The contribution of free trade agreements and bilateral investment treaties to a sustainable future

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A. Introduction

Climate change is the most important issue of our time, which, if unmitigated, will present significant dangers to human life and health, as well as social and economic wellbeing.[1] The United Nations Secretary-General, António Guterres stated that "even as we witness devastating climate impact causing havoc across the world, we are still not doing enough, nor moving fast enough, to prevent irreversible and catastrophic climate disruption."[2] His frustration is shared amongst the legal and academic

1 *Kulovesi*, TRADE, L. & DEV., 2014/6(1), at p. 59; *Leal-Arcas*, Solutions for Sustainability: How the international trade, energy and climate change regimes can help; *Leal/Leal-Arcas* (eds.), University Initiatives in Climate Change Mitigation and Adaptation.

2 *United Nation Press release*, "No Time Left for Limitless Negotiations, Secretary-General Stresses as Climate Talks Open, Warning: 'We Cannot Afford to Fail in Katowice'", (03/12/2018), available at: https://www.un.org/press/en/2018/sgsm19386.doc.htm (09/03/2020).

perspectives, as well as within the most vulnerable groups of countries,[3] as there is a feeling that not much has been achieved through Multilateral Environmental Agreements (MEAs) due to the lack of enforceability of their provisions. The impacts of climate change have no borders and will affect every country in the world.[4]

Some dreamers have gone much further and propose that humans should move to the Moon as an insurance policy for the Earth.[5] Therefore, the expectation is that, until that is possible, the international community would make the mitigation of such impacts their number one priority. However, due to countries having different agendas and economic interests, it has been considered difficult to establish binding commitments in relation to climate mitigation and adaptation.

A good example is that of China's rare earths. In 2010, China decided to restrict its exports of rare earths to protect its environment. The World Trade Organization (WTO) decided against China's restrictions after the US, the EU, and Japan challenged them. China's share of global rare-earth production dropped from over 95% in 2010

3 Among these countries are those near the Equator and small island states, concerned about the impact the sea level rise will have on them. Indeed, it is by now a fact that Greenland is melting. As a result, its ice sheet is rapidly retreating and can hold enough water to see the sea level rise by more than seven meters if it all melts and goes into the oceans. *The Economist* announced that, according to Polar Portal, "Greenland is currently losing 3bn tonnes of ice a day." That was certainly not the case millennia ago, when Greenland was covered by forests, hence its name. See *The Economist*, "Greenland is melting," 22 June 2019, p. 69. For an analysis of climate change in small island states, see *Plumer/Friedman*, Island Nations, With No Time to Lose, Take Climate Response Into Their Own Hands, *The New York Times*, 2017, available at: https://www.nytimes.com/2017/11/17/climate/islands-climate-change-un-bonn.html (09/03/2020); *Ourbak/Magnan*, Regional Environmental Change 2018/18, available at: https://link.springer.com/article/10.1007/s10113-017-1247-9 (09/03/2020); Adaptation Fund in the Small Island Developing States, (03/11/2017), available at: https://www.adaptation-fund.org/wp-content/uploads/2017/11/Adaptation-Fund-in-the-SIDS-1.pdf (09/03/2020); Global Environment Facility, LDCs, available at: https://www.thegef.org/topics/least-developed-countries-fund-ldcf (09/03/2020); Inside Kiribati: The Island Being Erased by Climate Change, *Al Jazeera Documentary,* (10/10/2017), available at: https://www.youtube.com/watch?v=plzBaNaCIv4 (09/03/2020); *Worland*, The Leaders of These Sinking Countries Are Fighting to Stop Climate Change. Here's What the Rest of the World Can Learn, *TIME*, (13/06/2019), available at: https://time.com/longform/sinking-islands-climate-change (09/03/2020); *Yeung*, Climate Change is Already Battering this West African City, *CityLab,* (07/04/2019), available at: https://www.citylab.com/environment/2019/04/climate-change-rising-sea-levels-west-africa-coastal-cities/586651/ (09/03/2020);*John*, While the Rich World Braces for Future Climate Change, the Poor World is Already Being Devastated By It, *CNN*, (01/04/2019), available at: https://www.cnn.com/2019/03/31/africa/poorest-hit-the-hardest-climate-change-mozambique-intl/index.html (09/03/2020).

4 As a result of human activity, a million species of animals and plants are threatened with extinction. *The Economist* reported in May 2019 that, according to the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, "more than 85% of wetlands have been lost. More than 90% of ocean fish stocks are being harvested at or above sustainable levels." See *The Economist*, Dead end, 11/05/2019, p. 73.

5 Jeff Bezos has proposed returning to the Moon by 2024. His justification is the mismatch between population growth and the Earth's limited natural resources, given the increasing levels of energy demand. Another dreamer, Elon Musk, would like humans to colonize Mars. See *The Economist*, Living in outer space: Back to the future, 18/05/2019, p. 74.

to 70% in 2018.[6] China is trying to clean its rivers and, although it is still excavating a lot of rare-earth elements, it is committed to importing most of what it needs in order to protect its own environment.[7]

There is an undeniable connection between climate change and international trade.[8] However, there is no mention in the WTO Agreement about mitigating climate change, despite the fact that the United Nations Framework Convention on Climate Change (UNFCCC) had been concluded two years before the creation of the WTO Agreement. The two regimes need to be intertwined in order to effectively address the major global challenges of the 21st century – climate change, economic and social development, human well-being, sustainable development, and global security.[9] Energy concerns are closely linked with trade and climate change, as energy is a commodity that is traded, and it has been generated through fossil fuels in the last 150 years, emitting many greenhouse gases (GHG) into the atmosphere.[10] As population increases,[11] energy consumption will also increase, creating urgency in developing clean energy technologies.

International trade law may be the solution to decarbonise the economy and invest in renewable energy, but there must be an effective measures agreed by the international community. The theory is that of agreeing on preferential trade agreements (PTAs)[12] with environmental and sustainable development chapters on a unilateral, bilateral or plurilateral basis, as multilateral agreements have proven to be increasingly

6 *The Economist*, Magnetic attraction, 15/06/2019, pp. 51-52, at p. 51.

7 Ibid., at p. 52.

8 The perception of this connection seems to be often negative. Nicolas Hulot, a former French ecology minister, has consistently argued that free trade deals are the cause of the world's environmental problems. See *Hulot*, Soyons cohérents, rejetons le Ceta, *Le Journal du Dimanche*, 29/06/2019, available at : https://www.lejdd.fr/Politique/nicolas-hulot-soyons-coherents-rejetons-le-ceta-3907233 (09/03/2020). Others have argued along the same lines: *Watts*, We must not barter the Amazon rainforest for burgers and steaks, *The Guardian*, 02/06/2019, (in relation to the EU-Mercosur Trade Agreement, stating the serious environmental concerns raised by the agreement), available at: https://www.theguardian.com/environment/commentisfree/2019/jul/02/barter-amazon-rainforest-burgers-steaks-brazil (09/03/2020). Equally, Dara Calleary, the deputy leader of one of the main opposition parties in Ireland (Fianna Fail), said that the EU-Mecosur Trade Agreement "goes against all of the principles, beliefs and declarations relating to climate change". See *Leahy*, Hogan rejects 'inaccurate' criticism of EU-Mercosur deal, *The Irish Times*, 05/06/2019, available at: https://www.irishtimes.com/news/politics/hogan-rejects-inaccurate-criticism-of-eu-mercosur-deal-1.3946980?mode=amp (09/03/2020).

9 *International Institute for Applied Systems Analysis*, "Global Energy Assessment – Toward a Sustainable Future", Cambridge UK and New York, NY, USA and the International Institute for Applied Systems Analysis, Laxenburg, Austria.

10 See generally *Leal-Arcas/Wouters* (eds.), Research Handbook on EU Energy Law and Policy; *Leal-Arcas et al*., Energy Security, Trade and the EU: Regional and International Perspectives; *Leal-Arcas*, The European Energy Union: The quest for secure, affordable and sustainable energy; *Leal-Arcas et al*., International Energy Governance: Selected legal issues.

11 Whether population is destiny, where growth is concerned, is the subject of new research. See *Desmet/Nagy/Rossi-Hansberg*, Journal of Political Economy, 2018/126(3), pp. 903–83.

12 For the purposes of this paper, preferential trade agreements (PTAs) and free trade agreements (FTAs) are used interchangeably.

difficult to negotiate. This paper will assess the feasibility of including such chapters through an analysis of existing environmental and climate change-content in recent PTAs.

This article is divided into five sections. After the introductory section, Section II analyses the extent to which free trade agreements (FTAs) can become the enforcers of climate-change obligations. Section III provides an analysis of the contribution of bilateral investment treaties to climate action and sustainable energy. Section IV offers an analysis of how current efforts to modernise the Energy Charter Treaty can contribute to the European Union's approach of linking trade and investment policies with climate action. Section V concludes the paper.

B. Free Trade Agreements as the enforcer of climate change obligations?

I. Introduction

The recent decline in the conclusion of multilateral environmental agreements (MEAs) has prompted scholars to identify the many institutional difficulties that climate negotiations are facing. Considering the continuous stalemate of WTO negotiations and the ineffectiveness of the UNFCCC, the Kyoto Protocol, and the Paris Agreement, some scholars argue that multilateral environmental agreements are inadequate to mitigate climate change.[13] Furthermore, the United States' intention to withdraw from the Paris Agreement since 2017 has overturned any prospects of bringing on board all major emitters in order to tackle the environmental challenges faced by today's world. That said, the USA is doing very much at the sub-national level towards the mitigation of climate change.[14]

In contrast, the web of bilateral and regional trade agreements is rapidly increasing.[15] The USA has FTAs in force with 20 countries,[16] while the European Union (EU) has 36 FTAs in place.[17] Many other FTAs are currently being negotiated or awaiting ratification. Notably, many of the new generation FTAs include a comprehensive chapter on the environmental protection with increasingly detailed and far-

13 See, inter alia, *Kim*, UNEP 2009, Climate and Trade Policies in a Post-2012 World; *Leal-Arcas*, in: Baetens/Caiado (eds.); *Clémencon*, Journal of Environment & Development, 2016/25(1), pp. 3–24; *Bang/Hovi/Skodvin*, Politics and Governance, 2016/4(3).

14 For instance, New York's state legislature passed a bill for the state of New York to have carbon-free electricity by 2040 and to eliminate carbon emissions by 2050. In 2018, California, Colorado, Maine, New Jersey, New Mexico, and Washington are all states with law and policies that aim at decarbonising electricity generation, bearing in mind that electricity is our comfort. Oregon and New York are heading in the same direction. See *The Economist*, Climate Change: States' rights, 29/06/2019, pp. 13-14, at p. 13.

15 For the purposes of this paper, Regional Trade Agreements include Custom Unions, Free Trade Agreements, Preferential Trade Agreements, and Association Agreements with trade provisions.

16 https://ustr.gov/trade-agreements/free-trade-agreements (26/02/2020).

17 http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place (26/02/2020).

reaching provisions on environment, climate change, biodiversity and sustainable development.

This section explains why FTAs have the potential to be more effective legal instruments than environmental agreements for environmental protection purposes. It then compares the texts of environmental and climate-related provisions in the new generation of American FTAs to the FTAs concluded by the EU and highlights key differences between them. Particular focus will be given to the legalisation of the environmental and climate-related obligations under the selected FTAs. We argue that European FTAs have the potential of becoming the new enforcers of climate change mitigation, but only if the EU starts to link the FTAs' general dispute resolution mechanism to the FTAs' environmental provisions. Finally, this section will look at the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the United States-Mexico-Canada Agreement (USMCA), and the Transatlantic Trade and Investment Partnership (TTIP). More specifically, it will argue that PTAs with a combination of CETA-like provisions and USMCA-like enforcement should be considered in future agreements.

II. The relationship between trade and the environment

Drivers of climate change and its impacts around the world are linked to nearly every industry. For this reason, it is very difficult for the UNFCCC framework to govern climate change in isolation. It is therefore unsurprising that international institutions, such as the World Trade Organization (WTO), have been trying to solve the problem.

Trade liberalisation has made significant progress since the General Agreement on Tariffs and Trade 1947 (GATT), particularly after the establishment of the WTO in 1994. The UNFCCC framework imposes duties on Governments to mitigate and adapt to climate change, including qualified targets for emissions reductions. Both regimes are incompatible with one another, and the agendas must be linked for the fight against climate change to succeed.

The link between trade and environmental law is increasingly relevant, even if not directly expressed in the GATT or WTO agreement.[18] When the GATT was passed, there were no concerns over climate change and its adverse effects; however, when the WTO agreement was drafted, there was already a lot of evidence regarding the link between climate change and trade.[19] Even though such evidence was already known, the WTO agreement failed to include climate change provisions or mention the UNFCCC in an attempt to link the efforts.

As per the WTO, sustainable development and protection of the environment are included in their fundamental goals, under the Marrakesh Agreement.[20] While there

18 *Leal-Arcas*, J. World Investment & Trade, 2012/13, pp. 875, 878.
19 Ibid.
20 Marrakesh Agreement Establishing the World Trade Organization (1994); see also WTO, Trade and Environment, WTO website, published online on: https://www.wto.org/english/tratop_e/envir_e/envir_e.htm (26/02/2020).

is no specific mention of the environment, members of the WTO can adopt trade-related measures to protect the environment, if such measures are not misused against other WTO members. It has also created a Committee Trade and Environment (CTE), which is a forum dedicated to the dialogue between governments on the impact of trade policies on the environment, and of environmental policies on trade.[21] The CTE has a working programme since 1994, focusing on issues related to trade rules and environmental agreements, environmental protection, sustainable development and transparency.

The Paris Agreement makes no mention of trade and fails to link trade and climate change.[22] However, there is mention of "market-based mechanisms"[23] such as emission trading and promotion of sustainable development and encouragement of broad participation through public and private sectors. Arguably this calls for the participation of trade mechanisms in the climate change agenda. The problem with the UNFCCC framework is the differentiation between developed and developing countries. The main issue was in the Kyoto Protocol as it only gave obligations to developed countries (or Annex I countries) countries to reduce their emissions. The Paris Agreement tried to move away from this distinction; however, due to opposition by developing countries their contribution is still on a voluntary basis. It is therefore not surprising that the United States (U.S.) wants to withdraw from the Paris Agreement, as China, who is the largest emitter of Greenhouse Gases (GHG),[24] is still considered a developing country. Some have argued that regardless of China's economic development, there should still be a distinction between developed and developing countries,[25] as the poorest countries do not have the capacity to mitigate and adapt to climate change without assistance, financial and otherwise.

