the diverging interpretations of general clauses on trade or investment protection provided by ISDS and WTO dispute settlement bodies.

While several reform processes regarding the procedural and institutional aspects of ISDS are ongoing,[82] at present there is no parallel comprehensive effort that focuses on the shortcomings relating to substantive rules governing investor-state relations.[83]

In the meantime, the examined megaregionals, together with recently negotiated FTAs, provide a decentralized approach to achieve gradually – across different states and regions of the world – greater consistency, coherence and predictability on the substantive rules governing trade and investor-state relations. The EU Commission is working towards the achievement of a higher level of coherence and convergence within the EU by requiring member states that negotiate new FTAs to align them and embrace the European substantive standards.[84]

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81 See Ortino, *supra* note 64 at 690: "While general substantive standards may perhaps require less political capital to negotiate and are more flexible in application, they lack certainty and predictability, and their determination is often left to a dispute settlement body."

82 See *infra*, Section V at 21.

83 In the past, political obstacles have derailed many multilateral projects under the auspice of the UN and of the Organisation for Economic Co-operation and Development (OECD). See Karl P. Sauvant, "Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11.

84 To achieve this purpose, the EC grants authorization to negotiate through a detailed decision, listing the criteria to be respected in the negotiations. This explains why the newly negotiated BITs and FTAs, like the one with Singapore or Vietnam and including CETA, are aligned.

This section will address the increasing precision in the drafting of substantive standards of treatment that emerges as a common element in recent FTAs and in the examined CETA and USMCA. Although the clarification of investors' protection often entails a narrowing down of their scope, nonetheless, the level of protection granted remains still generally high.

To reduce the negative effects deriving from these broadly phrased clauses, recent treaties have resorted to three approaches. A first way to narrow their scope, embraced by North American treaties, is to link them to customary law.[85] Considering this as a first but not satisfactory limitation to the discretion of interpreters, treaties further clarify their content with lists describing – most likely in a non-exhaustive way – the cases covered by the applicable standard. For instance, with regard to "fair and equitable treatment," CETA does not refer to customary law, but expressly lists the cases that entail breach of this standard.[86]

In a similar way – although without a specific list – USMCA art. 14.6.2 (a) includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." Furthermore, the same provision, with regard to the controversial notion of "legitimate expectations" expressly states that, "For greater certainty, the

[85] For instance, according to USMCA art. 14.6.2, the notion of "minimum standard of treatment" must be interpreted in accordance with customary international law and does not entail "treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."

[86] See *CETA* at art. 8.10.2: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. (…) 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article." For a critical take on the recourse to lists, see José E. Alvarez, "Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard?" IJIL Working Paper 2016/3, MegaReg Series at 26. Alvarez argues "The actual 'closeness' of (the) list and the ostensible value to host states seeking clarity or certainty with respect to what treatment they owe investors may be less than meets the eye."

mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[87]

Another noteworthy and welcome clarification in USMCA is found with regard to the concepts of "National Treatment" and 'Most Favorable Nation Treatment.' The two identical relevant provisions read as follows: "For greater certainty, whether treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[88] The outright recognition that states are allowed to treat products, services and investments differently depending on their contribution to public interest objectives take into account the long-lasting and controversial jurisprudence under trade and investment agreements.[89] Furthermore, these provisions must be read in conjunction with the previously examined provisions of the environmental chapter promoting environmentally friendly trade and investment.

Of great importance to better define the state regulatory space on environmental matters is the notion of "indirect expropriation," defined as "the action or series of actions by a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[90] This clause envisages a fluid concept, which requires a case-by-case and fact-based inquiry. To support the interpreters in this hermeneutic exercise, USMCA sets detailed criteria that serve as a "check list" for arbitrators and specific indications on how to address them. One of the factors to consider is the adverse economic impact of government action on the investment. This factor alone, however, cannot lead to establish that indirect expropriation occurred.[91] Other elements to consider are "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" and "(iii) the character of the government action,

87 See *USMCA* at art. 14.6.4.

88 *Ibid* at art. 14.4.4 and 14.5.4. Similar provisions are found in recent BITs, like the *Brazil-India BIT*, Article 5.2 and in the CPTPP, art. 9.4 footnote 14.

89 For a comprehensive account of the consideration of environmental matters before ISDS, see Di Benedetto, *supra* note 39. See also Francesco Francioni, "Foreign Investments, Sovereignty and the Public Good" (2013) Italian YB of Intl L 1.

