Environmental Dispute Settlement Mechanisms in EU Free Trade Agreements

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A. From "Going Global" to "Going Regional": On the Relationship between International Trade Agreements and Environmental Concerns

From the perspective of public international law, it was since the middle of the 1990s in particular that the so-called "trade and …" issues or linkages[1] gained importance and received increasing attention among legal scholars and practitioners alike. These overarching themes primarily address questions of whether and, in the affirmative, how to incorporate non-economic concerns like the protection of human rights and consumer interests, the promotion of sustainable development and cultural diversity

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1 On this labeling see, e.g., *Trachtman*, Trade and … Problems, Cost-Benefit Analysis and Subsidiarity, European Journal of International Law 9 (1998), p. 32 et seq.; *Trachtman*, Institutional Linkages: Transcending "Trade and …", American Journal of International Law 96 (2002), p. 77 et seq.; *Kluttig*, Welthandel und Umweltschutz – Kohärenz statt Konkurrenz, 2003, p. 5; *Leebron*, Linkages, American Journal of International Law 96 (2002), p. 5 et seq.

as well as the enforcement of core labour and social standards into the normative structure of the international economic system; thereby establishing linkages between different policy fields and corresponding areas of law that have previously largely existed and progressively developed in "splendid isolation" from each other.[2]

A quite prominent position among these "trade and …" topics has from the very beginning always been – and continues to be – occupied by the intensive and controversial debates on potential suitable connections between trade as well as investment agreements and the effective promotion of environmental objectives. These discussions frequently take place against the background of two main underlying perceptions. On the one hand, the field of international environmental law itself is often regarded as being characterised by comparatively weak enforcement structures[3] with the consequence that those seeking to create more effective and robust implementation mechanisms are attempting to link environmental objectives such as those stipulated in respective international conventions to other areas and sources of public international law such as, in particular, trade and investment agreements "where the sticks are bigger and the carrots are tastier".[4] On the other hand it is for a variety of reasons now ever more recognised among governments of industrialised and developing countries, practitioners and scholars alike, that at the level of drafting agreements in the field of international economic law as well as in the realm of the respective formalised dispute settlement mechanisms, one of the central challenges faced by lawmakers as well as international judges and arbitrators is to provide for a suitable and thus acceptable balance between the liberalisation of transboundary trade and investment relations as well as the legal protection of economic interest of private business operators and the domestic steering capacity or "policy space"[5] of states and other

2 *Cottier*, Trade and Human Rights: A Relationship to Discover, Journal of International Economic Law 5 (2002), p. 112; on this perception see also for example *Esty/Geradin*, Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements, Harvard Environmental Law Review 21 (1997), p. 266: "For most of the last century, trade liberalization and environmental protection initiatives have moved along separate tracks."

3 On the main enforcement mechanisms in international environmental law generally see, e.g., *Wolfrum*, Means of Ensuring Compliance with and Enforcement of International Environmental Law, Recueil des Cours 272 (1998), p. 9 et seq.; *Beyerlin/Marauhn*, International Environmental Law, 2011, p. 317 et seq., each with further references.

4 *Jinnah/Morgera*, Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda, Review of European Community & International Environmental Law 22 (2013), p. 324.

5 See thereto, e.g., *Tietje*, The Future of International Investment Protection: Stress in the System?, ICSID Review – Foreign Investment Law Journal 24 (2009), p. 461: "The need for a 'policy space' for governments, i.e. autonomy in national policy-making without constraints by international law and particularly international investment protection law, is one of the most significant consequences of the proliferation of investment law and the fragmentation of international law in general. We are currently witnessing discussions about the necessary policy space in the area of foreign investment, on both the national and international levels."

governmental actors to allow the latter to pursue the promotion and protection of further public interest concerns like the achievement of environmental objectives.[6]

Although clearly belonging to the class of issues that are of relevance for the global economic system and its legal structures as a whole, the rather complex relationship between the regulatory tasks of environmental protection and governance on the one side and the normative framework of international economic law on the other side has been initially – and indeed also until more recently – primarily discussed as well as analysed with a focus on respective developments taking place in, and opportunities arising from, the multilateral regime established by the General Agreement on Tariffs and Trade (GATT 1947) and subsequently, since its entering into force in 1995, in particular the global legal order of the World Trade Organization (WTO).[7]

In the course of this first phase of scholarly debates on trade-environment linkages dominated by multilateral perspective, with their global focus since the beginning of the 1990s admittedly first and foremost also fueled[8] by respective well-known trade disputes like *US-Tuna* and *US-Shrimp* addressing the legality under the GATT/WTO legal regime of governmental measures aimed at the protection of dolphins and sea turtles,[9] frequently insufficient attention was drawn to the fact that these interfaces

6 On this perception see for example *Nowrot*, How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?, Journal of World Investment & Trade 15 (2014), p. 612 et seq.; *Titi*, The Right to Regulate in International Investment Law, 2014, p. 53 et seq.; *Vinuales*, Investment Law and Sustainable Development: The Environment Breaks into Investment Disputes, in: Bungenberg et al. (eds.), International Investment Law, 2015, p. 1714 et seq., each with further references.

7 On this perception see also, e.g., *Jinnah/Morgera*, (fn. 4), p. 326: "most scholarship in this area has focused on the WTO". From the numerous respective contributions see for example *Esty*, Greening the GATT – Trade, Environment and the Future, 1994, p. 9 et seq.; *Jackson*, World Trade Rules and Environmental Policies: Congruence or Conflict?, Washington & Lee Law Review 49 (1992), p. 1227 et seq.; *Schoenbaum*, International Trade and the Protection of the Environment: The Continuing Search for Reconciliation, American Journal of International Law 91 (1997), p. 268 et seq.; *Kluttig*, (fn. 1), p. 5 et seq.; *Matsushita et al.*, The World Trade Organization – Law, Practice, and Policy, 3rd ed. 2015, p. 715 et seq.; *Chang*, Towards a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case, Southern California Law Review 74 (2000), p. 31 et seq.; *Ahn*, Environmental Disputes in the GATT/WTO: Before and after US-Shrimp Case, Michigan Journal of International Law 20 (1999), p. 819 et seq.; *Cheyne*, Environmental Unilateralism and the WTO/GATT System, Georgia Journal of International and Comparative Law 24 (1995), p. 433 et seq.