The U.S. and other developed countries believe that the distinction is unfair as it provides for inappropriate trade advantages for developing countries and because of the growing GHG emissions by developing countries, which will only continue to grow in the next 25 years unless binding commitments are implemented.[26] PTAs can be the solution for including developing countries, as they are proactive in creating

21 Ibid.

22 Yet, there is a growing body of academic literature on the links between international trade and climate change. See, for instance, *Leal-Arcas*, Climate Change and International Trade; *Esty*, Journal of Self-Governance and Management Economics, 2017; *Nordhaus*, The New York Review of Books 2015, available at: http://www.nybooks.com/articles/2015/06/04/new-solution-climate-club/ (26/02/2020); *Dechezleprêtre/Sato*, Review of Environmental Economics and Policy 2017; *Rodrik*, Global trade needs rules that adapt to economic diversity, *Financial Times*, (06/08/2018) at p. 9; *Trade and Environment, World Trade Organization*, available at: https://www.wto.org/english/tratop_e/envir_e/envir_e.htm (26/02/2020); *Cosbey*, Climate Policies, Economic Diversification and Trade, 2017, available at: http://dx.doi.org/10.2139/ssrn.3135359 (26/02/2020).

23 Article 6 of Adoption of the Paris Agreement, Decision 1/CP.21, in COP Report No. 21, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (29/01/2016).

24 China's large population of almost 1.4 billion people and rapid economic growth have made it the world's major GHG emitter.

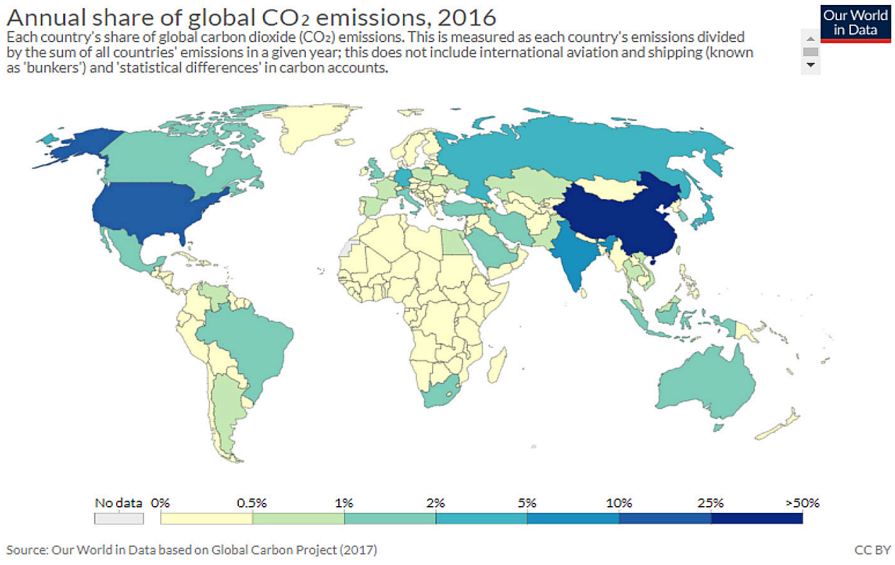
25 *Irish*, Law & Dev. Rev., 2012/5(2), at p. 2.

26 *Leal-Arcas*, Climate Change and International Trade, chapter 6.

them.[27] Climate-related provisions can be added into PTAs agreed between developing countries to encourage the reduction of GHG emissions through the facilitation of trade and investment in environmental goods and services.

However, most GHG emissions come from five entities, i.e., China, the U.S., the EU, India,[28] and Russia, as per Figure 1.

Figure 1: Annual share of global CO2 emission, as of 2016



The best solution to link climate change and trade concerns would be to create PTAs between the largest emitters, regardless of their developed status. MEAs should not be replaced and preferentially both systems would cooperate with each other.

27 *Leal-Arcas*, CCLR 2013, pp. 34-42.

28 For an analysis of India's climate change policy, see *Sivaram*, Still Shining? Our Third Annual Review on Solar Scale-up in India, *Council on Foreign Relations*, 2018, available at: https://www.cfr.org/blog/still-shining-our-third-annual-review-solar-scale-india (26/02/2020); *Carrington/Safi*, How India's Battle with Climate Change Could Determine All Our Fates, *The Guardian*, (06/11/2017), available at: https://www.theguardian.com/environment/2017/nov/06/how-indias-battle-with-climate-change-could-determine-all-of-our-fates (26/02/2020); *Najam*, in: Axelrod/VanDeveer (eds.); *Atteridge/Shrivastava/PahujaUpadhyay*, Climate Policy in India: What Shapes International, National and State Policy?, AMBIO, 2012, available at: http://link.springer.com/article/10.1007%2Fs13280-011-0242-5 (26/02/2020); *Osborn*, Why Developing Countries are Disproportionately Affected by Climate Change – and What Can They Do About it, *Huffington Post*, 2015, available at: https://www.huffingtonpost.com/tom-osborn/why-developing-countries-_b_6511346.html (26/02/2020); *Buchner*, *Climate Action*, 2016, available at: http://www.climateactionprogramme.org/climate-leader-papers/innovative_climate_finance_a_spotlight_on_india (26/02/2020); *Mendelsohn et al.*, Environment and Development Economics, 2006/11, pp. 159–178.

The inclusion of environmental and sustainable chapters in PTAs must not violate WTO rules. WTO members may not discriminate either "like goods" from different countries,[29] or between foreign goods and domestic goods;[30] nor may countries impose quantitative restrictions.[31]

Measures banning certain goods which are produced with high pollution technologies or importing higher tariffs on such products can be discriminatory.[32] However, there is a set of admissible justifications within Article XX GATT and XIV GATS. The promotion of environmental goods and services can be done through GATT Article XX(g)[33] as, per the WTO Dispute Settlement Body, the atmosphere, as well as "clean air", may be seen as exhaustible natural resources insofar as the chemical composition may be irreversibly modified.[34] For the exception to apply, the resource only has to be potentially exhausted. This is appropriate as it serves the objective of the exception, to conserve a natural resource before it has depleted.[35]

Trade can incentivise cleaner energy technologies which can lead to less carbon incentive types of growth. The facilitation of trade on environmental goods and services is needed to advance the fight against climate change.

III. The potential of free trade agreements for climate-change mitigation

This sub-section will examine PTAs that contain provisions to mitigate climate change, such as environmental and sustainable trade chapters. There has been a recent proliferation of PTAs in the international trading system, mostly due to the difficulties in trying to agree on multilateral agreements, as the negotiations at the Doha Round have shown. [36]

This proliferation is mainly due to multilateral negotiations being extremely complex and taking a long time due to the rule that nothing is agreed until everything is agreed by everyone.[37] The case for using a bottom-up approach to mitigate climate

29 Most favourable Nation, Article I:1 GATT and Article II:1 General Agreement on Tariffs and Services (GATS).
30 National treatment, Articles III: 4 GATT and XVII GATS.
31 Articles XI GATT and XVI GATS.
32 Example concerning production or process measures (PPMs) are protectionist and are considered discriminatory: see *Howse/Regan*, Journal of International Law, 2000/11(2), p. 249.
33 GATT Article XX(g) reads: "*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*.".
34 United States – Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R).
35 United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/49/Rev.1.
36 *Leal-Arcas*, Chicago Journal of International Law, 2011/11(2), pp. 597-629. For an in-depth analysis of the EU trading system, see *Leal-Arcas*, EU Trade Law and *Leal-Arcas*, Theory and Practice of EC External Trade Law and Policy.
37 This is the WTO principle called "single undertaking".

change through PTAs is a very common research topic in academia.[38] It tends to promote an alternative structure to the present MEAs, due to their lack of enforcement and the length of negotiations. It is ,therefore, necessary for PTAs to be explored to enforce climate change obligations, as these move much faster due to countries benefitting from extended trading markets. Trade agreements are generally preferred rather than climate change agreements, as acting against climate change may be seen by many as detrimental towards their economic growth while trade opens a new market to countries and offers economic incentives.[39]

The UNFCCC framework is the only platform attempting to mitigate and adapt to climate change internationally and the difficulty establishing ongoing obligations to finance developing countries capacities to combat climate phenomena, as well as slow progress in achieving significant emission reduction, lack of enforcement mechanisms and the unfair distinction between certain developed and developing countries. PTAs may be the building blocks to an international climate change agreement, though an "accidental" effort,[40] as they have the potential of including countries with the highest emissions and the major forces in the world's economy. This can influence other countries into agreeing to comply with environmental obligations.

The environmental protection under the new generation of FTAs has become increasingly far-reaching.[41] At the same time, the current fragmented perspectives on how to tackle climate change (in particular amongst the top emitters of the word, such as China and the USA), makes it highly unlikely that the global community will be able to successfully negotiate and conclude an effective global environmental agreement to which all relevant emitters in the world are party. Moreover, one could question the enforceability of environmental obligations imposed on states under the various MEAs currently in force. It is generally assumed that most MEAs, including the Paris Agreement, lack effective dispute settlement mechanisms and do not contain legally binding and enforceable obligations with respect to the parties' mitigation contributions.[42]

In contrast, the very nature of FTAs is to impose binding obligations upon the parties, and a breach of such obligations would in principle give rise to legal action under the sanction-backed dispute resolution mechanism of the FTA. Therefore, if FTAs contain legally binding and enforceable provisions on climate change and environmental protection, FTAs – rather than MEAs – could potentially be the enforcer

38 See for example *Leal-Arcas*, Carbon and Climate Law Rev. 2013/7(1), pp. 34-42; *Leal-Arcas*, Eur. J. Legal Stud. 2011/29(4); *Leal-Arcas*, Trade L. & Dev. 2014/11(6); *Holzer/Cottier*, Global Environmental Change 2015/35, pp. 514–522; *Morin/Jinnah*, The untapped potential of preferential trade agreements for climate governance.

39 *Leal-Arcas*, Carbon and Climate Law Rev. 2013/7(1) pp. 34-42, at p. 35.

40 Ibid., p. 36.

41 See in more detail*: Jinnah/Kennedy*, Environmental Provisions in US Trade Agreements: A New Era of Trade-Environment Politics, Whitehead Journal of Diplomacy and International Relations, XII(1) (2011) and *Jinnah/Morgera*, RECIEL 2013/22(3).

42 On the Paris Agreement, see *Bodansky*, RECIEL 2016/25(2).

of climate change obligations and thus be at the forefront of climate change mitigation.[43]

This assumption may be counter-intuitive for those who presume that trade agreements and environmental protection have conflicting objectives. According to some, trade liberalisation leads to increased economic activity and long-distance transportation, which, in turn, causes additional greenhouse gas emissions and pollution.[44] Think, for instance, of aviation, where it is expected that the number of planes flying will double by 2040 as people, especially in Asia, become richer and the middle class in China and India solidifies. The result will be an exacerbation of environmental problems.[45] A way to minimise the negative impact of aviation on the environment is by replacing engines with electric motors.[46]

However, academic studies refute this line of argumentation and show that trade agreements "*will not increase the amount of pollution, but in fact, may help the environment*".[47] Notably, CO2 emissions of countries that concluded an FTA with environmental provisions tend to converge and are lower in absolute terms, whereas this is not the case for FTAs without provisions on environmental protection.[48] An in-depth analysis of the environmental impact of environmental provisions in FTAs is beyond the scope of this paper. Therefore, this paper continues on the premise supported by scholarly research that FTAs play a significant role in climate change mitigation and environmental protection.

Morin and Jinnah rightly point out that the potential contribution of PTAs to climate governance rests on four distinctive features of trade agreements and their negotiations.[49] First, FTA negotiations involve a limited number of parties addressing a wide array of different issues. Such negotiations encourage bargaining and the conclusion of new agreements (while, in contrast, MEAs are negotiated amongst a large

43 See *Jinnah*, Journal of Environment & Development 2011/20(2); *Leal-Arcas*, in: Baetens/ Caiado (eds.); *van Asselt*, Climate change and trade policy interaction: Implications of regionalism, OECD Trade and Environment Working Papers, 2017/03, OECD Publishing, pp. 23-35; *Leal-Arcas/Alvarez Armas*, The climate-energy-trade nexus in EU external relations, in: Minas/ Ntousas (eds.), EU Climate Diplomacy: Politics, Technology and Networks.

44 *Conca*, Review of International Political Economy 2000/7(3); *Rodrik*, The globalisation paradox: Democracy and the future of the world economy (where Rodrik argues that full participation in the global economy implies that a country needs to give up a degree of either national sovereignty or democracy. For instance, lowering technical barriers to trade means harmonising regulatory and trade policies with other countries, which, in turn, means that governments are limited in their ability to dictate national preferences).

45 *The Economist*, The future of flight, 01/06/2019, pp. 1-12, at p. 4.

46 Ibid. at p. 7.

47 *Ghosh/Yamarik*, Applied Econometrics and International Development 2006/6(2). See also *Jinnah/Lindsay*, Global Environmental Politics 2016/16(3), who conclude that their article "*confirms prior hypotheses in the literature that environmental linkages within PTAs are important mechanisms of norm diffusion.*".

48 *Baghdadi/Martinez-Zarzosob/Zitounac*, Journal of International Economics /90(2). See, with a similar conclusion, *Martínez-Zarzoso/Oueslati*, International Environmental Agreements: Politics, Law and Economics 2018/18(6).

49 *Morin/Jinnah*, Environmental Politics 2018/27(3), pp. 542-543.

group of countries on a specific issue area). Second, FTAs are based on direct reciprocity, and a breach of the agreement gives rise to a claim under the sanction-based dispute settlement mechanism of the FTA (while MEAs, as discussed, generally lack strong enforcement mechanisms). Third, Morin and Jinnah submit that PTAs offer opportunity for policy experimentation since several new FTAs are negotiated and concluded every year with great diversity in types and membership. As a result, innovative provisions can be designed and tested at a limited scale and among like-minded countries. Fourth, FTAs are uniquely positioned to address trade-related aspects of climate mitigation (such as the export of low-emission technologies and fossil fuel subsidies).