90 See *USMCA* at Annex 14-B, art.3.

91 *Ibid* at Annex 14-B, art.3.a(i).

including its object, context, and intent." To further specify when these expectations can be considered "reasonable," it is required that the government releases "binding written assurances" and due consideration should be given to "the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[92]

In the same line, particularly favourable to public interests, CETA and USMCA further narrow arbitrators' discretion by setting the strong presumption that non-discriminatory measures designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation.[93]

In many cases, these narrower definitions of substantive investment protections are drafted taking into account or even incorporating interpretations found in previous investment awards.[94] While setting these parameters certainly narrows the scope of broadly phrased clauses, they are themselves open to interpretation. Thus, for example, in the Bilcon case, the Tribunal found a violation of the standard of fair and equitable treatment by acknowledging that legitimate expectations of the US investor based on brochures and other statements of Canadian officials were wrongfully discarded.[95]

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92 *Ibid* at Annex 14-B, art.3.a(ii), footnote 19.

93 See *CETA* at Annex on expropriation; See also *USMCA* at Annex 14-B, art.3.(b): "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances*. (italic added)". An identical provision is the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* at Annex 9-B.

94 For instance, on the notion of 'like circumstances' see *Myers*, *supra* note 39 at para 250: "The Tribunal considers that the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations to treat contending investors differently in order to protect public interest. The concept of 'like circumstances' invites an examination of whether a non-national investor, complaining of less favourable treatment, is in the same 'sector' as the national investor."; Similarly, the CETA list of requirements for the 'fair and equitable treatment' standard reaffirm and "codify" the ones identified in the NAFTA case, *Waste Management v. Mexico*, (2004), ARB (AF)/00/3 at para 98.

95 This is a controversial NAFTA case, *Bilcon v. Canada* (2015) PCA Case no.2009-04.

The third tool that reduces arbitrators' discretion, this time by reaffirming the states' control over the treaty commitments, is to resort to legally binding interpretations by the parties' joint commissions.[96] This is a codification of previous practice inaugurated by NAFTA, where the parties resorted to this tool to clarify the interpretation of "fair and equitable treatment."[97] Embracing this precedent, the CETA Joint Commission periodically reviews the content of the obligation to provide fair and equitable treatment upon the Parties' request.[98]

V. The Enforceability of Environmental and Economic Obligations: Two Worlds still Apart

ISDS are a double-edged sword because, on the one hand, states may be sued before an arbitral tribunal and face the risk of potentially being sanctioned to pay multimillion-dollar damages and, on the other hand, they provide valuable protection for their investors abroad. These conflicting interests are featured prominently in recent FTA negotiations by the business community upholding strong ISDS provisions. Conversely, labor and civil society groups are keener towards public interests, favoring alternative means to solve investment disputes.[99] Discussions to reform the

[96] See *CETA* at art. 8.31.3.: "Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date."; See *USMCA* at art. 30.2.2(f) read together with art. 14.D.9.2: "A decision of the Commission on the interpretation of a provision of this Agreement under Article 30.2 (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision."

[97] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provision, 31 July 2001. This practice has been criticized because it allegedly constitutes an amendment rather than a clarification of the treaty, see Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in Emmanuel Gaillard & Frédéric Bachand, eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011), online: <https://archive-ouverte.unige.ch/unige:86101>.

[98] See *CETA* at art. 8.10.3.

[99] With regard to the USMCA negotiation, see "NAFTA Renegotiation and the Proposed United States – Mexico – Canada Agreement (USMCA)" (26 February 2019), online: <https://crsreports.congress.gov> at 23.

procedural aspects of investor-state arbitration are ongoing in different fora to "redeem" these institutions perceived as unable or unwilling to adequately consider and deal with public interest concerns, including environmental protection.[100]

Following the European approach adopted in the recently concluded EU-Vietnam FTA and the EU's TTIP proposal, CETA establishes a permanent court of fifteen members.[101] This Tribunal is competent to hear claims for violation of the investment protection standards. However, alleged violations arising under the sustainable development, environmental and labor chapters remain outside its jurisdiction.[102] Similarly to CETA, USMCA interstate dispute settlement Chapter 31 excludes cases arising under its chapters on labor or the environment (alongside a number of other chapters), but covers the chapter on good regulatory practices, at least to cover "sustained or recurring course of action or inaction that is inconsistent with a provision of this Chapter."[103]

100 Procedural reforms might be less controversial and allow some flexibility in terms of gradual adhesion to reform packages that makes the changes more acceptable; they also allow different rates of adhesion. See the ongoing process of the Working Group III: Investor-State Dispute Settlement Reform under the auspices of the UN Commission on international trade law (UNCITRAL), online: <https://uncitral.un.org/en/working_groups/3/investor-state>.