8 See, e.g., more recently *Howse*, The World Trade Organization 20 Years On: Global Governance by Judiciary, European Journal of International Law 27 (2016), p. 36: "The entire trade/environment debate, with its central importance of turning attention of the anti-globalization movement to international trade, originated with a GATT case in the early 1990s involving two unadopted GATT panels – the Tuna-Dolphin rulings – which held that trade restrictions in response to other countries' environmental policies or practices were per se inconsistent with the GATT."

9 See for example GATT, *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel of 3/9/1991, DS21/R-39S/155 (unadopted); GATT, *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel of 16/6/1994, DS29/R (unadopted); WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12/10/1998, WT/DS58/AB/R; as well as more recently WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body of 16/5/2012, WT/DS381/AB/R.

between environmental governance and trade agreements do not only materialise at the universal level. In particular as a result of the ever-growing importance of treaties aimed at regional economic integration in the international system, quite comparable legal challenges as well as opportunities most certainly also arise for example in the realm of bilateral and other sub-multilateral free trade agreements.[10] In light of these findings, it is thus hardly surprising that especially since the end of the previous decade, the current second phase of academic discourse and research dealing with the relationship between trade and environment is characterised by an increasing emphasis on respective developments in treaty practice at the bilateral and regional level.[11]

Against this background, the present contribution is intended to describe and evaluate some of the main aspects of how environmental governance is addressed – and based on what types of regulatory approaches respective environmental provisions are incorporated as well as enforced – in regional economic integration agreements with a particular focus on free trade agreements concluded or currently negotiated by the European Union. Thereby, and despite the last-mentioned qualification, "environmental governance and regional trade agreements" still remains far too broad a topic to be discussed in the course of this comparatively short article in something even close to a comprehensive way. Rather, this contribution largely confines itself to present some systemising thoughts on this practically important issue in particular also from the implementation perspective of dispute settlement mechanisms, thereby primarily taking recourse to the notable regulatory schemes established under the EU

10 See thereto, e.g., *Jinnah/Morgera*, (fn. 4), p. 324: "Despite a strong scholarly focus on trade-environment linkages in the context of the World Trade Organization (WTO), the growing importance of these linkages is currently nowhere better illustrated than in recent bilateral free trade agreements (FTAs)."

11 From the respective reports, analyses and scholarly contributions see for example OECD, Environment and Regional Trade Agreements, 2007, p. 23 et seq.; *Duran*, The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches, in: van Vooren et al. (eds.), The EU's Role in Global Governance – The Legal Dimension, 2013, p. 224 et seq.; *Potestà*, From Mutual Supportiveness to Mutual Enforcement? The Contribution of US Preferential Trade and Investment Agreements to the Effectiveness of Environmental Norms, in: Hofmann et al. (eds.), Preferential Trade and Investment Agreements – From Recalibration to Reintegration, 2013, p. 167 et seq.; *Jinnah/Morgera*, (fn. 4), p. 324 et seq.; *Zvelc*, Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements, in: Morgera (ed.), The External Environmental Policy of the European Union, 2012, p. 193 et seq.; *Lo*, Environmental Protection through FTAs: Paradigm Shifting from Multilateral to Multi-Bilateral Approach, Asian Journal of WTO and International Health Law and Policy 4 (2009), p. 309 et seq.; *Wold*, Taking Stock: Trade's Environmental Scorecard after Twenty Years of "Trade and Environment", Wake Forest Law Review 45 (2010), p. 319 et seq.; *Colyer*, Environmental Provisions in Recent Regional Trade Agreements (2008 & 2009), Estey Centre Journal of International Law and Trade Policy 11 (2010), p. 321 et seq.; *Gantz*, Labor Rights and Environmental Protection under NAFTA and other U.S. Free Trade Agreements, University of Miami Inter-American Law Review 42 (2011), p. 297 et seq.

Association Agreement with Georgia signed on 27 June 2014 and entering into force on 1 July 2016.[12]

For this purpose, the following analysis is divided into three main sections. The first part addresses the underlying reasons for the increasing importance attached to regional trade and investment agreements in the more recent debates on trade-environment linkages (B.). Based on the findings made in this section, the subsequent two parts are devoted to a description and evaluation of what is qualified here as the two main dimensions of regulatory approaches to environmental governance in regional trade agreements. In this regard, the second part provides some thoughts on the scope and depth of respective environment-related stipulations from a substantive law perspective (C.I.). Subsequently, in the third and final section an assessment will be given of the different types of environmental dispute settlement mechanisms in regional economic integration agreements (C.II.).

B. Underlying Reasons for the Increasing Focus on Bilateral and Regional Trade Agreements in Transnational Environmental Governance

The individual reasons for the growing importance attached to bilateral and regional trade agreements in the recent discussions on trade-environment linkages and the resulting broadening of the analytical focus on the relationship between environmental governance and international economic law are surely manifold. Prominently among them, however, is the rise of regionalism in the international economic legal order as a whole.[13] In particular since the middle of the 1990s, for a variety of reasons numerous treaties establishing free trade zones and other regional economic integration agreements have been successfully concluded or are currently under negotiation.[14] Whereas within the time frame of close to fifty years under the former GATT 1947, from the beginning of 1948 until the end of 1994, a total number of only 107 regional trade agreements and accessions thereto were notified by contracting parties under Article XXIV:7 GATT 1947,[15] as of 5 May 2017, some 654 respective notifications have already been received by the WTO. These figures correspond to a total of 440 regional

12 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261 of 30/4/2014, p. 4.

13 On this perception see, e.g., UNCTAD World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, p. 103 et seq.: "Regionalism on the rise"; *Alschner*, Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?, Journal of International Economic Law 17 (2014), p. 273; *Bungenberg*, Preferential Trade and Investment Agreements and Regionalism, in: Hofmann et al., (fn. 11), p. 270 et seq.

14 Generally thereto see for example *Nowrot*, Die völkerrechtlichen Grundlagen regionaler Kooperation und Integration, in: Grimmel/Jakobeit (eds.), Regionale Integration – Erklärungsansätze und Analysen zu den wichtigsten Integrationszusammenschlüssen in der Welt, 2015, p. 54 et seq.; *Boysen*, Regionale Handelsabkommen, in: Hilf/Oeter (eds.), WTO-Recht – Rechtsordnung des Welthandels, 2nd ed. 2010, p. 662 et seq., each with further references.