IV. Preferential Trade Agreements with climate-related provisions: Substantive content and enforceability

This part will examine the regulatory contribution that PTAs with environmental provisions made in the creation of global climate governance.[50] These PTAs can be compared and assessed as per the Trade and Environmental Database (TREND)[51], and the analysis will focus on the substantive content and the enforceability of such provisions of these PTAs.[52]

For PTAs to be effective in establishing global climate governance, they must have a wide-variety of climate provisions with specific and strongly worded obligations and enforcement mechanisms. Most climate-related provisions are replicated from previous agreements; however, innovation in drafting such provisions is needed as the current ones are not achieving the desired objectives.

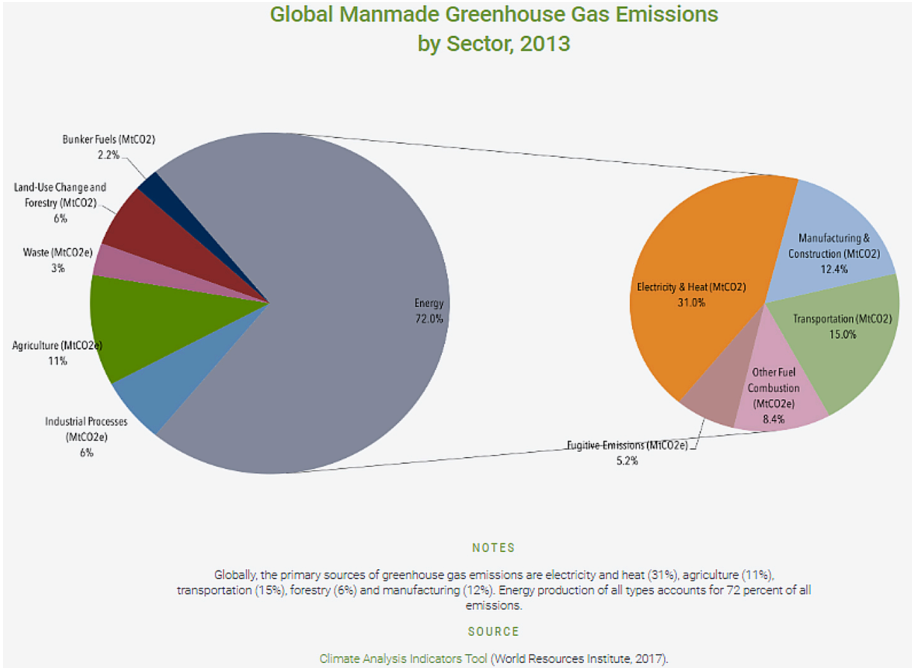
50 One issue with 'global' climate governance is that, currently, the benefits of climate change mitigation are global, but the costs are local. If we provide an analogy from Physics, it would be similar to the binary approach between relativity (a theory of the universe) and quantum mechanics (which deals with the behaviour of very small things). However, there are great benefits to decarbonising the economy, many of which are local. For instance, reducing the burden of air pollution on health.

51 Trade and Environment Database, Environmental provisions in Preferential Trade Agreements, available at: https://klimalog.die-gdi.de/trend/ (26/02/2020).

52 Global governance research has shown that trade regulation can indeed contribute to the protection of public goods, e.g. by trading up. The more critical International Political Economy (IPE) literature has also argued that the potential benefits of trade do not only require effective regulation, but have to be weighed against its negative (unintended) consequences. The IPE literature has also explored mega-PTAs as a means to internalise the negative externalities of international trade, showing that their creation and effectiveness hinge on economic, political, and social scope conditions that are rarely met.

There are different provisions that relate to climate change mitigation. The most used are the ones which address energy efficiency[53] and renewable energy.[54] To effectively decarbonise the economy and tackle climate concerns such as reduction of GHG emissions, it is important to have sector-specific provisions. The energy sector produces the most GHG emissions, as per Figure 2.

Figure 2: Global manmade greenhouse gas emissions, by sector (as of 2013)



PTAs can be a mechanism to drive research and development in the energy sector, as cooperation between countries would make it easier to share information and create alternatives to fossil-fuel electricity generation, promoting innovation in the renewable energy sector. Countries already include provisions for research, cooperation, assistance, project development, and the exchange of information on renewable en-

53 On energy efficiency, see *Gerrard*, pp. 1-22; *Carter*, Natural Resources Defense Council, September 22, 2016, available at: https://www.nrdc.org/experts/sheryl-carter/ramping-energy-efficiency-key-address-climate-change (26/02/2020); IEA, Energy Efficiency 2017, available at: https://www.iea.org/efficiency/ (26/02/2020); *Tankersley*, Can We Nudge People Into Conserving Energy?, *Washington Post,* 24/10/2014, available at: https://www.washingtonpost.com/news/storyline/wp/2014/10/24/can-we-shame-people-into-conserving-energy/ (26/02/2020); *Gillingham/Rapson/Wagner*, *Review of Environmental Economics and Policy* 2015; *Lovins*, Energy Strategy: The Road Not Taken?, *Foreign Affairs* 1976, available at: https://www.foreignaffairs.com/articles/united-states/1976-10-01/energy-strategy-road-not-taken (26/02/2020); *Suh et al.*, *Journal of Industrial Ecology* 2016, available at: https://onlinelibrary.wiley.com/doi/full/10.1111/jiec.12435 (26/02/2020).

54 *Morin/Jinnah*, pp. 541-565.

ergy. An example can be found in the Korea-Australia Free Trade Agreement of 2014, where it was agreed to exchange scientific measures relating to climate change and energy efficiency.[55] This is very general and vague; however, a more specific provision can be found on the South Korea-Peru Free Trade Agreement of 2011, which encourages public and private institutions related to small and medium sized enterprises to cooperate in renewable energy developments.[56]

In relation to general provisions on climate governance, there were provisions before the UNFCCC was created, such as provisions in the EU-Poland and EU-Hungary PTAs, negotiated in 1991.[57] These provisions only "encouraged" cooperation between the parties on climate change matters by establishing a dialogue between them. This could be made more specific, such as including provisions with "trade-related" aspects such as border tax adjustments for countries that do not attempt to reduce their GHG emissions.[58] Some PTAs have included direct provisions such as in the Indonesia-Japan PTA which refers directly to the Kyoto Protocol's Clean Development Mechanism.[59] Another alternative could be by promoting environmental goods and services and not treating them as "like" highly carbon produced goods and services. The differentiation could be related to the emissions that certain products have in production, and the introduction of a carbon tax forgoods and services that do not comply with reduction standards. The promotion of environmental goods and services can be seen in the Association Agreement between the EU and Georgia, which asks the parties to facilitate the removal of any obstacles to trade and investment of goods and services which are relevant for climate change mitigation.[60]

There are fewer adaptation provisions than mitigation provisions in PTAs, and even when such are included, there is vagueness for the required cooperation. The South Korea-Peru Free Trade Agreement, for example, only asks for policies and measures to be adopted to evaluate the vulnerability and adaptation to climate change.[61]

PTAs may also include indirect provisions relating to climate change, most frequently, trade-restrictive measure addressing the conservation of natural resources. This can be used to protect the atmosphere and justify measures to reduce air pollution, as clean air is an exhaustible natural resource. Many PTAs include provisions on air pollution and vehicle emissions, which indirectly mitigates climate change, as anthropogenic gases are the main causes for the current climate crisis. Another indirect provision in PTAs that mitigates climate change is that the levels of environmental protection cannot be weakened to benefit trade or attract investment. The EU tends to create PTAs with precise language and specific commitments. For example, in the EU-Montenegro Agreement, there are specific standards for vehicle emissions.[62]

55 Article 16.14 of the Korea-Australia FTA.
56 South Korea-Peru FTA, Article 20.4.
57 *Morin/Jinnah*, pp. 541-565.
58 A "trade-related" provision has been included in the Australia-Korea FTA in Article 18.8.
59 *Morin/Jinnah*, pp. 541-565.
60 Article 231 of the Association Agreement between the EU and Georgia.
61 *Morin/Jinnah*, pp. 541-565 and Article 19.8 of the South Korea-Peru FTA.
62 *Morin/Jinnah,* pp. 541-565.

Most PTAs replicate provisions from earlier agreements, keeping the generic, non-binding language. To have effective climate change-related provisions, the language must be precise, command an obligation and be properly delegated. The extent of the commitment made by parties will be measured by the level of obligations and precision of language; as such, this would limit discretion on the interpretation of provisions. Delegation is crucial as provisions must be able to be adjudicated, implemented and enforced; otherwise, the obligations will lack significance.[63] Several PTAs appear to have legally binding language, as 64% of PTAs have at least one provision with a high level of obligation. This is overshadowed by the fact that only 10% of such PTAs have precise targets and only 30% provide for third party settlement disputes.[64]

Considering the legality and precision issues, a comparison will be drawn between CETA and USMCA to determine the levels of precision, bindingness and enforcement, and the possibility of replication in the TTIP negotiations.

V. The US and EU approach to environmental provisions in free trade agreements

By comparing the text of the environmental and climate-related provisions in the new generation FTAs of the USA and EU to earlier trade agreements, we will ascertain whether the new FTAs have indeed the potential to become the new enforcers of environmental and climate change obligations.

1. The evolving practice of environmental and climate change-related provisions in free trade agreements concluded by the US and the EU

In the early 1990s, the USA became increasingly concerned that its domestic environmental standards were more stringent than other countries and that this imbalance would affect the county's competitiveness.[65] As a result, the USA started including environmental provisions in trade agreements in order to create a level playing field. The North American Free Trade Agreement (NAFTA) and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC), was the first FTA with extensive provisions on environmental protection and the enforcement of environmental regulations.[66] Noticeably, in the case of persistent failure to enforce domestic environmental laws, the NAAEC provides that any signatory state may request the establishment of an arbitral panel to consider the matter, which has the power to impose a monetary fine or, in the case of non-payment, suspend NAFTA benefits.[67]

63 Ibid.
64 Ibid.
65 *Morin/Rochette*, Business and Politics 2017/19(4).
66 North American Free Trade Agreement (17/12/1992; in force 01/01/1994).
67 Articles 24, 34, and 36 of the NAAEC.

Subsequent to NAFTA and following the enactment of the 2002 Trade Act,[68] the USA entered into FTAs with Singapore and Chile.[69] These FTAs were the first to include comprehensive chapters entirely devoted to environmental protection, recognising the importance of MEAs,[70] introducing consultations to resolve disputes under the environmental chapters[71] and creating Environmental Councils to monitor the implementation of the parties' environmental obligations under the FTA.[72] A few years later, these innovative (but one-size-fits-all) provisions on environmental protection were replicated in subsequent FTAs with Australia,[73] Morocco,[74] Bahrain,[75] Oman[76] and a multilateral trade agreement with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic (DR-CAFTA).[77]

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.[78] Consequently, the EU has always adopted a more cooperative and light-touch approach.[79] The environmental provisions in the early generation EU FTAs had no standardised form and greatly varied in legal force, standards, priority issues and areas for environmental integration. Moreover, the environmental clauses were open-ended, focusing on environmental cooperation and dialogue rather than enforcement.[80] However, it should be noted that the EU has moved in a slightly different direction following the 2006 Renewed EU Sustainable Development Strategy.[81] Post-2006 FTAs include comprehensive and streamlined chapters fully devoted to environmental protection, with explicit references to multilateral environmental agreements (MEAs)[82] and the establishment of committees or councils to monitor the implementation of the FTA's environmental chapter.[83]

68 H.R. 3009 (107th): Trade Act of 2002.
69 US-Singapore Free Trade Agreement (06/05/2003; in force 01/02/2004); US-Chile Free Trade Agreement (06/06/2003; in force 01/01/2004).
70 Article 18.8 USA-Singapore FTA and Article 19.9 USA-Chile FTA.
71 Article 18.7 USA-Singapore FTA and Article 19.6 USA-Chile FTA.
72 Article 18.4 USA-Singapore FTA and Article 19.3 USA-Chile FTA.
73 USA-Australia Free Trade Agreement (18/05/2004; in force 01/01/2005).
74 USA-Morocco Free Trade Agreement (15/06/2004; in force 01/01/2006).
75 USA-Bahrain Free Trade Agreement (15/09/2004; in force 11/01/2006).
76 USA-Oman Free Trade Agreement (19/01/2006; in force 01/01/2009).
77 Dominican-Republic-Central America-USA Free Trade Agreement (05/08/2004; in force 01/03/March 2006 (El Salvador), 01/042006 (Honduras and Nicaragua), 01/07/2006 (Guatemala), 01/03/2007 (Dominican Republic) and 01/01/2008 (Costa Rica).
78 *Morin/Rochette*, Business and Politics 2017/19(4).
79 *Jinnah/Morgera*, RECIEL 2013/22(3), pp. 332-335.
80 On environmental integration in FTAs (in particular, on EU association agreements), see *Marin-Duran/Morgera*, in particular Chapter 2.
81 Council of the European Union, 10117/06, Brussels 9 June 2006.
82 See, for example, EU-Peru/Colombia Free Trade Agreement, (21/12/2012; provisionally applied since 01/03/2013 (Peru) and 01/08/2013 (Colombia)), Article 270.2; Art. 13.5 EU-Singapore FTA. On the reference to MEAs in trade agreements in more detail, see *Morin/Bialais*, CIGI Policy Brief No. 123, 2018.
83 See for example Article 13.15 EU-Vietnam FTA.

Thus, it could be argued that, although the USA and EU initially developed different approaches to environmental provisions in free trade agreements, over time, both regions have borrowed some of the environmental features from each other's FTAs. Over the years, the USA has expanded the scope of environmental-related provisions in its PTAs and started to include a selection of MEAs under the umbrella of the trade agreement as a mechanism to diffuse environmental norm abroad (rather than to create a level playing field).[84] At the same time, the EU PTAs gained depth and encompassed more enforcement mechanisms such as consultations and panel reports.[85] However, as will be shown in the next paragraph, crucial differences remain.