101 See *CETA* at art. 8.29 *Establishment of a multilateral investment tribunal and appellate mechanism*: "The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements." For a harsh criticism of the project to establish a Multilateral Investment Court (MIC) as a "European imperialist exercise," see José E. Alvarez, "Mythic Courts" (2020) iCourts Working Paper Series No 214.

102 Cf *CETA* at art. 24.16.

103 See *USMCA* at art. 28.20. With rather mysterious wording, this provision also provides that "Recognizing that a mutually acceptable solution can often be found outside recourse to dispute settlement, a Party shall exercise its judgment as to whether recourse to dispute settlement under Chapter 31 would be *fruitful*" (italic added). USMCA differs from CPTPP, which excludes the application of interstate dispute settlement to its regulatory chapter. Ortino and Lydgate's hypothesis is that "The difference in legal strength and enforceability of the provisions on good regulatory practices in the two trade agreements may be seen as a function of the level of comfort with such practices of the various contracting parties involved." See Ortino, *supra* note 64 at 699.

Probably because of the negative record of lost cases by Canada as a respondent state and by Canadian investors,[104] Canada opted out from USMCA investor-state arbitration, which is limited to the US and Mexico, with the exclusion of claims of indirect expropriation.[105] Accordingly, Canadian investors may still have recourse to ISDS under the CPTPP against Mexico and vice versa, while with regard to the US the only remedies will be state-to-state arbitration under USMCA Chapter 31 or domestic courts.

Compared to CETA, USMCA is not particularly revolutionary in its approach to ISDS. It nonetheless incorporates many of the substantive and procedural innovations concerning the scope and availability of the ISDS that differentiate it from the earlier NAFTA model.[106] First and foremost, USMCA requires that the claimant shall exhaust national remedies before resorting to ISDS.[107]

A. Procedures for the enforcement of environmental law and for the implementation of the national environmental chapter

Under CETA and USMCA, two separate procedures exist with regard, on one hand, to questions relating to the enforcement of domestic envi-

104 Canada has been the state facing the most claims and has the least successful record, both as respondent and with regard to Canadian investors acting as claimants (15 lost against the US). Canada has faced 43 cases overall from foreign investors (26 cases from US investors and 17 from Mexican investors) and only won 8 (5 lost; 5 settled; 4 discontinued and 4 pending). On the contrary, the US has never lost a case against a foreign investor under NAFTA ISDS (as of February 2019). The effect on Canada is limited to the US, since Canada and Mexico are bound by ISDS under the CPTPP.

105 See Graham Coop & Gunjam Sharma, "Chapter IV: Investment Arbitration, Procedural Innovation to ISDS in Recent Trade and Investment Treaties: A Comparison of the USMCA and CETA" (2019) 467:8 Austria YB Intl Arbitration 467. According to the authors, Canada proposed the CETA ISDS model as the starting point to build the ISDS under USMCA but it was unsuccessful.

106 For a comparative study of the ISDS provision of USMCA and NAFTA, see Daniel Garcia-Barragan, Alexandra Mitredotis & Andrew Tuck, "The New NAFTA: Scaled-Back Arbitration in the USMCA" (2019) 36:6 J Intl Arb 739.

107 While NAFTA did not require the prior exhustion of domestic remedies, *USMCA* at Annex 14-D, art.5 requires claimants to initiate and maintain domestic litigation proceedings for at least thirty months, except if recourse appears obviously futile.

ronmental law, and on the other hand, to questions relating to the implementation of the environmental Chapter.