15 See, WTO, *Turkey – Restrictions on the Imports of Textile and Clothing Products*, Report of the Panel of 31/5/1999, WT/DS34/R, para. 2.3.

trade agreements, of which 274 treaties are presently in force.[16] As a result, the number of regional trade agreements has increased more than four-fold in the last two decades.[17] In order to illustrate the overall significance and consequences of these developments, let it initially suffice to draw attention to the fact that as of today all of the present 164 WTO members are party to at least one regional trade agreement and most of them have concluded considerably more than one of these types of arrangements. Already towards the end of the previous decade, the average WTO member had concluded regional trade agreements with roughly fifteen other countries.[18]

Another notable factor contributing to the increasing prominence of regional cooperation projects in the discussions on the relationship between trade regulations and environmental governance, in addition to the closely connected phenomenon of the ever-growing importance of regionalism as manifested by the conclusion of respective trade and investment agreements in the global economic legal system, is the current lack of substantial progress with regard to the multilateral trade negotiations in the ongoing Doha Development Round of the WTO in general and particularly the debates on trade-environment linkages therein.[19] As a consequence of these only very slowly advancing trade negotiations at the global level, an ever-growing number of states have not only turned their attention to regional economic integration plans. Rather, they are, based on a variety of motives, also increasingly committed to more coherently pursuing high levels of environmental protection in all policy fields, including foreign trade policies.[20] Finally, an additional reason for this paradigmatic shift might very well also be seen in the – compared to the multilateral realm of the WTO – apparently more expedient conditions for negotiating and reaching a consensus on the incorporation of environmental governance provisions into trade agreements at the bilateral and regional level.

C. Environmental Governance as a Regulatory Issue of EU Free Trade Agreements: Two Main Dimensions

When attempting to map and systemise environmental governance as an increasingly important regulatory subject of regional trade agreements, in particular also from the perspective of EU foreign trade policy, it seems useful to broadly distinguish between two main dimensions or perspectives that might be appropriately termed the substantive law perspective on the one hand, being concerned with the scope and depth

16 On these data as well as continuously updated information on this issue see the respective information provided by the WTO on its website available under www.wto.org/english/tratop_e/region_e/region_e.htm (15/9/2017).

17 See on this finding already WTO, World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-Existence to Coherence, 2011, p. 3.

18 *Freund/Ornelas*, Regional Trade Agreements, World Bank Policy Research Working Paper 5314, May 2010, p. 2; *Bungenberg*, (fn. 13), p. 270.

19 See WTO, Doha Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/1 of 20/11/2001, para. 31 et seq.

20 On the different motives of states to include environmental concerns in their negotiations on regional trade agreements see, e.g., OECD, (fn. 11), p. 40 et seq.

of environment-related provisions stipulating respective rules of behavior of the treaty parties, and the enforcement-oriented perspective on the other hand, addressing the different approaches towards environmental dispute settlement in regional economic integration agreements.

I. Substantive Law Perspective: Scope and Depth of Environmental Provisions in EU Free Trade Agreements

Approaching the subject of environmental-related provisions in regional trade agreements from the perspective of substantive law, we can initially observe the existence of something like a minimalist substantive approach to environmental governance in many of the respective treaty regimes. In particular, this regulatory approach manifests itself in those regional trade agreements whose only reference to certain environmental issues is stipulated in exception or justification clauses modelled after or even explicitly incorporating Article XX GATT 1994 and addressing certain environmentally related concerns such as the protection of human, animal and plant life or health as well as the conservation of exhaustible natural resources.[21]

Respective stipulations are a characteristic feature of those economic integration agreements that have been concluded already a number of decades ago.[22] A telling example is provided by the former trade agreement between the European Economic Community and Israel of 11 May 1975 whose Article 11 is at least loosely modelled after Article XX GATT 1994:

> "The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of human, animal or plant life and health, the protection of national treasures of artistic, historic or archaeological value, the protection of industrial and commercial property, or rules relating to gold or silver. Such prohibitions or restrictions must

21 See also *Monteiro*, Typology of Environment-Related Provisions in Regional Trade Agreements, WTO Working Paper ERSD-2016-13, July 2016, p. 4: "Certain environment-related provisions included in RTAs do not differ significantly from the provisions of the WTO Agreements with direct relevance to the environment. In fact, the most common type of environment-related provisions, with can be found in 262 RTAs is an environmental exception, similar to the general exceptions of Article XX of the General Agreement on Tariffs and Trade (GATT 1994) or Article XIV of the General Agreement on Trade in Services (GATS)." Generally on the normative functions, regulatory structure and content of Article XX GATT 1994 see, e.g., *van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 3rd ed. 2013, p. 545 et seq.; *Tietje*, WTO und Recht des Weltwarenhandels, in: Tietje (ed.), Internationales Wirtschaftsrecht, 2nd ed. 2015, p. 199 et seq.; *Schöbener et al.*, Internationales Wirtschaftsrecht, 2010, p. 171 et seq.

22 *Jinnah/Morgera*, (fn. 4), p. 325: "early agreements only linked trade and the environment through a general exception clause, allowing parties to pursue environmental protection objectives through trade measures".

> not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."[23]

Attention might also be drawn to the free trade agreement, still in force between Israel and the United States, of 26 April 1985 stipulating in its Article 7 that

> "Article XX and XXI of the GATT are hereby incorporated into and made a part of this Agreement".[24]

However, such a minimalist regulatory approach to environmental governance can also be found in a considerable number of more recent economic integration treaties, among them – to mention but two examples – Article IX of the revised Treaty of Trade between India and Nepal signed on 27 October 2009[25] as well as Article XIX of the Preferential Trade Agreement between Chile and India of 8 March 2006.[26]

While many of the numerous regional trade agreements currently in force are thus rather displaying what can be qualified as a kind of minimalist substantive approach to issues of environmental protection, there is today clearly a trend in the relevant treaty-making practice towards the inclusion of considerably more comprehensive environmental provisions.[27] An important or even something like a pioneering ex-

23 Agreement between the European Economic Community and the State of Israel, OJ L 136 of 28/5/1975, p. 3. The agreement was subsequently replaced by the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States of the one part, and the State of Israel, of the other part, OJ L 147 of 21/6/2000, p. 3.