2. Textual analysis of recent US and EU trade agreements

In this sub-section, we aim to analyse the legalisation of the new generation of American and EU free trade agreements by conceptualising the issue first and then by providing a textual analysis.

a) The concept of legalisation

In order to ascertain whether FTAs can be the enforcer of climate-change obligations, one would need to analyse the wording of the FTAs and assess the legal strength of the environmental clauses. For this purpose, the present paragraph will measure the degree of legalisation of environmental and climate-related provisions in the new generation of American and EU FTAs.[86] Legalisation is defined along three dimensions:

1. Obligation,
2. precision, and
3. delegation.

Obligation means that states are legally bound by a rule or set of rules (and thus relates to the strength of the commitment made). Precision refers to rules that unambiguously define the conduct they require, authorise or proscribe (and therefore narrows down the possible interpretations of a rule). Finally, delegation relates to the power of third parties to implement, interpreted and apply the rules and to resolve disputes.[87]

Of course, the world is not just black and white. Each of the dimensions of legalisation is a matter of degree and gradation, ranging from the weakest form (the absence of any legal obligation, precision or delegation) to the strongest form (a detailed and

84 *Morin/Rochette*, Business and Politics 2017/19(4).
85 On this convergence of American and EU FTAs, see *Morin/Rochette*, Business and Politics 2017/19(4).
86 On legalisation, see *Abbot et. al.,* International Organization 2000/54(3), pp. 401-419. For a broader analysis of the regulatory contribution that FTAs make to global climate governance (including aspects of legalisation), see *Morin/Jinnah*, Environmental Politics 2018/27(3).
87 *Abbot* et. al., International Organization2000/54(3), pp. 401-402.

binding commitment that is fully enforceable in court or arbitration).[88] Moreover, one can plot where a particular arrangement of environmental provisions falls on all three dimensions of legalisation.[89] If a provision scores high on all three dimensions, the particular clause is classified as highly legalised and has the potential to become instrumental to climate change mitigation.[90]

b) Textual analysis

Based on the legalisation-concept described above, in this article, we identify the level of obligation, precision and delegation of the main environmental and climate-related provisions in the recently concluded or negotiated American and EU FTAs. All legalisation dimensions are measured along a three-degree continuum (low, moderate or high).[91] Levels of obligation range from not binding (a mere recommendation to consider certain environmental issues) to legally binding commitments (generally proceeded by the words "shall" or "must"). Precision ranges from general environmental references (such as the mere acknowledgement of a given MEA) to specific and detailed targets (for example, the commitment to act in accordance with certain environmental rules or agreements). Finally, delegation ranges from a political mechanism of enforcement (such as government consultations) to judicial enforcement by an independent court or tribunal that renders a final and binding decision.[92] Based on the level of legalisation of their major environmental and climate-related provisions, each of the fifteen analysed FTAs has received a score between 0 and 6 (with a maximum of 3 points for each of the three legalisation dimensions).[93] The findings of the textual analysis are outlined in Annex 3 of this paper.

From Annex 3, it is immediately apparent that FTAs concluded by the USA receive a higher total score than EU FTAs (and are thus classified as more legalised). The reasons for this higher degree in legalisation will be explained in subparagraphs i) and ii) below.

i) American FTAs

The FTAs concluded by the USA generally contain binding obligations (such as the commitment that parties "shall adopt, maintain and implement" laws in order to fulfil

88 See Figure 1 in Annex 1 of this paper: The dimensions of legalisation.
89 *Abbot et. al*., International Organization 2000/54(3), pp. 404-408.
90 See also *Morin/Jinnah*, Environmental Politics2018/27(3), p. 551.
91 Inspiration is derived from the analysis of *Morin/Jinnah*, Environmental Politics 2018/27(3).
92 See Annex 2 of this paper.
93 It should be noted that the Transatlantic Trade Investment Partnership (TTIP) between the EU and the USA has deliberately been excluded from this part of this research, since negotiations of this Agreement had been suspended and have only been resumed as of 2019. The available (draft) documents most likely do not represent the parties' current position on environmental provisions in TTIP. On the potential enforceability of environmental provisions under TTIP, see *Leal-Arcas/Alvarez Armas*, in: Minas/Ntousas (eds.), EU Climate Diplomacy: Politics, Technology and Networks.

their obligations under certain MEAs).[94] However, the same binding obligations have a limited scope since they only relate to MEAs included in the list of covered agreements, annexed to the FTA.[95] These annexes include only seven international agreements that are focussed on specific issue areas, such as the International Convention for the Regulation of Whaling 1946. Moreover, when it comes to international environmental agreements not covered by the annex, the commitment is much weaker and merely provides that parties "shall continue to seek means to enhance the mutual supportiveness"[96] of these agreements. As a result of the above, the environmental obligations contained in the American FTAs are classified as "moderate".

American FTAs score high on precision, because the reference to a closed list of covered international agreements (albeit limited in scope) provides great certainty and the agreements clearly define the state's conduct that is required. Furthermore, the FTAs include additional references to environmental rules that the signatory states have to comply with. For example, Annex 18.3.4 (Forest Sector Governance) of the USA-Peru FTA, contains an eight-page list of specific and detailed provisions that Peru must implement in its own national laws. In addition, the recent UMSCA agreement is particularly precise, with the incorporation of various specific and detailed targets. For example, art. 24.9 provides that each party shall take measures to control the production and trade in substances that can significantly deplete and otherwise modify the ozone layer. Footnote 6 supplements this provision in more detail by regulating when a party shall be deemed in compliance with this provision.[97]

The FTAs concluded by the USA with Peru,[98] Colombia,[99] Panama[100] and South Korea[101] score high on the delegation dimension. This generation of American FTAs, concluded after the Democrats regained control over the House and the Senate in 2006, links the FTA's environmental provision to the formal dispute settlement mechanism under the FTA, which makes the full environmental chapter directly enforceable. In case of an alleged breach of environmental commitments under the FTA, a Panel established under the dispute resolution chapter can render a binding report.[102] Failure to implement the determinations of the panel gives the complaining party the right to suspend the application to the other party of benefits under the FTA.[103] The utilisation

94 See, for example Article 18.2 USA-Peru FTA and Article 17.2 USA-Panama FTA.
95 See for example, Article. 18.3 USA-Peru FTA.
96 See for example, Article 17.13 USA-Panama FTA. Note that Article 28.8 of UMSCA departs from earlier texts of American FTAs, by stating that parties "*shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party*".
97 See, in a similar vein, the detailed commitments with respect to sustainable fisheries management in Article 24.10 UMSCA.
98 USA-Peru Trade Promotion Agreement (12/04/2006; in force 01/02/2009). See on the USA-Peru FTA and its implications: *Jinnah*, Journal of Environment & Development 2011/20(2).
99 USA-Colombia FTA (22/11/2006; in force 14/05/2012).
100 USA-Panama TPA (28/06/2007; in force 31/10/2012).
101 USA-Korea FTA (30/06/2007; in force 15/03/2012).
102 See for example, Article 30.13 USA-Panama FTA.
103 See for example, Article 22.13 USA-Korea FTA.

of the sanction-based dispute settlement regime in order to address environmental protection has led some authors to label the USA approach as "confrontational".[104]

ii) European FTAs

Turning to Europe's FTAs, a distinction should be made between the agreements pre-2018 and those agreements recently concluded or currently being negotiated.

The pre-2018 agreements with South Korea, Colombia, Peru, Moldova, Georgia, Ukraine and Canada predominantly contain vague and ambiguous language on environmental protection (such as the commitment to "reach the ultimate objective" of the UNFCC and the Kyoto Protocol,[105] or the obligation to "address global environmental challenges").[106] Moreover, the FTAs generally lack precision because they merely refer to general environmental issues without specifying instruments that states have to implement in their national law or targets that have to be reached.[107] The provisions are, therefore, unable to result in measurable environmental objectives. On the other hand, this generation of European FTAs also contains some stronger and more precise obligations. For example, the provisions in which the parties "reaffirm their commitments to the effective implementation"[108] of the MEAs to which they are party might come across as weak at first. However, they are ,in fact, binding obligations to implement environmental instruments because a failure to effectively implement the MEAs might constitute a breach of this environmental provision in the FTA.[109] As a result of the mixed nature of the commitments undertaken by the parties, the level of obligation and precision under this generation of FTAs is classified as "moderate".

The European FTAs concluded in or after 2018 contain binding[110] and precise[111] obligations. Notably, and in contrast to previous EU FTAs, art. 12.6 of the EU-Singapore FTA provides that the parties "shall effectively implement" in their laws the

104 *Jinnah/Morgera*, RECIEL 2013/22(3), p. 335.
105 See Article 13.5(3) EU-South Korea FTA.
106 See Article 267(2) EU-Colombia/Peru FTA.
107 With the exception of the EU-Colombia/Peru FTA, which provides in Article 270 (2) a detailed list of international agreements that states have to effectively implement in their national laws (including, for example, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987.
108 See Article 13.5 (2) EU-South Korea FTA; Article 270 EU-Colombia/Peru FTA; Article 24.4 (2) CETA.
109 See *Leal-Arcas/Alvarez Armas*, in: Minas/Ntousas (eds.), EU Climate Diplomacy: Politics, Technology and Networks.
110 For example Article 16.6 (2) EU-Japan EPA provides that "parties *shall implement* effective measures to combat illegal trade". Article 13.9 (2) EU-Vietnam FTA provides that "each party *shall comply* with long-term conservation and management measures.".
111 For example, Article 8 (3) (1) EU-Mexico (draft) Agreement provides that each party shall implement long-term conservation and management measures "as defined in the main UN and FAO instruments to these issues". Article 18.8 (d) EU-Singapore FTA provides that parties will "uphold the principles of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.".

MEAs to which they are party.[112] Even more ambitious is art. 5.1 of the EU-Mexico (draft) Agreement, which provides that each party "shall effectively implement" the UNFCC and the Paris Agreement.[113] This (draft) provision contains an unparalleled level of protection since a state's failure to implement the Paris Agreement would constitute a direct breach of art. 5.1 EU-Mexico (draft) Agreement. In addition, the post-2018 European FTAs all contain various precise obligations to act in accordance with specific environmental agreements, rules or protocols. For example, the EU FTAs with Japan, Vietnam and Mexico all include provisions on biological diversity pursuant to which the signatory states shall comply with specific agreements relating to the issue (such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora).[114] As a consequence of the above, the EU FTAs with Japan, Singapore Vietnam and Mexico score high on the obligation and precision dimensions.

However, both the pre-2018 and the recently concluded or negotiated European FTAs score low on delegation because all of them exclude the environmental chapter from the general dispute settlement mechanism of the FTA.[115] The environmental and climate change-related provisions, no matter how strong and precise they are, can therefore not be enforced. Instead, disputes relating to the environmental chapter of the FTA can only be resolved by non-binding consultations or panel reports.[116]

3. Conclusion and way forward

It would seem that, in climate change, sanctions are in the political sphere, not in the legal sphere. That said, the American FTAs analysed in this paper contain strong, precise, and enforceable environmental provisions. In theory, the FTAs concluded by the USA could thus be an effective instrument to enforce environmental and climate change obligations. The problem, however, is that most binding commitments under American FTAs only apply to the international agreements included in the list of covered agreements. Unfortunately, this list is rather limited and does not include

112 In previous European FTAs, the parties reaffirmed their commitment to effectively implement the MEAs to which they are party. The commitment under the EU-Singapore FTA that a party "shall effectively implement" MEAs is, of course, much stronger and leaves no room for ambiguity. It should be noted that with respect to major environmental agreements such as UNFCCC and its Kyoto Protocol, the EU-Singapore FTA contains less strong language and parties only "reaffirm" their commitment to the ultimate objectives of these agreements.

113 See also Article 13.6 (1) EU-Vietnam FTA, which provides that the parties reaffirm their commitment to reaching the ultimate objective of the UNFCC, its Kyoto Protocol and the Paris Agreement.

114 See Article 16.6 EU-Japan EPA; Article 13.7 EU-Vietnam FTA; Article 6 EU-Mexico (draft) Global Agreement.

115 See Article 13.16 EU-South Korea FTA; Article 285 (5) EU-Colombia/Peru FTA; Article 12.16 (1) EU-Japan EPA; Article 12.16 (1) EU-Singapore FTA; Article 12.16 (1) EU-Vietnam FTA and art. 15 EU-Mexico (draft) Global Agreement.

116 See, for example, Article 12.17 of the EU-Singapore FTA and Article 13.17 of the EU-Vietnam FTA.

major climate change agreements such as the UNFCCC, its Kyoto Protocol, and the Paris Agreement on Climate Change.[117] As a result of this restrictive scope, the practical impact of these FTAs on climate change mitigation will be limited.

European FTAs, on the other hand, have gained depth and the most recent agreements with Japan, Singapore, Vietnam, and Mexico contain a wide array of binding and precise environment-related issues. Notably, the climate change provision of the EU-Mexico (draft) Global Agreement, pursuant to which the signatory states "shall effectively implement" the UNFCC and the Paris Agreement,[118] might constitute the most far-reaching environmental provision found in any of the analysed FTAs. However, the other side of the coin is that European FTAs do not include an effective and sanctions-based dispute settlement mechanism that extends to the environmental chapter of their trade agreements. It would seem that the EU does not favour litigation as a way to solve environmental protection-related trade disputes.

The positions of the European Commission and the EU Member States regarding issues covered by trade and sustainable development (TSD) chapters in FTAs, including climate change, have been evolving.[119] France, Spain, and Luxembourg outlined a proposal at the EU Environment Council in March 2019 to include commitments related to the implementation of the Paris Agreement on Climate Change[120] into essential FTA clauses, which means that the EU could suspend an agreement in case these obligations are not met by the partner countries.[121] Such a proposal raises an interesting question: how could the EU (and, more precisely, the European Commission) make an evaluation of other countries' delivery of their obligations without interfering with competences that belong to another international organisation (i.e., the UNFCCC and its bodies, in this case)?

117 See for instance, Chapter Nineteen (Environment) of the US-Australia FTA, where there is no mention of climate change, available at: https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-nineteen-environment.aspx (26/02/2020).