As for the former, CETA and USMCA converge to a large extent with regard to their respective provisions regarding the recognition of procedural guarantees for "interested" persons who claim that the state is failing to enforce its environmental laws. Both agreements shall ensure that their domestic authorities and procedures respect due process and provide for timely and effective remedies. Keeping with the American tradition, USMCA refers expressly to the possibility to issue "sanctions"[108] while CETA refers more generically to remedies. Under the forthcoming USMCA/ECA procedure any person – including individuals and non-governmental organizations – of a party may start the procedure by filing a written submission directly to the CEC Secretariat stating the necessary elements to substantiate its allegation that there has been a failure to enforce a specific environmental law.[109] If the CEC Secretariat, after ascertaining that the submission meets the substantive and procedural criteria, considers that the submission warrants the preparation of a factual record, it requests the Council to proceed.[110] The CEC retains most of its previous responsibilities, with the notable exception of preparing reports on environmental matters related to the cooperative functions covered by the treaty.[111] Compared to NAAEC, ECA is more focused on potential activities for cooperation, rather than on enforcement matters.[112]

108 See *USMCA* at art. 24.6.7. USMCA maintains without significant modifications, the NAAEC citizen submission process to identify alleged failures to enforce national environmental laws.

109 *Ibid* at art. 24.27.

110 *Ibid* at art. 24.28.

111 *NAAEC* at art 13. This power to autonomously undertake factual reports was the Secretariat's only direct analysis of trade's impact on the environment and its redimensioning has been criticized.

112 See, notably, *NAAEC* at art. 5 requiring governments to put in place a series of specific enforcement action, including appointing and training inspectors; monitoring compliance and investigating suspected violations, including through on-site inspections; publicly releasing non-compliance information; issuing bulletins or other periodic statements on enforcement procedures; promoting environmental audits; initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations. A parallel provision cannot be found in the actual treaties.

As for questions regarding the implementation of the environmental chapter taking a step backwards with respect to NAAEC international procedure,[113] under USMCA written submissions from its nationals shall be received by the party and be considered according to its domestic procedures. They should be answered in a timely manner and then made publicly accessible.[114]

Questions of implementation may also be brought up by states' parties, who can request up to three rounds of consultations to reach a mutually satisfactory resolution of the matter. Only as a last resort, if the consultations fail, can the requesting party ask for the establishment of a panel.[115]

As previously examined, it is worth highlighting that, if the dispute concerns the implementation of covered MEAs, in deciding the matter, the panel shall seek advice and give due consideration to the guidance received by the relevant MEAs bodies.[116] Interestingly, through this long procedure, breaches of MEAs might be enforced by the FTA dispute settlement mechanism, which will apply its environmental-related provisions according to MEA's bodies' authentic interpretation. This hybrid dispute settlement procedure reflects a constructive implementation of the principle of mutual support in the integration of economic and environmental matters. Further developing the mutual consideration between trade and environmental treaties,[117] the positive effects of this exchange of views at an early stage of the dispute settlement procedure allows to prevent potential normative conflicts and ensure mutually coherent solutions. A similar attitude of institutional cooperation can be seen in the ICJ's recent environmental jurisprudence.[118]

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113 Although this recourse was never used, under the NAAEC an arbitral panel could be convened to cover state-to-state environmental disputes.

114 See *USMCA* at art. 24.5.2.

115 *Ibid* at art. 31.6.

116 *Ibid* at art. 24.32.2.

117 This mandatory obligation of consulting with MEA entities and of giving due consideration to the guidance received innovates the regulatory approach under *NAFTA* at art. 104. According to this provision, environmental measures implementing a covered MEA should be considered compatible with NAFTA if there was no less-restrictive trade alternative. This latter requirement proved difficult to meet in practice, as shown by the Myers case. USMCA changed the approach by shifting from the substantive interaction of norms to institutional cooperation with MEAs.

118 International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order of 8 March 2011. In this case, the ICJ requested

Moving to CETA, with regard to the enforceability of its environmental chapter, none of its provisions is subject to the CETA dispute settlement procedures, but is subject to a review process based on consultations between the state parties. Similarly with regard to USMCA, environmental-related disputes are also subject to consultative procedure that only as a last resort may end up before a panel.[119] This "differential treatment" of environmental and more generally of sustainable development matters reflects their still incomplete integration with economic objectives. A more progressive approach with regard to integration has been advocated by "Third World Approaches to International Law" (TWAIL) scholars and recently has been shown by African courts. Through a "judicial environmentalism,"[120] Africa's international courts manifested great institutional flexibility and have overcome the compartmentalization of trade with respect to human rights and environmental matters. They have embraced the principle of systemic integration, promoting coherence in a still fragmented system of international legal rules.[121]

B. Procedural aspects of dispute settlement and ISDS Relevant for environmental matters

Limiting our reflections on procedural aspects that relate to the environment, an element of convergence found in USMCA and CETA that addresses criticisms against the system of investor-state arbitration in favor of the right of states to regulate in the public interest, is the so called "selective judicialization."[122] These clauses limit the type of claims that are justiciable before international arbitration. As previously observed, particularly noteworthy for its potential impact on environmental related disputes, is

the Secretariat of the Ramsar Convention to serve as a facilitator of the implementation of certain activities by the parties to the dispute.