24 For the text of this agreement see the information available under http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp (15/9/2017).

25 The text of the agreement is available under http://commerce.nic.in/trade/nepal.pdf (15/9/2017).

26 The text of the treaty can be found under www.sice.oas.org/trade/chl_ind/ptatext_e.pdf (15/9/2017). Generally on this regulatory approach in regional trade agreements and its relevance for the realm of environmental governance see also for example OECD, (fn. 11), p. 134 et seq.

27 With respect to the existence of such a trend see also, e.g., *George*, Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers, OECD Trade and Environment Working Papers 2014/02, p. 2 and 4: "Analysis of the environmental provisions in RTAs reveals an encouraging upward trend. While basic provisions remain the most common types found in RTAs, the incidence of more substantive provisions has increased significantly in recent years. […] However, the incidence of all the more substantive provisions covered by the analysis has increased significantly in recent years, from around 30 % of those entering into force up to 2010, rising to over 50 % in 2011 and close to 70 % in 2012." *Jinnah*, Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance, Journal of Environment and Development 20 (2011), p. 191: "Environmental provisions in trade agreements have evolved from weak statements of nonderogation […] to strong mechanisms of transnational policy influence." *George/Serret*, Regional Trade Agreements and the Environment: Developments in 2010, OECD Trade and Environment Working Papers 2011/01, p. 4; *Potestà*, (fn. 11), p. 167: "In a number of PTIA [preferential trade and investment agreements] regimes, however, one can witness a growing attention towards non-economic concerns, such as labor, environmental and health issues."

ample in this regard[28] is the North American Free Trade Agreement (NAFTA) that entered into force between Canada, Mexico and the United States on 1 January 1994.[29] In addition to stipulating respective environmental governance clauses in the text of the free trade agreement itself – attention might be drawn in this regard, for example, to the preamble emphasising, *inter alia*, the desire of the parties to strengthen the development and enforcement of environmental laws and regulations, as well as Article 104 NAFTA including a list of multilateral environmental agreements whose provisions would supersede those of NAFTA in case of a conflict, NAFTA is first and foremost also accompanied by an environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC) that entered into force on 1 January 1994 and provides for a number of institutional and procedural features aimed at establishing an appropriate and acceptable balance between the promotion of international trade and the realisation of environmental objectives.[30]

In the realm of the common commercial policy of the European Union, intended to provide for a uniform conduct of trade relations by EU Member States with third countries,[31] the free trade agreement signed by this supranational organisation and its Member States with the Republic of Korea in 2010 that entered into force on 1 July 2011[32] appears to be the first treaty of a kind of "new generation" of EU regional trade agreements[33] that distinguishes itself, *inter alia*, through the inclusion of a whole separate chapter on trade and sustainable development (Articles 13.1 et seq. EU-Korea

28 On this perception see also for example *Knox*, The Neglected Lessons of the NAFTA Environmental Regime, Wake Forest Law Review 45 (2010), p. 392; *Potestà*, (fn. 11), p. 169: "The NAFTA represents the initial milestone of a treaty regime addressing environmental issues within the context of an economic treaty." *Lo*, (fn. 11), p. 313; *Gantz*, (fn. 11), p. 308.

29 North American Free Trade Agreement, 32 ILM 289, 605 (1993).

30 The text of this agreement is available under www.cec.org/Page.asp?PageID=1226&SiteNodeID=567 (15/9/2017). For a more detailed account of the NAAEC see *Markell*, North American Agreement on Environmental Cooperation (1993) in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, August 2009, para. 1 et seq.; *Knox*, (fn. 28), p. 391 et seq.; *Gantz*, (fn. 11), p. 310 et seq.

31 Generally thereto for example *Khan*, in: Geiger et al. (eds.), European Union Treaties – A Commentary, 2015, Art. 207 TFEU, para. 1 et seq.; *Oppermann et al.*, Europarecht, 7th ed. 2016, p. 646 et seq.; *Kuijper et al.*, The Law of EU External Relations, 2nd ed. 2015, p. 295 et seq.

32 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 of 14/5/2011, p. 6.

33 Generally on the regional trade agreements concluded by the European Union see for example *Antimiani/Salvatici*, Regionalism versus Multilateralism: The Case of the European Union Trade Policy, Journal of World Trade 49 (2015), p. 253 et seq.; *Melo Araujo*, The EU's Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?, European Yearbook of International Economic Law 5 (2014), p. 263 et seq.; *Melo Araujo*, The EU Deep Trade Agenda – Law and Policy, 2016, p. 49 et seq.

FTA),[34] first and foremost addressing issues of environmental governance.[35] This novel and considerably more comprehensive regulatory approach towards environmental issues adopted by the EU with regard to its external trade relations is, for example, also mirrored in the Association Agreement between the EU and Georgia that was signed on 27 June 2014 and that entered into force on 1 July 2016. In accordance with its Article 22, the parties to this agreement establish a free trade area in conformity with the requirements enshrined at the multilateral level in Article XXIV GATT 1994.[36] In the same way as other economic integration agreements more recently concluded by the EU such as, for example, the Comprehensive Economic and Trade Agreement (CETA) with Canada signed on 30 October 2016,[37] the Economic Partnership Agreement with the Southern African Development Community Economic Partnership Agreement States signed on 10 June 2016[38] as well as the Trade Agreement with Colombia and Peru of 26 June 2012,[39] the 2014 EU-Georgia Association Agreement does not only emphasise already in its preamble the importance of effective environmental governance in the economic relations between the parties[40] and provide for the incorporation of Article XX GATT 1994 (Article 33 EU-Georgia Association Agreement 2014) as well as for a general exception clause concerning the realm of trade in services in its Article 134. Rather, the agreement also includes in its

34 See, however, in this regard also already the Articles 183 to 190 (chapter 4: Environment) of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed on 15/10/2008, OJ L 289 of 30/10/2008, p. 3.

35 On the environmentally related provisions of the EU-Korea FTA see also, e.g., *Duran/Morgera*, Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions, 2012, p. 117 et seq.; *Zvelc*, (fn. 11), p. 195 et seq. Generally on the inclusion of a sustainable development chapter in EU free trade agreements see for example *Hoffmeister*, The Contribution of EU Trade Agreements to the Development of International Investment Law, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified, 2016, p. 361 et seq.