118 Article 5.1 of the EU-Mexico (draft) Global Agreement.

119 In the context of the ongoing EU negotiations with Chile on the modernisation of the trade pillar of their Association Agreement, a report on an impact analysis recommended the inclusion of strong provisions related to climate change and to meeting their obligations under the Paris Agreement on Climate Change in the TSD chapter. See http://trade-sia-chile.eu/images/reports/EU-Chile_SIA_draft_final_report_2019-03.pdf (26/02/2020), pp. 138 ff. See also the EU's proposal for a TSD chapter in the EU-Australia FTA, Articles X. 5 (on trade and climate change) and X.13-X.15 (on dispute settlement mechanism), available at: http://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157865.pdf (26/02/2020). Equally, in 2018, the European Commission published texts of the trade part of the 'agreement in principle' reached between the EU and Mexico for a modernised EU-Mexico Global Agreement. See the text of the TSD chapter, Article 5 (on trade and climate change) and Articles 15-18 (on dispute settlement mechanism), available at: http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156822.pdf (26/02/2020).

120 One should add that the credibility of the Paris Agreement would be questionable if the US will withdraw and if countries will not stand up to their pledges.

121 Council of the European Union, Strengthening coherence between EU free trade agreements and the Paris Agreement on climate change, 01/03/2019, 7016/19, available at: http://data.consilium.europa.eu/doc/document/ST-7016-2019-INIT/en/pdf (26/02/2020).

In a nutshell, US FTAs offer enforceability of environmental protection provisions via sanctions, whereas EU FTAs make use of international cooperation/dialogue and other soft power mechanisms. Regarding the origins of the EU approach, a decision was made to choose a broad scope and high level of ambition of TSD chapters in FTAs, the inclusion of civil society monitoring mechanisms, and putting an emphasis on dialogue and cooperation, rather than sanctions or financial penalties (which is the approach of the US and Canada). For example, in the area of labour rights, TSD chapters in EU FTAs commit the Parties to ratify and to effectively implement eight fundamental conventions of the International Labor Organization (ILO),[122] while the US FTAs speak only about domestic enforcement. If we take an example from climate change, when the Republic of Korea wanted, and indeed needed, to improve its record on GHG emissions reduction, the EU offered the possibility to discuss lessons learned from its own climate change policy and operation of the Emission Trading Scheme (ETS). That discussion took place during an annual meeting under the EU-Korea FTA TSD chapter in December 2014 and was followed by an assistance project launched in 2016.[123]

It is also pertinent to note that TSD chapters in FTAs have their own dispute settlement mechanism, which can be activated if necessary. It envisages launching Government consultations, followed by setting up a panel of experts (arbitrators) if the Parties cannot solve the problem on their own. A case in point is to be found in the EU-Korea FTA, where the Republic of Korea failed to meet its commitments under the TSD chapter[124] in the labour-related part (namely ratification and effective implementation of the ILO fundamental conventions). After several attempts of dialogue and cooperation to encourage progress in this area, the EU's patience came to an end and, in December 2018, in accordance with Article 13.14 of the EU-Korea FTA,[125] the European Commission launched Government consultations[126] with Korea as a first step in the dispute settlement mechanism under the TSD chapter of the EU-Korea

122 In the past, the EU has tested an approach similar to that of the US in the application of pre-ratification conditionality regarding a TSD-related area. For instance, in the negotiations with Georgia for an Association Agreement, the European Commission clearly stated that the negotiations would not be concluded, and therefore the Agreement would not enter into force, if Georgia did not change its Labour Code, which, at the time, was not in compliance with Georgia's commitment under the GSP+ scheme on effective implementation of ILO fundamental conventions. Georgia was very reluctant to change its Labour Code at the beginning, but given the incentive of getting into a preferential trade regime (as part of the Association Agreement) with its biggest trading partner (i.e., the EU), eventually it followed the EU's suggestions. The Labour Code was amended and negotiations for an Association Agreement were concluded. Even if this example refers to labour rights, not climate change, it demonstrates that there is space for the enforceability of TSD-related aspects of EU trade relations and trade agreements with third parties.

123 https://eeas.europa.eu/headquarters/headquarters-homepage/14138/eu-korea-emissions-trading-system-cooperation-project-launches-series-activities-benefit_en (26/02/2020).

124 See Chapter 13, EU-Korea FTA.

125 Article 13.14 of the EU-Korea FTA deals with Government consultations to reach mutually satisfactory resolutions of matters of dispute.

126 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1961 (26/02/2020).

FTA.[127] Even if the case relates to labour rights, not climate change, it is an interesting test case for the enforceability of TSD provisions in FTAs.[128]

VI. Lessons learned from CETA and USMCA: How can the TTIP be an improvement on 21st century PTAs

When comparing the PTAs agreed between the 1990s and the beginning of the 21st century, it is apparent that the 1990s provisions were vague and non-enforceable. However, this changed in the beginning of the 21st century, where climate provisions within PTAs became more precise, for example, EU agreements' language is more precise and highly binding, with a higher degree of legality than usual.[129] That said, such agreements favour dispute resolution by consultation. In contrast, US agreements tend to include dispute settlement mechanisms with legally binding decisions and sanctions-based enforcement provisions, although with weaker levels of obligation and precision than the EU's.[130] It is argued that a "trade-off" in provisions is either highly enforceable or precise with high levels of obligation.[131]

We also note that CETA offers various dispute settlement mechanisms in different chapters of the Agreement. This shows that there is no universal dispute settlement system in CETA.

1. CETA's climate-related provisions and level of obligations

CETA is a comprehensive trade and investment agreement between the EU and its Member States, on the one hand, and Canada, on the other, which is based on the foundations and values shared between them. Both the EU and Canada have pledged their ambition and commitment to uphold the Paris Agreement and to fight climate change impacts. Therefore, CETA has included two separate chapters on climate

127 http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (26/02/2020), Under the EU approach to dispute settlement, there is no need to prove the link between the failure of a partner country to meet their TSD commitments and the impact on trade between the Parties. This is an important difference between the EU and US approach and, indeed, an EU advantage in enforceability. In the case of labour rights, the only case that has reached arbitration (US v. Guatemala) was not successful for the US because the panel was not able to establish a clear link between Guatemala's poor record on labour rights and trade between the Parties.

128 In February 2018, in a dedicated non-paper, the European Commission outlined its commitment to improve the overall implementation and enforcement of TSD chapters in EU FTAs to better meet expectations. This commitment relates to both labour right and environmental protection, including climate change. See http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (26/02/2020).

129 *Morin/Jinnah*, pp. 541-565.

130 Ibid.

131 Ibid.

change: one on sustainable development (SD) and trade[132] and one of trade and the environment.[133]

The agreement made a clear link in the SD chapter between the economic growth, social development and environmental protection. It encourages the promotion of trade and economic flow that enhances the environmental and labour protection framework.[134] The language used in this chapter is precise; however, it lacks obligation and enforcement, as it arguably uses only voluntary commitments. It starts with obligatory language "[…] accordingly, each Party shall strive to promote trade and economic flows […] enhancing […]environmental protection […]", however, it follows that Parties should encourage "development and use of voluntary schemes relating to the sustainable production of goods and services[…]".[135] Although provisions lack in obligation, it does specify that Parties can use eco-labelling schemes as a way to promote sustainable practices. The SD chapter has less force than the labour chapter, as it provides for a dispute mechanism by consultation, instead of dispute resolution.[136]

The chapter on the environment commits the parties to put into practice MEAs, whilst protecting each party's right to regulate on environmental matters, with each side enforcing domestic environmental laws and preventing the relaxation of any of those laws.[137] This chapter is substantial in enforcing climate change obligations as it promotes trade and investment of environmental goods and services, including the reduction of non-tariff barriers.[138] This is significant as it specifies the promotion of environmental trade and removal of barriers, but it only asks for the reduction and not the removal of said barriers. However, there is an obligation to facilitate the removal of these barriers, and it specifically refers to the importance of climate mitigation, and more specifically, it promotes renewable energy.[139] In addition, the chapter encourages the conservation and sustainable management of forests[140] and fisheries[141] and ensures participation of non-governmental groups. When it comes to dispute mechanisms, it provides for consultation on matters arising from this chap-

132 CETA, Chapter 22.
133 Ibid., Chapter 24.
134 Ibid., Article 22.2.
135 Ibid., Article 22.3.2 (a).
136 See Article 22.4 for SD "Civil Society Forum" consultative mechanism meetings; Article 23.11 for dispute resolution. The SD chapter does not mention any forms of dispute resolution.
137 CETA, Articles 24.2 to 24.5.
138 Ibid., Article 24.9.1.
139 Ibid., Article 14.9.2. This provision carries a high level of obligation with the use of the word "shall"; This is arguably dismissed by the fact that it follows with "consistent with their international obligations". However, it could be argued that climate mitigation is an international obligation under the UNFCCC and such promotion of environmental goods and services falls within such obligations.
140 Ibid., Article 22.10.
141 Ibid., Article 22.11.

ter[142] and for dispute resolution (DR).[143] Therefore, CETA has strong binding obligations in relation to trade and the environment, which upholds both Parties' commitments under their national and international environmental obligations.

CETA set up a Committee on Trade and Sustainable Development,[144] which supervises the matters under chapters 22, 23, and 24 and their implementation.[145] It has obligations to promote transparency and public participation[146] and must make reports public unless it decides otherwise.[147]

This agreement is a good example of the EU enhancing its environmental commitments in their recent agreements, and such a method can be used in relation to the TTIP in order to further enhance the enforcement of climate-related provisions within international trade law. Since the EU is a global leader in climate change governance through climate change agreements, as it includes climate provisions more frequently with a high variety of provisions,[148] other countries may follow their lead and replicate such provisions in their future PTA negotiations.

2. USMCA's environment provisions

This part will briefly examine provisions related to environmental protection in USMCA and the correspondent dispute mechanisms.

Chapter 24 of the USMCA concerns environmental protection and establishes an obligation on the Parties to improve their levels of environmental protection but allows parties to establish and regulate their national legislation.[149] When analysing the scope and objectives of the agreement, the language is aspirational and has a passive voice, as it uses terms such as "recognises", "taking into account", "promote", et cetera. However, the agreement establishes binding obligations in the enforcement of environmental laws[150] and prohibits the relaxation of environmental laws for the encouragement of trade and investment.[151] The agreement also obliges Parties to promote public awareness and participation in environmental matters.[152]

The USMCA goes beyond the climate-change protection in CETA, as it includes indirect environmental protection under the Environmental chapter such as the protection of the marine environment from ship pollution,[153] the protection of the Ozone

142 Ibid., Article 24.14.
143 Ibid., Article 24.16, in accordance with chapter 29 and rule 42 of the Rules of Procedures for Arbitration set out in Annex 29-A.
144 Ibid., Article 26.2.1(g).
145 Ibid., Article 22.4.1.
146 Ibid., Article 22.4.4.
147 Ibid., Article 22.4.4 (a). This may hinder transparency, as they can decide not to make such reports of implementation public.
148 See generally *Morin/Jinnah*, Environmental Politics 2018/27(3).
149 USMCA, Article 24.3.
150 Ibid., Article 24.4.1.
151 Ibid., Article 24.4.3.
152 Ibid., Article 24.5.
153 Ibid., Article 24.10.

layer,[154] promotes the improvement of air quality,[155] a chapter on trade and diversity[156] and protection against marine litter,[157] amongst others. However, most of the provisions still have weak content in comparison when establishing recognition and cooperation, with no high degree of obligation as the language is unspecific.[158]

It is important to note that the dispute mechanism under USMCA is binding and provides for dispute alternatives. Parties should try to agree on the interpretation and application of the environmental chapter through dialogue, consultation, exchange of information and cooperation.[159] If the initial consultation fails, there are provisions for a Senior Representative consultation[160] and, if still unresolved, a Ministerial Consultation.[161] Only if the consulting Parties fail to resolve the matter under any of the three consultations, can they request a meeting with the designated Commission to try to mediate or conciliate,[162] and thereafter request the establishment of a Panel of Experts.[163] It is also interesting to note that, at the time of writing, USMCA had not yet been ratified by US Congress, where Democrats in the House of Representatives were asking for tougher protections for the environment.

3. TTIP: What should the agreement include to better enforce climate-related provisions

As Polanco *et al* (2017) argue, PTAs would be more effective than MEAs, as they only involve the negotiation between a limited number of countries, who will deliberate in a multitude of issues and agree on new commitments.[164] PTA disputes can be resolved within the WTO's dispute settlement procedure through sanction-based mechanism with the potential of enhancing compliance between parties. The U.S. is an example of dispute settlement mechanisms which offer strong incentives of compliance through sanction-based mechanisms.

Countries should use this method when creating new PTAs with climate change-related provisions. Most recent PTAs have included climate related provisions; however, most lack substantive content and enforcement, the TTIP could improve on this.

Currently, the U.S. and the EU are negotiating a new PTA, the TTIP, which is a significant trade deal due to them being the second and third largest GHG polluters,

154 Ibid., Article 24.9.
155 Ibid., Article 24.11.
156 Ibid., Article 24.15.
157 Ibid., Article 24.12.
158 Ibid. For example, Article 24.12.3 only recognises that Parties should act to address marine litter through cooperation.
159 Ibid., Article 24.29.
160 Ibid., Article 24.30.
161 Ibid., Article 24.31.
162 Ibid., Article 31.5.
163 Ibid., Article 31.6.
164 *Polanco et al*, CCLR 2017/3), pp. 206-222.

and such a trade deal amounts for 50% of global trade.[165] The initial proposal paper on the TTIP on Trade and SD[166] includes the proposition of a chapter covering aspects of climate change and SD. These chapters can be included to prevent a "race to the bottom" on environmental provisions. This would promote the cooperation on trade-related issues of SD.

It is important to note that climate-related provisions do not necessarily have to be drafted in their own separate chapter and can be included in all chapters. For example, there could be a provision for tariff differentiation based on the carbon footprint of products, which would be made as part of the tariff schedules included in a chapter for trade in goods. The TTIP can liberalise trade in environmental goods and services of any kind, as opposed to "like" services that would not be produced in an environmental manner. Polanco argues this would be a breakthrough and would play a positive role in the environment, as the impact of such products is positive to climate change. This measure is cheaper to implement, and therefore likely to happen, and such would lead to almost immediate environmental benefits. An argument could be made that preferential treatment of service suppliers that meet environmentally relevant criteria such as emission standards would improve the overall environmental performance.