119 While still quite exceptional, binding dispute settlement for environmental provisions exists, for instance, in the *US-Korea FTA*, art. 20.9.3 (a-b).

120 James Thuo Gathii, "The Promise of International Law: A Third World View" (Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law, 25 June 2020) at 9.

121 For further discussion on recent environmental cases before Africa's international courts, see James T Gathii, "Saving the Serengeti: Africa's New International Judicial Environmentalism" (2016) 16 Chicago J Intl L 386 at 431.

122 Stephan W Schill and Geraldo Vidigal, "Cutting the Gordian Knot: Investment Dispute Settlement à la Carte." *RTA Exchange* (2018), online: <available at www.rtaexchange.org/> at 4.

the exclusion of disputes regarding alleged indirect expropriation under the USA-Mexico ISDS.[123]

These procedural measures coupled with the ones specifying the substantive standards for investors' protection lead to a further limitation of the controversial power of arbitrators to review governmental regulatory powers on particularly sensitive matters.

Another potentially promising tool for environmental matters relates to the possibility to bring environmental counterclaims. Because of the inherent asymmetry of investment arbitration, access to arbitration is granted to investors and precluded to those that may be negatively affected by investors' misconduct, namely host states, but also local communities and other stakeholders.

However, respondent states may raise environmental concerns before ISDS by bringing counterclaims against investors. The recourse to environmental counterclaims depends on the relevant treaty provisions[124] and has been an uphill exercise.[125]

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123 See *USMCA* at Annex 14-D, Article 14.D.3: Submission of a Claim to Arbitration: "1. In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Annex a claim:(i) that the respondent has breached: (B) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation (…)". Besides limiting the type of justiciable claims, CETA and USMCA further shrink the power of arbitrators with respect to domestic regulatory powers through self-judging clauses relating to national security matters. Most of these are strictly connected with the exercise of governmental authority (claims relating to public debt restructuring, government procurement and subsidies), financial services and taxation. The environment is not expressly referred to in these provisions and hence, these clauses would unlikely be applicable to environmental matters, except for extraordinary circumstances such as natural disasters leading to emergency situations that threaten national security. See *CETA* at art 28.6(b); *USMCA* at art 32.2(b).

124 An example of a provision favorable to counterclaims is "tout différend légal survenant entre cette Partie contractante et un national ou une société de l'autre Partie contractante A propos d'un investissement de ce dernier dans la première." (*France-Ecuador BIT*, art. 9) Vice versa, a narrower provision on the basis of which it would be difficult to establish jurisdiction on counterclaims defines investment disputes more narrowly by referring to only claims brought on the basis of investment agreements, investment authorizations or provisions of the treaty. (*US-Ecuador BIT*, art, 6(1)).

125 Although the ICSID Convention (art. 46) and UNCITRAL arbitration rules envisage the jurisdiction of the tribunal to hear counterclaims under certain conditions, scholars debate whether these legal bases are sufficient or whether additional consent is

In case the jurisdictional basis to bring counterclaims is uncertain, counterclaims could still be admitted as a last resort option if the investors agree not to raise jurisdictional objections to counterclaims.[126]

Both CETA and USMCA, similar to other investment agreements, do not explicitly address the admissibility of counterclaims by the respondent state. However, since their relevant provisions indirectly admit the possibility to bring counterclaims by setting certain limitations to the respondent,[127] it follows *a contrario*, that other counterclaims may be admissible before their arbitral tribunals.

On this matter, arbitral tribunals enjoy a degree of discretion and recent case law shows a variety of different positions that have been taken with regard to the admissibility of counterclaims. Recent cases have shown that arbitrators are starting to open up to counterclaims, demonstrating a certain consideration for public interests and environmental concerns.[128]

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USMCA and CETA converge to a great extent in embracing a similar approach to the integration of environmental concerns into their economic objective, thereby strengthening environmental protection and reducing the risk of regulatory chill and of environmentally-unfriendly arbitral awards. Two converging trends can be identified in their pursuit of environmental integration.