36 For a general account of these requirements under Article XXIV GATT 1994 see, e.g., *Matsushita et al.*, (fn. 7), p. 507 et seq.; *Nowrot*, Steuerungssubjekte und -mechanismen im Internationalen Wirtschaftsrecht (einschließlich regionale Wirtschaftsintegration), in: Tietje, (fn. 21), p. 142 et seq.; *Boysen*, (fn. 14), p. 674 et seq.; *Herrmann et al.*, Welthandelsrecht, 2nd ed. 2007, p. 269 et seq.

37 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11 of 14/1/2017, p. 23.

38 Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ L 250 of 16/9/2016, p. 3.

39 Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354 of 21/12/2012, p. 3.

40 See the respective stipulation in the preamble: "Committed to respecting the principles of sustainable development, to protecting the environment and mitigating climate change, to continuous improvement of environmental governance and meeting environmental needs, including cross-border cooperation and implementation of multilateral environmental agreements; […]". Generally thereto also, e.g., *Waleson*, Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment, Legal Issues of Economic Integration 42 (2015), p. 159: "The EU has established a practice of including a reference to sustainable development in EU FTAs."

Articles 227 to 243 a chapter on trade and sustainable development (chapter 13), thereby recognising economic development, social development and environmental protection as the "interdependent and mutually reinforcing pillars" of this overarching steering concept (Article 227(2) EU-Georgia Association Agreement 2014).

And indeed, chapter 13 of the EU-Georgia Association Agreement contains a number of notable provisions from the perspective of environmental governance. Among them are substantive stipulations like the obligation of each party to ensure that its domestic laws provide for high levels of environmental protection in accordance with Article 228(2) as well as the prohibition to encourage trade or investment by means of lowering the level of protection afforded in domestic environmental law or by way of failing to effectively enforce the respective environmental legal framework under Article 235(1) and (3), thereby in fact transforming the expectation of effectively implementing existing domestic laws aimed at environmental protection into an international legal obligation of the parties.[41] In addition, and as kind of complementary means to the obligations just referred to, the parties explicitly recognise the importance of multilateral environmental governance (Article 230(1) EU-Georgia Association Agreement 2014) and, against this background, not only commit themselves to consult and cooperate with respect to multilateral negotiations on trade-related environmental matters (Article 230(1)) but also stipulate an obligation to effectively implement the provisions of multilateral environmental agreements to which they are a party in their respective domestic legal orders in accordance with Article 230(2). Finally, to mention but one further example, the EU, its Member States and Georgia have under Article 239 of the agreement identified certain areas of environmental concerns as potential fields for cooperative efforts, among them the promotion of sustainable fishing practices, sustainable forest management and corporate social responsibility in general (lit. g, l and m), the development of private as well as public certification, traceability and labelling schemes (lit. f) and the identification of suitable trade-related measures aimed at promoting the conservation of biological diversity (lit. k).[42]

These and numerous other substantive stipulations are complemented by provisions establishing an institutional framework intended to serve as oversight bodies as well as to facilitate the realisation of the normative steering ideas and guiding principles enshrined in the EU-Georgia Association Agreement 2014.[43] Article 240(1) stipulates in this regard, that each party to the agreement is required to designate a specific unit within its administration that shall serve as an institutional contact point for the purposes of implementing the chapter on trade and sustainable development. Further-

41 Generally on this regulatory technique in the realm of regional trade agreements see for example *Potestà*, (fn. 11), p. 177 et seq.; OECD, (fn. 11), p. 108 et seq.; *Lo*, (fn. 11), p. 325 et seq.

42 Generally on these types of environmental cooperation provisions in regional trade agreements see also OECD, (fn. 11), p. 76 et seq.; *Lo*, (fn. 11), p. 324 et seq.; *Gallagher/Serret*, Implementing Regional Trade Agreements with Environmental Provisions – A Framework for Evaluation, OECD Trade and Environment Working Papers 2011/06, p. 8 et seq.

43 Generally on this institutional dimension in the context of environmental provisions of regional trade agreements more recently concluded by the EU see, e.g., *Zvelc*, (fn. 11), p. 199 et seq.

more, in accordance with its Article 240(2) the treaty regime establishes the Trade and Sustainable Development Sub-Committee comprising of senior administrative officials and entrusted with the task of overseeing the implementation of the substantive and procedural provisions stipulated in chapter 13 of the association agreement. Finally, and reflecting the participatory and inclusive approach adopted by the parties in order to promote an environmentally sound regional economic integration regime, a joint civil society dialogue forum is created on the basis of Article 241 that shall be convened once a year in order to conduct a dialogue between the parties and relevant non-state actors on sustainability aspects including environmental concerns.[44] With regard to the composition of the forum, the parties have committed themselves to promote – in the words of Article 241(1) – "a balanced representation of relevant interests" and stakeholders by inviting, *inter alia*, representative organisations of employers, workers, environmental interests and business groups to participate in the dialogue forum.

II. Enforcement Perspective: Environmental Dispute Settlement in Free Trade Agreements

Turning to the enforcement-oriented perspective and thus assessing the different approaches towards environmental dispute settlement in regional trade agreements, it seems appropriate to start the evaluation by recalling that most – albeit not all[45] – economic integration treaties also contain provisions that establish procedures for resolving disputes among the contracting parties.[46] Thereby, in previous decades roughly until the end of the 1990s, the majority of regional trade agreements stipulated

44 For a general account of this regulatory approach in economic integration agreements see, e.g., OECD, (fn. 11), p. 149 et seq.

45 An example of a free trade agreement that does not contain a dispute settlement provision is the Agreement of the Government of Iceland, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part of 31/8/2005 ("Hoyvík Agreement"), www.government.fo/foreign-relations/hoyvik-agreement/ (15/9/2017).