The TTIP should include the ratification of MEAs and other environmental instruments, to ensure global and transboundary environmental challenges are being addressed, especially in relation to combatting climate change. The agreement should also include chapters on Trade and SD and trade and environment, such as in CETA. This is a common practice by the EU, but also by the U.S., as the country is directly mandated by Congress under the Trade Act 2002 to include such provisions with legally binding and enforceable commitments. Therefore, to enhance the already ongoing efforts by the EU and the US to globalise enforcement of climate-change obligations through trade, the TTIP would further enhance the precision and ambition of its provisions, introduce specific commitments to include the promotion of renewable energy and environmentally friendly goods and services, such as a possible carbon taxes on goods which exceed the limit on emission levels during production. Finally, it should include a strong enforcement mechanism, comparable to the one found in the USMCA. The TTIP can replicate good practices of environmental and climate-change provisions.

Research shows that countries that include more climate provisions in their FTAs tend to be low GHG emitters.[167] For trade to be an enforcer of climate change obligations successfully, future PTAs should be negotiated with oil-exporting countries. For example, Norway includes fewer provisions in its PTAs; however, this attitude may change soon, as Norway has recently diverted oil funds to subsidise renewables, which marks a shift from their oil exploration to the expansion of clean technology

165 *Leal-Arcas*, CCLR 2013, pp. 34-42, at p. 41.
166 *European Commission*, EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development. Initial EU Position Paper (2013).
167 See generally *Morin/Jinnah*, Environmental Politics 2018/27(3).

markets.[168] This move of transferring even a small percentage (i.e., 10%) of fossil-fuel subsidies to the renewables industry could be the catalyser to pay for a global transition to clean energy.[169] In fact, ending the fossil-fuel subsidies "would cut global emissions by about a quarter, the IMF estimates, and halve the number of early deaths from fossil fuel air pollution."[170]

Let us now turn to the contribution of bilateral investment treaties to sustainability.

C. How can bilateral investment treaties contribute to climate action and sustainable energy?

I. Introduction

Bilateral investment treaties ("BITs") are treaties entered into by two contracting states with the aim to protect and promote investment. These treaties typically include substantive protections for the investors and investments from one contracting party in the territory of another contracting party, such as protection against unlawful expropriation or unfair and inequitable treatment, as well as a dispute resolution mechanism which allows investors to bring claims regarding their investment against the host state in international arbitration outside national courts, subject to specific conditions and potential limitations.[171] Arbitration forums which may be referred to in BITs differ, from the International Centre for Settlement of Investment Disputes ("ICSID") through arbitral institutions, such as the Stockholm Chamber of Commerce or International Chamber of Commerce, to ad hoc arbitration under UNCITRAL Rules.[172] Statistics show that in 2017, there was a total of 2,946 BITs signed.[173]

Compared to the older BITs with emphasis on the protection of foreign investment by providing substantive protection standards and allowing investors to bring a claim against host states through investor-state dispute settlement mechanism, the recent developments in newer BITs show that there is a positive shift towards explicit inclusion of sustainable development issues into their wording (e.g. states' right to adopt sustainable development-oriented regulation).[174] It is clear from the wording of new BITs that reference to sustainable development issues may appear in different parts of

168 *Carrington*, Historic breakthrough: Norway's giant oil fund dives into renewables, *The Guardian online*, 05/04/2019.

169 See *Carrington*, Just 10% of fossil fuel subsidy cash 'could pay for green transition, *The Guardian*, 01/10/2019, available at: https://www.theguardian.com/environment/2019/aug/01/fossil-fuel-subsidy-cash-pay-green-energy-transition (26/02/2020).

170 Ibid.

171 *Born*, pp. 421 f.; *Leal-Arcas*, International Trade and Investment Law: Multilateral, regional and bilateral governance.

172 *Born*, p. 422.

173 UNCTAD, Recent developments in the international investment regime (UNCTAD, 01 May 2018), available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (26/02/2020), p. 2.

174 Ibid., p. 5.

a BIT, e.g. as a general objective of the treaty in a preamble, as a separate obligation of the state parties or investors, or as an exception to the substantive protection standards, such as prohibition of unlawful indirect expropriation. Specific position and wording of sustainable development provisions determine to what extent such provisions will be binding and enforceable against state parties. Certain BITs contain only a broad reference to sustainable development without clear practical consequences. Others list sustainable development obligations that may be enforced in practice, e.g., by means of state to state dispute settlement mechanism or, if such obligations are imposed on foreign investors, as a counterclaim brought by a host state against an investor. Since this paper emphasises climate action and sustainable energy, we will focus on the protection of the environment as one of the key aspects of sustainable development.

This section starts with the question of the compatibility of traditional objectives of BITs and environmental protection goals. It then addresses three potential solutions that might increase BITs' contribution to climate action and environmental protection. These are (i) imposition of an environmental obligation on state parties or investors,[175] (ii) freedom of state parties to adopt environmental regulations and exemption of environmental measures from BITs' substantive protection standards, and (iii) counterclaims brought by host states for violation of environmental protection standards.

II. Are BITs reconcilable with environmental protection goals?

The main objectives of BITs may be traditionally found in their preamble. Most BITs focus on three main objectives, namely desire to increase economic cooperation between state parties, stimulation of economic growth and creation of a favourable environment for investment.[176] Looking at these objectives, one may argue that they are not necessarily compatible with environmental protection. However, despite existing challenges, recent state practice and pertaining case law of investment tribunals show that the existing system of BITs may be adapted in order to accommodate environmental protection goals.[177]

175 It is interesting to see the difference in expectations between shareholders of big oil companies on both sides of the Atlantic. In 2018, shareholders of Royal Dutch Shell persuaded Royal Dutch Shell to pledge the reduction of GHG emissions from its operations and products. What is more, in 2019, BP's shareholders voted to require BP to disclose how its plans match with the goals of the Paris Agreement on Climate Change. By contrast, shareholders of ExxonMobil and Chevron (both big US oil companies) have voted against any sort of climate change resolutions. See The Economist, Big oil and climate change: Back to the well, 01/06/2019, p. 59. In fact, it has been reported that ExxonMobil intends to increase oil and gas production by 25% between 2017 and 2025 (see *The Economist*, The Seven Ages of Climate Man, 25/05/2019, p. 70) and that the 24 biggest listed oil companies only invested 1.3% of capital expenditure in 2018 in renewable technologies (see ibid.).

176 *Cordonier Segger/Newcombe*, in: Cordonier Segger/Gehring, et al., Global Trade Law Series, Kluwer Law International 2011/30, p. 126.

177 Ibid., p. 124.

Although far from being common, some recent BITs provide for additional objective to the abovementioned traditional ones in their preamble, namely concept of sustainable development.[178] This language may be found, e.g., in the 2018 Argentina-Japan BIT or the 2018 Netherlands Model BIT. The preamble of an international treaty does not necessarily impose enforceable obligations on states, but it has an important role in the interpretation of the treaty, in accordance with Article 31(2) of the Vienna Convention on the Law of Treaties.[179] This rather recent development shows that states view their BITs as a chance to promote a more environmentally friendly investment framework that expands the traditional perception of the investment protection as being strictly focused on economic development and creation of more favourable conditions for foreign investment. Furthermore, this development also contributes to the balancing of the inequality of rights and obligations between investors and host states under BITs, with host states typically being the sole bearers of obligations and investors the sole bearers of rights, by imposing certain obligations also on investors,[180] some of them directly enforceable under the BITs, as discussed below in sub-section 3.

One of the ways in which BITs reconcile their object and purpose with the environmental-protection goals is by including specific provisions on conflict with other international treaties in their wording.[181] Such a provision may be found, e.g., in the 2016 India Model BIT or the 2018 Netherlands Model BIT and it solves potential conflicts that may arise between the BIT and other international treaties to which a state may be a party. Such other international treaties may include *inter alia* environmental protection agreements or human rights conventions. Article 6(5) of the 2018 Netherlands Model BIT may serve as an example of such conflict provision. This Article states that "*[w]ithin the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection […] to which they are party, such as the Paris Agreement[…].*" Some other international treaties that include investment chapters, such as NAFTA, go even further and provide a list of environmental agreements that prevail over the wording of NAFTA, with the option to add other environmental agreements on the list upon parties' agreement.[182] The language of these provisions narrows down the otherwise broad object and purpose of BITs, by imposing certain limitations on states with regard to their environmental obligations when encouraging and protecting foreign investment in their territories.

178 Ibid., p. 125.

179 Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/011980) 1155 UNTS 331 (VCLT) Article 31 (2).

180 *Herbert Smith Freehills*, Is the recently signed Morocco-Nigeria BIT a step towards a more balanced form of intra-African investor protection? (Herbert Smith Freehills, 23/05/2017), available at: https://hsfnotes.com/arbitration/2017/05/23/is-the-recently-signed-morocco-nigeria-bit-a-step-towards-a-more-balanced-form-of-intra-african-investor-protection/ (26/02/2020).

181 *Cordonier Segger/Newcombe*, in: Cordonier Segger/Gehring, et al., Global Trade Law Series, Kluwer Law International 2011/30, p. 127.

182 1994 North American Free Trade Agreement, Article 104(1).

Embedding environmental language into BITs is not entirely unknown in state practice, although it has only been gaining momentum in recent years. The first states to add environmental provisions into their BIT were China and Singapore in 1985.[183] The development since then has been monitored in the 2011 OECD study of 1,623 international investment agreements (1, 593 BITs and 30 other non-BIT investment agreements, mainly free trade agreements), which showed that only 8.2%, or 133 out of 1,623 treaties include some sort of reference to environmental issues.[184]

Interestingly, whereas only 103 of 1,593 reviewed BITs include such a reference, all 30 reviewed non-BIT investment agreements include such a reference.[185] The same survey found that a relatively high number of BITs containing environmental language are entered into by the same small number of states, which at some point began systematically including this language in all their treaties (e.g. Canada, Mexico, USA, or Luxembourg).[186] However, a more recent survey shows that the number of recently-concluded or renegotiated BITs which adopt pro-environmental language is increasing, leading to greater environmental protection through BITs.[187] This approach shows a clear intent of some states to subject future foreign investments to certain environmental standards, which in turn reflects the effort of these states to tackle climate change and other environmental issues by other means than just by international environmental agreements.

Therefore, it may be concluded that objectives pursued by both BITs and environmental protection regulations are in fact reconcilable, proof of which may be found in more recent treaty practice. Considering the latest developments, it may be assumed that even more BITs will include environmental protection provisions in the future.

III. How can BITs contribute to environmental protection?

Given the number of existing BITs and a dramatic rise of investor-state disputes in recent years,[188] there are several ways BITs can contribute to the protection of the environment. This section addresses three different proposals that the authors consider most effective.

183 *Gordon/Pohl*, Environmental Concerns in International Investment Agreements: A Survey (OECD, 01/06/2011), available at: http://www.oecd.org/daf/inv/internationalinvestmentagreements/WP-2011_1.pdf (26/02/2020), p 8.

184 Ibid., p. 7.

185 Ibid., p. 5.

186 Ibid.

187 UNCTAD, Recent developments in the international investment regime (UNCTAD, 01/05/2018), available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (26/02/2020), pp. 5, 7.

188 According to official statistics of the International Centre for Settlement of Investment Disputes available at: https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf (26/02/2020), ICSID had registered 401 new cases in the last nine years (i.e. between 2010 and 2018), compared to 305 new cases registered in the previous 38 years (i.e. between 1972, when the first ICSID case was registered, and 2009).

1. Imposition of environmental obligations in BITs

The first and probably most effective option would be for state parties to undertake environmental protection obligations in their BITs, such as an obligation to enforce BIT standards on investors by requiring high levels of environmental protection.[189] Since the primary aim of BITs is to promote and protect investments, it is clear that the nature of environmental obligations imposed by BITs will always be linked to foreign investments in some way.

Certain BITs, mainly the more recent ones, already impose concrete environmental obligations on state parties, but at the same time go even further by providing an additional remedy to investors in case of a host state's breach of its environmental obligations. An example of such a treaty is 2012 US Model BIT. In Article 12.3 it states that "*each Party shall ensure that it does not […] fail to effectively enforce [domestic environmental] laws through a sustained or recurring course of action or inaction as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.*"[190] This provision constitutes the specific international treaty obligation of state parties to enforce national environmental laws on foreign investments and investors.

At the same time, this provision clearly connects the environmental protection with different stages of the investment, namely its establishment, acquisition, expansion, or retention. Furthermore, Article 12.6 of the same BIT provides for a state party's right to initiate "*consultations with the other [p]arty regarding any matter arising under [Article 12 on Investment and Environment].*"[191] Therefore, an investor under the 2012 US Model BIT has the opportunity to turn to his home state government and ask them to convince the host state's government to take particular environmental action, in case the investor seeks restitution of his interest through an "*adequate environmental remediation*" rather than through damages, should the latter not be an appropriate remedy for the investor in a particular case.[192] This constitutes a potential additional remedy for investors besides the standard BIT remedy of monetary damages.[193] Moreover, it is clear from the wording of Article 12.6 that this remedy is primarily designed for use by BIT's state parties, so it could also be the other state party who enforces these environmental obligations against the host state, not just an investor.

BITs do not have to impose environmental obligations solely on state parties. There are few BITs that impose direct obligations with regard to the protection of the environment also on investors. An example of such a treaty is the 2016 Morocco-Nigeria BIT, which takes a particularly pro-environmental and pro-sustainability approach

189 *Mayeda*, in: Cordonier Segger/Gehring et al., Global Trade Law Series, Kluwer Law International 2011/30, p 545.
190 2012 U.S. Model Bilateral Investment Treaty, para. 12.3.
191 Ibid., p. 12.6.
192 *Hicks*, Environmental Protection in International Investment Agreements, Center for Strategic and International Studies, 7 April 2015, available at: https://www.csis.org/analysis/environmental-protection-international-investment-agreements (26/02/2020).
193 Ibid.

throughout its whole wording.[194] In its Article 14(1), the Morocco-Nigeria BIT explicitly requires investors to conduct a pre-investment environmental impact assessment, by saying that "*[i]nvestors […] shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state […] or the laws of the home state […], whichever is more rigorous […].*"[195] This is a significant step towards sustainable development.