The first one is based on a top-down and content-based approach and aims at broadening public policy space by expressly recognizing and

necessary. See Alessandra Asteriti, "Environmental Law in Investment Arbitration: Procedural Means of Incorporation" (2015) 16 J World Investment & Trade 248.

126 See for instance: *The Burlington Resources v Ecuador* (2012), ICSID Case No ARB/08/5, Decision on Liability (14 December 2012).

127 See *CETA* at art. 8.40 and *USMCA* at art. 14.D.7.8. Both provisions provide that the respondent state cannot propose counterclaims based on the indemnification or compensation available to an investor for the alleged damages suffered, pursuant to an insurance or guarantee contract.

128 For an analysis of recent cases in which counterclaims have been accepted, see James Harrison, "Environmental Counterclaims in Investor-State Arbitration" (2016) 17 J World Investment & Trade 479.

strengthening environmental obligations.[129] Global standards and MEAs, to which state parties to the FTAs are also parties, become common denominators and while CETA is more conservative with regard to its relationship with MEAs, USMCA – at least with regard to certain environmental challenges – goes beyond what is required by relevant MEAs. In fact, USMCA allows parties to adopt measures setting an equivalent or higher level of environmental protection, compared to the one internationally agreed to.[130] In this respect, USMCA definitely provides for more precise and far-reaching provisions. Going beyond and strengthening substantive convergence, MEAs' treaty bodies must be involved when dispute settlement bodies of USMCA and CETA are called to decide on alleged violation of environmental provisions stemming from MEAs. These forms of institutional cooperation are positive elements that enhance mutual supportiveness by encouraging dialogue and thereby preventing contradictory or incoherent interpretations by judicial or quasi-judicial bodies. Moreover, welcome novel obligations in both agreements are the ones that allow states to provide preferential treatment to sustainable goods and services and that promote green trade and investment, thereby tackling illegal trade and discouraging unsustainable PPMs. These trade-related provisions are complementary to MEAs in that they indirectly contribute to environmental protection by intervening in the markets where these natural resources are exchanged. Always using a "top-down" approach, these megaregionals, following up on the reforms of investment agreements and ISDS, provide more certainty and predictability with regard to investors' protections through substantive clarifications of these standards. In this way, and by

[129] While there are scholars and policy makers who welcome enthusiastically the introduction of environmental chapters into FTAs and describe them as "far-reaching," others consider that their provisions do not impose any new obligations on the parties, either because they are best-effort pledges or because they do not go beyond their existing international obligations. See Sikina Jinnah, Elisa Morgera, "Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda" (2013) 22:3 RECIEL; Rafael Leal-Arcas, Marek Anderle, Filipa da Silva Santos, Luuk Uilenbroek, Hannah Schragmann, "The contribution of free trade agreements and bilateral investment treaties to a sustainable future" *Zeitschrift für europarechtliche Studien*, (December 2019) at 12. The authors consider that FTAs could be more effective legal instruments, compared to multilateral agreements, because they are negotiated more easily and are more enforceable.

[130] Cf *USMCA*, footnote 10 of art. 24.9.1 and similar provisions applicable to other articles: footnote 14 to art. 24.10.1.

resorting to legally binding interpretations by the parties' joint commissions, they correspondingly reduce the discretion of arbitral tribunals.

The second trend showed by these megaregionals via a "bottom-up" perspective, aims at promoting transparent and effective regulatory processes at home to better support public policy objectives. By opening public participation at an early stage in the process and using regulatory impact assessments, they strengthen due process. Furthermore, by promoting international cooperation on regulatory matters, CETA and USMCA favor mutual understanding, recognition and foreseeability of the expected impacts and eventually could overcome regulatory divergences. This approach enhances the convergence of procedural safeguards and strengthens domestic governance, thereby reducing the risk of challenges to state regulatory measures and increasing compliance of host states with their treaty obligations.[131]

These novel provisions show that states pursuing trade and investment liberalization are less keen to rely on substantive standards and prefer to focus on strengthening procedural obligations.

The substantive improvements that strengthen the presumptions of legitimacy in favor of non-discriminatory public interest regulatory measures, on the one hand, combined with the due process requirements of domestic regulatory procedures, on the other hand, may result in valuable and useful tools which will greatly enhance the transparency, predictability and coherence of awards and thereby also the legitimacy of ISDS.