46 Generally on this issue see, e.g., *Donaldson/Lester*, Dispute Settlement, in: Lester et al. (eds.), Bilateral and Regional Trade Agreements – Commentary and Analysis, 2nd ed. 2015, p. 385 et seq.; *Chase et al.*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?, WTO Staff Working Paper ERSD-2013-07, with further references.

in this regard only a "negotiation model" of dispute settlement[47] by providing exclusively for the possibility of negotiated settlements between the disputing parties through informal consultations or in the more formal and institutionalised context of political bodies established under the treaty regime in question.[48] Nevertheless, more recently these types of pragmatic, negotiation-based dispute settlement procedures are in relative decline since the respective treaty-making practice in the realm of regional trade agreements shows a clear trend towards establishing and implementing a more "rule-oriented" model of dispute settlement in particular involving a right of access to third-party adjudication at some stage of the dispute settlement process.[49]

The design of these more legalistic mechanisms in regional trade agreements frequently follows a structure that is quite similar to the WTO dispute settlement process,[50] albeit in most cases without an institution exercising an appellate review function.[51] With regard to an example from treaty-practice in the realm of EU free trade agreements, attention can be drawn to the dispute settlement mechanism established on the basis of the Articles 244 et seq. of the EU-Georgia Association Agreement 2014. In addition, most of these more sophisticated, rule-oriented forms of dispute settlement in economic integration agreements – in principle in the same way as the WTO dispute settlement mechanism itself[52] – offer access to trade sanctions to be temporarily adopted by the complaining party against the respondent in cases of non-compliance with arbitration panel rulings as, again, illustrated by the measures foreseen under Article 257(2) of the EU-Georgia Association Agreement 2014 as well as for example

47 On the distinction between "negotiation models" and "adjudication models" of dispute settlement in the context of dispute settlement mechanisms in the international economic system, see *Davey*, Dispute Settlement in GATT, Fordham International Law Journal 11 (1987), p. 69 et seq. For a related systemising approach distinguishing between "pragmatism" and "legalism" in the design of international dispute settlement mechanisms see already *Hudec*, GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade, Yale Law Journal 80 (1971), p. 1304 et seq.; *Dam*, The GATT: Law and International Economic Organization, 1970, p. 3 et seq. Generally on these approaches see also *Nowrot*, NAFTA Dispute Resolution – Zwischen Diplomatie und Recht, in: Ehlers et al. (eds.), Aktuelle Entwicklungen des Rechtsschutzes und der Streitbeilegung im Außenwirtschaftsrecht, 2013, p. 83 et seq., with further references.

48 *Chase et al.*, (fn. 46), p. 13.

49 Ibid., p. 11 et seq. Generally on the differentiation between "rule-oriented" and "power-oriented" structures in the international economic system see already *Jackson*, The Birth of the GATT-MTN System: A Constitutional Appraisal, Law and Policy in International Business 12 (1980), p. 27 et seq.; *Jackson*, The World Trading System, 1989, p. 85 et seq.

50 *Chase et al.*, (fn. 46), p. 13 et seq. Generally on the WTO dispute settlement mechanism see, e.g., *van den Bossche/Zdouc*, (fn. 21), p. 156 et seq.; *Tietje*, Rechtsschutz und Streitbeilegung in der Welthandelsorganisation (WTO), in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 2009, p. 37 et seq.; *Hilf/Salomon*, Das Streitbeilegungssystem der WTO, in: Hilf/Oeter, (fn. 14), p. 165 et seq.; *Weiss*, Streitbeilegung in der Welthandelsorganisation, in: Tietje, (fn. 21), p. 886 et seq.; *Qureshi/Ziegler*, International Economic Law, 3rd ed. 2011, p. 430 et seq.

51 For a number of notable exceptions in the realm of economic integration agreements see *Chase et al.*, (fn. 46), p. 30 et seq.

52 See thereto, e.g., *van den Bossche/Zdouc*, (fn. 21), p. 291 et seq.; *Krajewski*, Wirtschaftsvölkerrecht, 4th ed. 2017, p. 75 et seq.; *Matsushita et al.*, (fn. 7), p. 132 et seq.

under Article 15(2) of the chapter on Dispute Settlement of the Free Trade Agreement between the EU and Vietnam on which negotiations were completed in the beginning of 2016.[53]

Although these findings undoubtedly serve as an indication that the legal regimes aimed at regional economic integration have in general more recently, from an enforcement perspective, become considerably more rule-oriented in character on the basis of quasi-judicial or even judicial dispute settlement mechanisms, it needs to be emphasised that the respective situation and assessment is not as straightforward when it comes to the implementation dimension of environmental governance provisions stipulated therein. Rather, with respect to the design and applicability of dispute settlement mechanisms we often – even frequently – find in the regulatory framework of regional trade agreements a clear distinction being made between disputes over what might be qualified as "environmentally-related" provisions on the one hand and traditional "trade-related" obligations of the contracting parties on the other hand.

In order to establish a systemising typology of the various respective dispute settlement procedures, it seems useful to broadly distinguish between three main approaches identifiable in current treaty practice of those regional trade agreements that include more comprehensive stipulations or even separate chapters devoted to environmental governance. Initially, we can find something like a minimalist procedural approach towards the enforcement of environmentally-related provisions that, strictly adhering to the above-mentioned "negotiation model", relies exclusively on a settlement through consultations between the parties in the case of a dispute. A more recent example of such a minimalist approach is provided by the Canada-Peru Free Trade Agreement and its accompanying Agreement on the Environment that both entered into force on 1 August 2009.[54] While the stipulations enshrined in chapter 17 on environmental matters in the free trade agreement itself are, in accordance with Article 2102(1) of the treaty, excluded from the scope of application of the general dispute settlement mechanism established under chapter 21, any disputes arising between the parties with regard to the interpretation and application of the Canada-Peru Agreement on the Environment are to be solved exclusively through consultations as laid down in Article 12 of the agreement.[55] The same applies for example to the Free Trade Agreement between the EFTA States and Bosnia and Herzegovina signed on 24 June 2013[56] as well as to the Framework Agreement Establishing a Free Trade Area con-

53 Free Trade Agreement between the European Union and Vietnam. The respective agreed text of this agreement as of January 2016 is available under http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (15/9/2017).

54 The text of both agreements is available under www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&menu_id=137 (15/9/2017).

55 See in this context also specifically Article 12(6) Canada-Peru Agreement on the Environment: "Neither Party may provide for a right of action under its law against the other Party on the ground that the other Party has acted in a manner inconsistent with this Agreement."