However, the crucial question with regards to investors' environmental obligations under BITs is their enforceability *vis-à-vis* investors, as investors are not generally bound by BITs. In this regard, state parties in Article 20 undertake to subject investors to civil liability in their home jurisdiction for any breach resulting in "*significant damage, personal injuries or loss of life in the host state.*" This concept of investors' liability may, however, in practice prove to be problematic, as it depends on investor's home state to bring an independent action against its own national (either natural or juridical person).[196]

There is another potential way how states may try to enforce these obligations against investors, namely counterclaims. As will be addressed in further detail in subsection 3.3 below, counterclaims are available to a host state only if there is a claim brought against the host state by an investor and thus, they are of limited use. Therefore, it may be assumed that the enforceability issues will most likely hinder the practical impact of these otherwise ambitious BIT provisions imposing environmental protection obligations on investors.

Although states may include specific pro-environmental obligations in their future BITs, it might be problematic to include such obligations in the already existing BITs, unless parties agree to renegotiate them. Due to the large number of existing BITs, this would require re-opening negotiations between a large number of states, placing great burden especially on states with a high number of BITs, such as UK, Switzerland, Netherlands, France or Luxembourg.[197] Moreover, unless both parties agree on the renegotiation of a particular BIT, there is no possibility to include such provisions in BITs unilaterally by a state wishing to take a more pro-environmental approach. This may be a problem as many BITs are concluded between developed and developing countries. Developed countries may try to shield their investors from burdensome environmental obligations under BITs or from broad regulatory discretion of the host states with regard to the environment, as their investors are most likely the beneficiaries of BIT protections since the biggest flow of investments goes from developed to

194 *Smith Freehills*, Is the recently signed Morocco-Nigeria BIT a step towards a more balanced form of intra-African investor protection?, Herbert Smith Freehills, 23/05/2017, available at: https://hsfnotes.com/arbitration/2017/05/23/is-the-recently-signed-morocco-nigeria-bit-a-step-towards-a-more-balanced-form-of-intra-african-investor-protection/ (26/02/2020).

195 2016 Morocco-Nigeria BIT, Article 14 (1).

196 Ibid.

197 Statistics on concluded BITs by economy at: https://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (26/02/2020).

developing countries.[198] Despite hurdles state parties may have to overcome when faced with the renegotiation of BITs, statistics show that renegotiation of existing treaties is, in fact, gaining in popularity, with at least 27 outdated BITs being replaced by more modern treaties since 2012.[199]

Even if state parties do not agree on specific environmental obligations in their BITs, some investors have tried to bring an action against host states for the failure to comply with the environmental protection standards under very generally-worded provisions of BITs. An example was the case of Allard v. Barbados, in which a Canadian investor brought claims against Barbados for breach of Article II(2)(a) on the fair and equitable treatment ("FET") and full protection and security ("FPS") and Article VIII on expropriation of the 1996 Canada-Barbados BIT, claiming that Barbados has "*failed to take reasonable and necessary environmental protection measures and […] has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment.*"[200] Both Article II(2) and Article VIII of the Canada-Barbados BIT represent generally-formulated BIT standards, and neither these articles nor other provisions of the BIT imposed any specific environmental obligations on the state parties. Eventually, Allard's claims were dismissed due to his failure to bear the burden of proof that there was (i.) sufficient changes in the environmental conditions of the eco-tourism site and (ii.) a causal link between such changes and actions or inactions of Barbados.

However, despite the fact that Allard's claims were dismissed, the tribunal's reasoning shows that in principle, the tribunal did not refuse to entertain such an environmental claim under the generally worded substantive protection standards of the BIT. However, it concluded that such claims must still meet specific requirements of particular substantive protection standards, such as the existence of the investor's reasonable legitimate expectations, and reliance on them in case of FET standard.[201] Had Allard proven the fulfilment of these requirements in establishing the breach of the substantive protection standards under the Canada-Barbados BIT with regard to his claim, it is possible that the tribunal would have found in his favour even under such generally worded substantive protection standards without specific environmental obligations imposed on the state parties. However, the investor's burden of proof with regard to the breach of a general substantive standard (such as FET) by means of the host state's environmentally harmful conduct is higher than in case of violation of the specific environmental obligation of a host state explicitly formulated in the BIT.

198 Historically, the main reason for entering into a BIT between a developed and a developing country was to protect the investment of investors from a developed country in a developing country, although some authors argue that this trend is shifting towards different reason – liberalisation of the investment flows. See *Vandevelde*, U.C. Davis J. Int'l L. & Pol'y 2005/157(12), p 183.

199 UNCTAD, 'Recent developments in the international investment regime' (UNCTAD, 01/05/2018), available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (26/02/2020), p. 7.

200 *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award (27 June 2016), para. 3.

201 Ibid., p. 194.

Moreover, one could argue that the success of such an environmental claim based on a generally worded substantive protection standard depends on a tribunal's assessment if such standard in fact encompasses protection of the environment. If the tribunal decides that it does not, the investor's environmental claims would be dismissed as falling outside the BIT's scope.

2. Freedom to adopt environmental regulations and exemptions from substantive protection standards under BITs

Even if state parties fail to include concrete environmental obligations in their BITs, there is another way how BITs can contribute to climate action and sustainable development. As recent practice shows, some BITs provide for the provisions that allow state parties to adopt any non-discriminatory proportionate and reasonable pro-environmental legislation without violating provisions of BITs aimed at the protection of foreign investors, in particular, provisions on the prohibition of unlawful (indirect) expropriation.[202] Such provisions could prevent investors from bringing claims against host states as a result of the passing of legislation for the protection of the environment, such as shutting down of nuclear power plants or imposition of quotas on production of carbon emissions. Recently, there have been some cases brought under different investment treaties (although not precisely under BITs) where investors challenged the host states' legislation adopted with the intention of tackling greenhouse gas pollution and protection of environment, such as the 4.7 billion EUR Energy Charter Treaty claim for unlawful expropriation brought by Swedish investor Vattenfall against Germany over the compulsory phase-out of its nuclear power plants in Germany imposed by the 2011 amendment to the German Atomic Energy Act in the aftermath of the Fukushima disaster in March 2011.[203]

Similarly, in another case brought by the US investor Bilcon of Delaware against Canada under NAFTA, there have been concerns as to whether investor-state dispute settlement mechanisms included in investment and trade agreements undermine the environmental policies of states, by allowing investors to file claims against environmental measures implemented by governments if such measures interfere with investors' profits.[204] Therefore, it seems to be appropriate for states to include in their BITs provisions that would allow states to adopt *bona fide* non-discriminatory and proportionate environmental protection measures without violating BIT's substantive protection standards, or even completely exempt these measures from the scope of the

202 *Schill*, J Int'l Arb 2007/24, pp. 469, 470.

203 *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (31/082018). For an in-depth analysis of the Energy Charter Treaty, see *Leal-Arcas* (ed.), Commentary on the Energy Charter Treaty.

204 *McAnsh/Attaran*, Investor-state dispute settlements: great for business, risky for the environment (ecojustice blog, 14/02/2017), https://www.ecojustice.ca/isds-settlements-great-for-business-risky-for-the-environment/ (13/03/2019); *Strazzeri*, Geo. Int'l Envtl. L. Rev. 2002/14, pp. 837, 859; *Gantz*, Geo. Wash. Int'l L. Rev. /33, pp. 651, 656.

substantive protection standards, thus avoiding their liability vis-à-vis foreign investors or, if the regulatory measure is adopted in a non-discriminatory, fair and equitable manner, avoiding payment of compensation to the foreign investors.[205]

Examples of BITs already adopting this approach are the 2012 US Model BIT or the 2018 Netherlands Draft Model BIT. Both the US and Netherlands Model BITs include specific provisions on sustainable development and protection of the environment, the former in Article 12 (Investment and Environment) and the latter in Section 3 (Sustainable development). Moreover, the US Model BIT in par. 4(b) of its Annex B (Expropriation) states that "*[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*"[206] Article 13(8) of the Netherlands Investment Agreement contains an almost identical provision, holding that "*[e]xcept in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures […] designed and applied in good faith to protect legitimate public interests, such as […] environment or public morals […] do not constitute indirect expropriations.*"[207] Similar provisions may be found in the 2017 Israel-Japan BIT.

The abovementioned provisions of the US and Netherlands Model BITs both allow state parties to adopt in good faith non-discriminatory and reasonable measures designed to protect the environment without breaching the BITs and at the same time exempt these measures from the scope of certain substantive protections under BITs, particularly protection against indirect expropriation. These provisions may serve as a template for the drafters of future BITs, potentially also extending the exemption of regulatory measures designed to promote sustainable development also to other substantive protection standards, especially FET.

3. Counterclaims for breach of environmental regulations by investors

The final proposal discussed in this paper is host states' counterclaims brought under BITs against investors who do not observe the environmental standards formulated in BITs, resulting in harm to the host states.[208] The counterclaims would allow a host state to defend itself against the claims for violation of an investor's economic interests under a BIT, by either mitigating the amount of compensation to be paid to the investor as a result of such violation or by not being obliged to pay the damages to the investor at all, should the host state prove the investor's involvement in the conduct harmful to the environment in breach of the BIT.[209] However, this proposal presupposes the imposition of specific requirements on investors to comply with environ-

205 *Gantz,* Geo. Wash. Int'l L. Rev. 2001/33), pp. 651, 656.
206 2012 U.S. Model Bilateral Investment Treaty, Annex B, Article 4(b).
207 2018 Netherlands Draft Model Bilateral Investment Treaty, Article 13(8).
208 *Mayeda*, in: Cordonier Segger/Gehring et al., , Global Trade Law Series, Kluwer Law International 2011/30, p 545.
209 Ibid., p. 556-7.

mental norms directly in the BITs, otherwise, it might not be possible for a host state to bring counterclaims against an investor who causes environmental harm unless domestic laws of the host state include such norms and the BIT requires investments to be made in compliance with domestic law of the host state.[210] In recent practice, there have been few cases where host states have brought environmental counterclaims against investors in investment arbitration by claiming breach of their domestic environmental laws, e.g. Burlington v. Ecuador[211] or Perenco v. Ecuador.[212]

While the latter case is still pending, the former represents one of the very few instances when a host state successfully brought environmental counterclaims against an investor. In 2017, an ICSID tribunal awarded almost 42 million USD to Ecuador after finding Burlington liable towards Ecuador for the costs of restoring the environment in certain areas for exploration and exploitation of oil in Ecuador, caused by the investor's breach of certain Ecuadorian domestic environmental regulations.[213] This example demonstrates that in practice states may actually be successful in holding investors responsible for the harmful conduct to the environment thought investor-state dispute settlement provisions of the BITs. However, by their very nature, counterclaims may be brought only if an investor initiates investment arbitration by bringing claims against a host state, which makes them not particularly effective tool in the hands of host states who cannot resort to them every time they deem bringing an environmental action against an investor appropriate. Nevertheless, counterclaims are an example of how BITs can contribute to climate action.

IV. Conclusion

Latest developments in treaty practice show that BITs may play a vital role in environmental protection and sustainable development. As the global community becomes increasingly concerned about the environment, some states are starting to re-evaluate the traditional objectives of BITs and include sustainable development as a condition of establishment and operation of foreign investments in their territory as part of newly negotiated BITs. This trend is starting to gain more weight, especially in recent years, with several recently concluded BITs referring to sustainable development at least in their preambles.[214] Moreover, some BITs also include specific pro-

210 *Parlett/Ewad*, Protection of the environment in investment arbitration – a double edged sword, Kluwer Arbitration Blog, 22 August 2017, available at: http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ (26/02/2020).

211 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (07/02/2017).

212 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11/08/2015).

213 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (07/02/2017), para. 468.

214 See, e.g. 2018 Argentina-Japan BIT, 2018 Brazil-Guyana BIT, or 2018 Netherlands Draft Model BIT.

visions aimed at the resolution of conflicts between obligations under BITs and under domestic or international environmental protection regulations in favour of the latter, sending a clear message that environmental protection has precedence over the protection of investments. All this indicates a shift towards the promotion of more sustainable investments and greater scrutiny of environmental and social impact of investments by the host states in the future.

We propose three potential solutions as to how BITs can in fact contribute to climate action and sustainable energy. Our first proposal would be to impose specific investment-related environmental obligation on states or investors in BITs that could be enforced either by the other state party to the BIT or by investors. Second, BITs could include specific provisions allowing states to adopt *bona fide* non-discriminatory environmental regulation without violating substantive protection standards under BITs. For example, FET or prohibition of expropriation, or even completely exempting adoption of environmental measures from the scope of the substantive protection standards, thus exempting host states from any liability to pay damages for a breach of investors' economic interests caused by the adoption of reasonable non-discriminatory environmental measures. Finally, the third proposal is to embed specific provisions allowing host states to bring counterclaims against investors who cause harm to the host-states environment by, e.g., producing excessive amounts of greenhouse gas or by polluting waters. However, due to the limited nature of counterclaims that can be brought only when foreign investors bring their claims against host states, this third solution seems to be the least effective.

All three proposals are being tested in practice to a different extent, but in order to have a real impact, more states would have to adopt this pro-environmental language in their BITs. One way or another, recent practice shows that there is a shift in treaty practice towards a higher degree of environmental protection, which is demonstrated by a number of newly concluded BITs as well as by states' attempts to renegotiate older BITs.

Whereas the unilateral and bilateral efforts could contribute to the sustainable development and mitigation of greenhouse gas emissions, one must agree with some of the publicists who claim that such actions would "*only provide second-best solution*" and the only effective way in order to tackle climate change would be a truly global mechanism that imposes strict enforceable obligations on states, as opposed to mere best efforts obligations imposed by some existing international conventions, such as the Paris Agreement.[215] However, due to different political and economic interests of the major global players, such as the USA, China or EU, an agreement on such a global mechanism seems unlikely. Therefore, until a global solution is found, BITs, together with regional FTAs, could bridge this gap and contribute to climate action and broader environmental protection.

215 *Schill*, J Int'l Arb.l(2007/24), pp. 469, 477.

D. How can current efforts to modernise the Energy Charter Treaty contribute to the European Union's approach of linking trade and investment policies with climate action?