A still egregious downside of these agreements is the net differentiation between the *soft* implementation mechanisms of environmental commitments and the *harder* dispute settlement procedures resolving trade and investments claims. This aspect clearly shows that there is still a long way to go for the full integration of environmental protection into FTAs, which remain (still) predominantly economic agreements.

131 On the importance of strengthening domestic governance in connection with NAFTA implementation, see Linda J. Allen, "Reassessing the 'green' in NAFTA" (2018) 52:4 J World Trade 557 at 563: "the weak enforcement of environmental law and low levels of environmental protection observed in Mexico were due to lack of capacity, and building institutional capacity would be the most effective means of improving environmental conditions in that country."

An integrated and comprehensive reform that endorses sustainable trade and investment would lead to more effective levels of environmental protection. From this perspective, there is growing public awareness of the environmental and social impacts of corporate activities and the attitude of capital markets toward investments attentive to environmental, social and governance (ESG) aspects is also evolving. In fact, while conventional investment analysis focuses on value in the sense of financial performance, the integration of ESG factors in the assessment of financial performance are increasingly being recognized and required in many jurisdictions.[132] In light of the reformed sustainable mission of FTAs, an outright step forward in this direction would be to revisit how the agreements define "investment" to account for broader environmental concerns. Traditionally, under FTAs and BITs, investments are characterized only according to their economic and financial features. A promising – although still early – step in treaty making might be seen in Model BIT, advancing provisions that grant protection only to "sustainable" investments.[133] Furthermore – noteworthy, although still minoritarian – is the jurisprudence of arbitral tribunals excluding investments in violation of human rights from the protection of the investment treaty.[134]

In this direction, State Parties could set a qualitative screening of the foreign investments they are willing to attract and to whom hence they recognize the guarantees by identifying criteria that investments should meet to be considered "sustainable."[135] In Europe the recently adopted Regulation on Taxonomy of sustainable investments would allow to set objec-

[132] The use of positive screening for environmental, social and ethical factors is entering mainstream investment analysis particularly where such screening may potentially yield superior financial performance and thereby avoid future liabilities and losses. The greatest support for taking environmental, social and ethical factors into account is shown in Europe. There is less support in the US.

[133] See, for instance, the *Model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation*.

[134] See, for instance, the *Phoenix Action Ltd v Czech Republic* (2009), ICSID Case No. ARB/06/5 at para 78.

[135] Karl P. Sauvant and Howard Mann, "Making FDI more sustainable: towards an indicative list of FDI sustainability characteristics" (2019) 20 J World Investment & Trade 916. A similar regulatory approach is not radically new. For instance, under the GATS, market access and national treatment obligations of trade in services, including FDI in services, apply to sectors and sub-sectors of services that the state parties have chosen to include in the 'Schedule of Specific Commitments', and are subject to conditions and limitations depending on states' declarations. Cf *GATS* at art. XVI and XVII.

tive criteria that need to be fulfilled in order for an investment to be considered sustainable.[136]

In this "reformed" mandate of pursuing and promoting sustainable investments, States' regulatory powers and investors' behaviors would be conceived as aligned and not as conflicting. State regulations will still need to meet the requirements of reasonableness and non-discrimination, but without the need to envisage general exceptions like those of GATT Article XX. In fact, the ultimate interests and objectives pursued by companies and by states would converge, with companies going beyond the realization of the maximum economic revenue because their shareholders (and stakeholders) are more and more keen on recognizing their broader mandate, which includes social and environmental objectives. Accordingly, a combination of the recalibration of the ultimate objective of FTAs and the clarifications on the content of investment protection clauses would achieve a long desired balance between the need of business operators for protection and predictability and the need of governments for flexibility to pursue legitimate public policies.

These and other improvements might be introduced in the near future, either in the next review of USMCA,[137] or in the case of CETA, through amendments or interpretations by the CETA Joint Committee.

136 EC, *Commission Regulation* 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

137 USMCA is the only FTA that envisages a renegotiation provision: *USMCA* at art. 34.7, which provides that the agreement is subject to review and renewal by mutual agreement after six years (in 2026). At that time, its parties would need to agree to a further 16-year extension and, absent mutual assent, USMCA would expire in 2036. Furthermore, there is a periodic review, every 5 years, of the implementation of the environmental chapter by the Environment Committee.