56 For the text of the agreement see www.efta.int/media/documents/legal-texts/free-trade-relations/bosnia-and-herzegovina/bosnia-and-herzegovina-fta.pdf (15/9/2017).

cluded between the Republic of Korea and Turkey that entered into force on 1 May 2013.[57] Article 5.12(3) of the last-mentioned agreement explicitly proscribes that

> "[n]either Party shall have recourse to Chapter 6 (Dispute Settlement) for any matter arising under this Chapter [Trade and Sustainable Development]".[58]

The normative framework established by Articles 242 and 243 of the EU-Georgia Association Agreement 2014 provides an example of the second main type of environmentally-related dispute settlement mechanisms in current regional trade agreements, a regulatory approach that might appropriately labelled as "soft" quasi-judicial dispute settlement.[59] In order to illustrate this qualification, it seems useful to draw attention to the fact that the procedure itself can again be subdivided into three principle phases of dispute settlement. The first phase – following the "negotiation model" – requires the disputing parties to make every attempt to arrive at a mutually satisfactory resolution of the matter on the basis of consultations, either on an informal basis or within the institutional framework of the Trade and Sustainable Development Sub-Committee (Article 242(2) to (4) EU-Georgia Association Agreement 2014). In this respect, Article 242(3) and (5) foresees that the parties may seek advice from relevant multilateral environmental organisations and bodies as well as from their domestic advisory groups or other experts. In case the parties are unable to reach a satisfactory solution within a timeframe of 90 days after the first formal request for consultations in accordance with Article 242(2) has been made, the dispute settlement procedure enters into its second phase that is designed on the basis of an "adjudication model". Article 243(1) provides that each party may request that a panel of experts be convened, comprising of three experts selected from a list of at least fifteen individuals with specialised knowledge in legal or environmental issues as established by the Trade and Sustainable Development Sub-Committee in accordance with Article 243(2) to (5) and Article 249, in order to examine the matter at issue. The panel of experts issues a report to the parties under Article 243(7), thereby – in the words of this provision –

> "setting out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes".

While this second phase is clearly rule-oriented and justifies the qualification of this mechanism as a quasi-judicial dispute settlement procedure, the design of the subse-

57 The text of the agreement is available under www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002366&layoutMenuNo=23274 (15/9/2017).

58 See thereto also, e.g., *George*, Developments in Regional Trade Agreements and the Environment: 2013 Update, OECD Trade and Environment Working Papers 2014/01, p. 10 et seq.

59 In accordance with Article 242(1) of the EU-Georgia Association Agreement 2014, for any dispute arising under chapter 13 (Trade and Sustainable Development) "the Parties shall only have recourse to the procedure established under this Article and Article 243 of this Agreement", thus excluding the applicability of the general dispute settlement mechanism provided for in chapter 14.

quent third (implementation) phase indicates the "soft" character of this mechanism. Once the report of the panel of experts has been issued and published, the parties are, under Article 243(8) of the EU-Georgia Association Agreement 2014, in the enforcement phase of the dispute settlement procedure asked to

> "discuss appropriate measures to be implemented taking into account the Panel of Experts' report and recommendations".

In contrast to the general dispute settlement mechanism under chapter 14, however, Article 243(8) does not stipulate a right of the complaining party to adopt trade sanctions against the respondent in cases of non-compliance with the recommendations included in the panel report. The enforcement phase is thus, again, strictly adhering to the pragmatic "negotiation model" of dispute settlement. A quite similar governance approach towards the enforcement of environment-related provisions can be found in other EU free trade agreements as exemplified by Articles 13.14 and 13.15 of the EU-Korea FTA, Articles 16 and 17 of the chapter on Trade and Sustainable Development of the Free Trade Agreement between the European Union and Vietnam, Articles 24.14 and 24.15 CETA as well as Articles 13.16 and 13.17 of the Free Trade Agreement between the EU and Singapore on which negotiations were completed in October 2014.[60]

It is precisely these "soft" implementation features that distinguishes this second type of environmental dispute settlement mechanisms from the "hard" quasi-judicial dispute settlement procedures that constitute the third notable approach that can already be occasionally found in the current treaty-making practice of economic integration agreements. This most far-reaching approach in fact largely eliminates the above-mentioned procedural differences between disputes dealing with traditional trade-related obligations of the contracting parties on the one side and those addressing the more recently introduced environmental provisions in regional trade agreements on the other side. A respective example is provided by the free trade agreement concluded between Nicaragua and Taiwan on 16 June 2006.[61] This agreement includes in its chapter 19 (Environment) quite comprehensive stipulations, among them for example the obligation to effectively enforce the domestic environmental laws in accordance with Article 19.02(1)(a). However, contrary to many other regional trade agreements, the obligations accepted by the parties under this chapter are not explicitly excluded from the scope of application of the general dispute settlement mechanism established under chapter 22 of the agreement.[62] Consequently, in case a dispute arises between the parties concerning the interpretation and application of their environmentally-related obligations under chapter 19, a non-compliance with the recommendations made in the report of an arbitral group gives the complaining party also the right to suspend benefits to the respondent in accordance with Article 22.16.

60 EU-Singapore Free Trade Agreement, authentic text as of May 2015, http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (15/9/2017).

61 The text of the agreement is available under www.sice.oas.org/Trade/nic_twn/nic_twn_e/TWN_NIC_full_text_06_16_09.pdf (15/9/2017).

62 See thereto also for example *George/Serret*, (fn. 27), p. 6 et seq.

Such a "hard" quasi-judicial dispute settlement procedure also finds its manifestation for example in the most recent generation of regional trade agreements concluded by the United States.[63] Article 20.9(4) of the free trade agreement between the Republic of Korea and the United States that entered into force on 15 March 2012[64] explicitly stipulates that the parties, in case of a dispute arising in connection with the interpretation and application of provisions enshrined in chapter 20 (Environment) may also have recourse to the general dispute settlement mechanism established under chapter 22 (Institutional Provisions and Dispute Settlement), including the right to adopt trade sanctions in the event of non-compliance under Article 22.13.[65] Quite similar provisions can already be found for example in Article 18.12(6) of the Peru-US free trade agreement that entered into force on 1 February 2009,[66] as well as subsequently *inter alia* in Article 17.11(6) of the trade promotion agreement concluded between the United States and Panama, effective since 31 October 2012,[67] and in Article 18.12(6) of the trade promotion agreement between Colombia and the United States that entered into force on 15 May 2012.[68] The same also applies to Article 20.23(1) of the Trans-Pacific Partnership (TPP), originally signed by the United States as well as Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Sin-

63 On the constitutional law background of this more recent innovation in the respective US treaty practice see for example *Gantz*, The "Bipartisan Trade Deal", Trade Promotion Authority and the Future of U.S. Free Trade Agreements, Saint Louis University Public Law Review 28 (2008), p. 135 et seq.; *Gantz*, (fn. 11), p. 340 et seq.; *Condon*, The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments, Virginia Environmental Law Journal 33 (2015), p. 110 et seq.

64 The text of the agreement is available under https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (15/9/2017).

65 See thereto also already *Jinnah*, (fn. 27), p. 208: "The environmental provisions in the U.S.-Peru TPA are unprecedented. Most notably, the opening of the TPA's Dispute Settlement Chapter's procedures to environmental disputes not resolvable via environmental consultations means that implementation of covered agreements, including CITES, is for the first time subject to the full economic gravitas of FTA enforcement power." *Potestà*, (fn. 11), p. 181: "these PTIA mechanisms effectively provide for potentially powerful cross-regime enforcement tools". *Tébar Less/Gigli*, Update on Environment and Regional Trade Agreements: Developments in 2007, OECD Trade and Environment Working Paper No. 2008-02, p. 7: "In the more recent agreements (e.g., the FTA with Korea) [signed by the United States], the whole Environment chapter is subject to formal dispute settlement." *Jinnah/Morgera*, (fn. 4), p. 331; *Gigli*, Update on Environment and Regional Trade Agreements: Developments in 2008, OECD Trade and Environment Working Paper No. 2009-01, p. 11 et seq.

66 The text of the free trade agreement can be found under https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (15/9/2017). See also, e.g., *Gallagher/Serret*, Environment and Regional Trade Agreements: Developments in 2009, OECD Trade and Environment Working Papers 2010/01, p. 12 et seq.

67 The text of the treaty is available under https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text (15/9/2017). See also, e.g., *George*, Developments in Regional Trade Agreements and the Environment: 2013 Update, OECD Trade and Environment Working Papers 2014/01, p. 11 et seq.

68 For the final text of this agreement see the respective information under https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (15/9/2017). See thereto also for example *George*, Developments in Regional Trade Agreements and the Environment: 2012 Update, OECD Trade and Environment Working Papers 2013/04, p. 9 et seq.

gapore and Vietnam on 4 February 2016,[69] whose fate, however, hangs somehow in the balance following the withdrawal by the United States in January 2017.

D. Concluding Observations

The – necessarily selective – assessment undertaken in the present article has revealed a number of indications in the relevant treaty-making practice supporting the perception that there is currently not only a trend towards the incorporation of more substantive and comprehensive environmental provisions into the legal frameworks of regional trade agreements. Rather, we can more recently, albeit not (yet) in the treaty practice of the EU, also observe in the realm of these economic integration agreements the emergence of more robust dispute settlement mechanisms designed to provide for a potentially quite effective enforcement of these substantive environmental stipulations in cases of non-compliance; a regulatory approach that results in the elimination of the traditional procedural differences between disputes relating to trade-related obligations of the treaty parties on the one side and those being concerned with environmental stipulations on the other side. It is first and foremost this last-mentioned feature that has been rightly considered in the literature as one of the most notable normative innovations in recent years in the realm of regional economic integration agreements as a whole.[70]

Nevertheless, it should finally not be left unmentioned that the practical impact of these innovations in the realm of dispute settlement is until now rather limited, to say the least. Already from a general quantitative perspective, it has frequently been emphasised that although most regional trade agreements by now included dispute settlement mechanisms, the number of actual party-to-party disputes formally initiated by recourse to these mechanisms has until now remained very small.[71] This finding holds particularly true for respective disputes involving environmental provisions in economic integration agreements since no known dispute proceedings have been initiated yet, and some authors have expressed their skepticism as to future recourse to these mechanisms in dispute settlement practice.[72] However, while the future most certainly continues to be difficult to predict, in light of the unprecedented step more recently taken by the United States to initiate dispute settlement proceedings against Guatemala based on an alleged failure to effectively enforce domestic labour laws under Article 16.2(1) lit. a and Article 16.6 of the Dominican Republic-Central

69 The text of the TPP is for example available under https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (15/9/2017).

70 On this perception see, e.g., *Jinnah*, (fn. 27), p. 208; *Potestà*, (fn. 11), p. 182 et seq.; *Jinnah/Morgera*, (fn. 4), p. 331.

71 See for example *Chase et al.*, (fn. 46), p. 6.

72 See thereto, e.g., *Jinnah/Morgera*, (fn. 4), p. 335: "Utilization of the dispute settlement provisions, however, is unlikely to occur in practice, […]." *Jinnah*, (fn. 27), p. 208: "Nevertheless, it is unclear whether the U.S. government would actually use its ability to file a dispute under the FTA for failure to implement the CITES-relevant provisions of the annex. Indeed, NGO representatives interviewed for this study did not see this as a likely option. U.S. government officials also expressed resistance to using this provision, […]."

America Free Trade Agreement (CAFTA-DR)[73] it seems not entirely unrealistic to assume that this new generation of respective dispute settlement mechanisms created in more recently concluded regional trade agreements for the purpose of enforcing the implementation of certain non-economic concerns might even in the foreseeable future also occasionally been used in the context of environmental governance. Against this background, the EU in particular, which is not infrequently acting – and indeed on the basis of Article 21 TEU as well as Articles 205 and 207(1) 2nd sentence TFEU being normatively expected to act – as a kind of "self-styled champion" of the global environment, would surely be well advised to at least seriously consider a change in its foreign trade and investment policy from the current "soft" to a more "hard" quasi-judicial approach concerning the environmental dispute settlement mechanisms stipulated in its free trade agreements.

73 See on this labour rights dispute for example US, Guatemala Square Off as FTA Labour Dispute Advances, Bridges Vol. 19, No. 5 of 12/2/2015; Arbitral Panel of the Dominican Republic-Central America-Free Trade Agreement (CAFTA-DR), *Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of Guatemala of 2/2/2015, https://ustr.gov/sites/default/files/enforcement/labor/NON-CONFIDENTIAL%20-%20Guatemala%20-%20Initial%20written%20communication%20%202-02-2015.pdf (15/9/2017). The text of the CAFTA-DR itself is for example available under https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (15/9/2017).