I. The European approach to linking trade and investment to climate action

1. Introduction

The European Union (EU) proclaims to be a frontrunner with regards to climate protection[216] and recently reinforced its commitment to the Paris Agreement on Climate Change. With this renewed commitment to the Paris Agreement, the EU at the same time has to further align its policy efforts in trade and investment to the Paris goals. As action is urgent and trade and investment have significant effects on the environment and on the level of greenhouse gas emissions, those two policy areas are crucial leverages in contributing to the Paris goals and at the same time working towards the Sustainable Development Goals (SDGs), which were set by the United Nations General Assembly in 2015. SDG number 7, namely affordable and clean energy, and SDG number 13, namely climate action, are particularly relevant in this regard.

To reach a further alignment to the Paris goals, the EU is intensifying its efforts to not only invest in renewable energy and climate protection on a stand-alone basis but also to specifically link its investment and trade policy to development and climate protection purposes. This materialises in both the EU's external trade as well as its external investment policy and is underlined by two concrete proposed strategies, namely a) Commissioner Malmström's 15-point plan and b) the EU's reformed approach to investment protection. Both will be introduced in the first part of this section.

After that, the second part turns attention to the Energy Charter Treaty (ECT) which is undergoing a modernisation process, as suggested by the European Commission and authorised by the Council as of July 2019. Since the Energy Charter Treaty is an agreement with both a trade and an investment component and is targeting the energy sector and hence one of the most important sectors in terms of climate action, its reform proposal could contribute to a closer link of the EU's trade and investment policy to the Sustainable Development Goals of climate action and clean energy and therefore requires close examination. Therefore, part two seeks to evaluate what potential the ECT reform holds.

216 See European Commission (2012): Address by Herman Van Rompuy, President of the European Council & José Manuel Durão Barroso, President of the European Commission. "From war to peace: a European tale", available at: http://europa.eu/rapid/press- release _SPEECH-12-930_en.htm (26/02/2020).

2. Trade and climate: The 15-point plan

As the World Trade Organization (WTO) and with that the multilateral pathway has not made significant progress since its Doha Round stalemate in terms of incorporating a stronger link between trade and sustainable development goals, bilateral action is becoming important leverage in connecting climate and trade. When concluding Free Trade Agreements (FTAs), the engagement of the agreement partners on a bilateral basis in terms of including climate protection provisions, therefore, is an important factor which decides how climate-compatible a trade agreement becomes. The EU, as an important weight both in global trade as well as in international negotiations around climate governance, has a great role to play in this regard which is why the recently proposed strategy with the aim of linking climate and trade can have significant trickle-down effects if it can serve as a model strategy for other countries.

The so-called 15-point plan recently published by the European Union, and more concretely by Commissioner Malmström,[217] has the goal of aligning the European trade policy with the Sustainable Development Goals by particularly ensuring the successful enforcement and implementation of Trade and Sustainable Development (TSD) chapters in European Free Trade Agreements. Although this rather broad goal also includes issues relating to labour standards, the EU explicitly mentions "climate action" and the Paris Agreement fulfilment as core points. The 15-point plan can therefore contribute to advancing an integrated thinking of climate and trade, thereby aiming to boost climate-positive effects of trade like the technique effect, i.e. the improvement of the diffusion of climate-friendly technologies to trade partner countries, and reducing potential detrimental developments like shifting of climate-damaging business activities to countries with less stringent environmental regulations. In the 15-point plan, the EU commits to the integrated approach and argues that trade alone cannot solve the current challenges. Therefore, it strives to "put values and principles such as high social and environmental standards at the core of EU trade policy".[218] This underlines how the EU is seeking to mainstream climate considerations into its trade and investment policy in order to leverage all resources to reach the Paris goals.

The 15 "concrete and practicable actions"[219] put forward by the EU (see Annex 4 of this paper) target the four areas of i) working together, ii) enabling civil society including the Social Partners to play their role in implementation, iii) delivery, and iv) transparency and communication. The more concrete sub-chapters tackle, for example, making sure that countries comply with their commitments via more assertive enforcement, improving the monitoring role of civil society and the mobilisation of EU resources to support the implementation of sustainable development chapters in

217 European Commission (2018). Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, available at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (26/02/2020).
218 Ibid., p. 1.
219 Ibid., p. 2.

trade agreements.[220] Furthermore, the Commission puts forward in the plan that it will "encourage early ratification of core international agreements",[221] explicitly mentioning the Paris Agreement as an important multilateral environmental agreement, and "step up efforts to ensure early ratification on the course of trade negotiations, using all available tools."[222] By using its weight as a trade power[223] to incentivise the ratification of the Paris Agreement, the EU also requires other countries to pursue a similar integrated approach. From its statement in the 15-point plan, the EU has now even gone a step further by requiring the ratification of the Paris Agreement as a prerequisite for market liberalisation through a trade agreement. After the French minister for foreign affairs stated that if the US will go through with the withdrawal from the Paris Agreement, no trade and investment agreement with the US will ever be signed, Commissioner Malmström confirmed the demand and made clear that a reference to the Paris Agreement is needed in all trade agreements.[224] This shows that the values at the core of the 15-point plan are taken seriously in international bargaining.

To conclude, the 2018 15-point plan offers a concrete way to tackle problems related to sustainable development and climate provisions in current European FTAs and highlights how the EU is seeking a structured approach to integrating its trade and climate policies more closely going forward and therefore contribute to SDG 13. Also, as already discussed, the integrated chapters particularly related to advancing technology transfer and renewable energies, are very prominent and comprehensive. For example, in the Agreement between the EU and Vietnam, they can enable developing states to reach the goals of clean and affordable energy as put forward by SDG 7.

3. Investment and climate: The approach to investment protection

The European Commission states that one of the principal objectives of its investment policy is to "promote investment that supports sustainable development, respect for human rights and high labour and environmental standards. This includes encouraging corporate social responsibility and responsible business practices".[225] The develop-

220 European Commission (2018). Commissioner Malmström unveils 15-point plan to make EU trade and sustainable development chapters more effective,available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1803 (26/02/2020).

221 European Commission (2018). Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements. a: vailable at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (26/02/2020), p. 8.

222 Ibid.

223 The European Union is the largest trader of manufactured goods and services around the world. Compare European Commission (2019). EU position in world trade. Retrieved from EU position in world tra. Available at: http://ec.europa.eu/trade/policy/eu- position-in-world-trade/ (26/02/2020).

224 Climate Action (2018). 'No Paris Agreement, no EU trade deal', says France to US. Retrieved from http://www.climateaction.org/news/no-paris-agreement-no-eu- trade-deal-says-france-to-us (26/02/2020).

225 European Commission (2018). Investment, available at: https://ec.europa.eu/trade/policy/accessing-markets/investment/ (26/02/2020).

ment towards mainstreaming environmental concerts into the EU's investment strategy was also reflected by the headline of its trade strategy "Trade for All: Towards a more responsible trade and investment policy" which was presented by the European Commission in October 2015. The 2012 EU regulation for BITs sets the condition that concluded investment agreements are "consistent with the EU's principles and objectives for external action".[226]

However, unlike the frequent inclusion of sustainable development provisions in Free Trade Agreements, the included chapters on investment usually in the best case refers to sustainable development or the environment in the preamble without making any direct links between investment and climate as an analysis based on the UNCTAD policy hub database shows.[227] Also, in the 2010 presented paper on the reformed investment approach by the EU labelled "Towards a comprehensive European international investment policy", it is only vaguely mentioned that "finally, it should be recalled that the Union's trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy. Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives."[228] Current Bilateral Investment Treaties (BITs) of the European Union therefore, fall behind in terms of putting environmental values in general and climate considerations in particular at the core of its external strategy.

II. The Energy Charter Treaty – Then and Now

1. Current set-up and goal of the Energy Charter Treaty

Apart from the clearly delineated areas of trade, reflected by the World Trade Organization framework and by concluded trade agreements, and investment, reflected by BITs, the Energy Charter Treaty is an important multilateral framework targeting both trade and investment which is important to mention in the context of climate action and clean energy promotion. The Energy Charter Treaty was signed in 1994, came into effect in 1998 and counts 54 signatories as of today, including the EU and the European Atomic Energy Community (EURATOM). Its initial objective was the

226 Ibid.

227 UNCTAD (2019). Investment Policy Hub. Treaties with Investment Provisions. Retrieved from https://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/78#iiaInnerMen u (26/02/2020).

228 European Commission (2010), Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a Comprehensive European International Investment Policy, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF (26/02/2020), p. 9.

provision of legal protection for those large oil and gas companies which were seeking to make an investment in the states constituting the former communist bloc.[229] The multilateral agreement is legally binding and covers the four areas of (i) trade and transit of energy materials and products, (ii) investment protection in the energy sector, (iii) dispute resolution with regards to matters covered by the ECT, and (iv) the promotion of energy efficiency and attempts to minimise the environmental impact of energy production and use. Since it includes the principles of the General Agreement on Tariffs and Trade (GATT) but also includes non-WTO members, it extends the reach of the WTO framework to non-WTO members.[230]

When evaluating the ECT in terms of climate considerations, point four particularly becomes interesting since the component of energy efficiency has the potential to directly advance climate protection goals if technology transfer to fossil-fuel dependent states comes with a reduction of their energy demand. As Figure 3 illustrates, energy efficiency provisions were, together with renewable energy promotion, amongst the first important climate-related provisions to be included in free trade agreements around the world.[231] This comes despite the fact that energy efficiency provisions could include a potential source of conflict with the WTO if energy efficiency standards based on processes and methods of production are regarded as disguised barriers to trade leading to discrimination between "like" products.[232] However, a sharp increase in energy efficiency provisions only took place around the turn of the millennium. Therefore, the ECT was a pioneer as a legally binding treaty with an energy-efficiency component which, importantly, extended the reach to countries beyond the WTO. Since energy efficiency provisions feed into the EU's proclaimed goal of staying at the forefront and highly competitive with its green economy,[233] energy efficiency is an important provision for the EU to push internationally.

229 *Frédéric,* EU asserts 'right to regulate' as part of energy charter treaty reform, (2019), available at: https://www.euractiv.com/section/energy/news/eu-asserts-right-to-regulate-as-part-of-energy-charter-treaty-reform/ (26/02/2020).

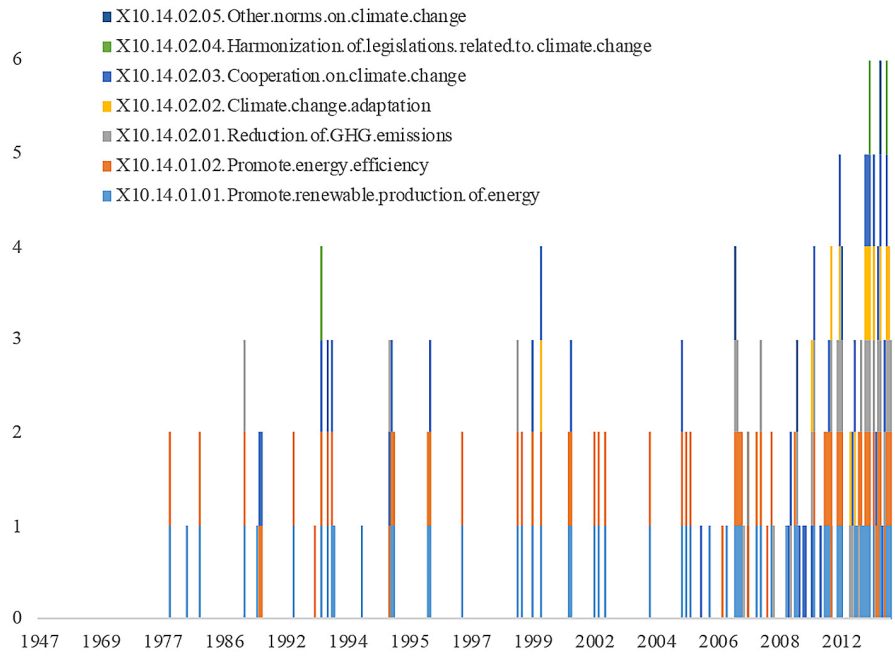
230 For further information see *Yodogawa*, in: Matsushita/Schoenbaum/Tokyo (eds.), pp. 279–288, available at: http://link.springer.com/10.1007/978-4-431-56426-3_13 (07/04/2019).

231 See also *Morin//Jinnah*, Environmental Politics2018/27(3), pp. 541–565.

232 *Carraro/Egenhofer* (eds.).

233 *Bogojević*, in: Gray/Tarasofsky/Carlarne (eds.), pp. 674-691.

Figure 3: Growth of climate provisions in RTAs over time



Source: Authors' own illustration based on Berger, A., Brandi, C., Bruhn, D., & Morin, J. (2019). TREND analytics – Environmental Provisions in Preferential Trade Agreements. (German Development Institute/ Université Laval). DOI: 10.23661/trendanalytics_2017_1.0

As the energy sector is responsible for a high amount of greenhouse gas emissions, the legal framework governing investments in that area has a very important role to play when it comes to reaching the Paris goals. Since the ECT comprises a high number of signatories and is legally binding, it becomes crucial to leverage in slowing down climate change.

2. ECT-reform suggestions related to clean energy and climate action

Although many cases were raised on the basis on the Energy Charter Treaty and despite the importance of the sector in reaching the Paris goals, the ECT has hardly been revised in its roughly 30 years of existence. Therefore, the European Commission recently went ahead to label the Energy Charter Treaty as outdated. In its proposal of the 14th of May 2019, the Commission stated explicitly: "Since the 1990s (most of) the ECT provisions have not been revised. This became particularly problematic in the context of the ECT provisions on the protection of investment, which do not correspond to modern standards as reflected in the EU's reformed approach to investment protection. Those outdated provisions are no longer sustainable or adequate for the current challenges; yet it is today the most litigated investment agreement in

the world",[234] with a total of at least 121 investment notified disputes. The Recommendation for a Council decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty includes a list of topics covering investment protection provisions, pre-investment commitments, transit, the economic integration agreements clause and dispute resolution provisions. Although all of those issues need further analysis, this chapter focuses on the points which are linked to advancing the SDGs 7 and 13, whereas the other topics will be neglected. The proposed EU negotiating directives aim to ensure greater legal certainty and clarify the rules applying to the protection of foreign investments. The European Commission therefore calls the "the ECT modernisation […] a logical step in pursuing the EU's reformed approach on investment protection"[235]At the core of the discussion is also the Investment-State Dispute Settlement (ISDS) clause which the EU seeks to fundamentally reform, including a more narrow definition of investors to "prevent that mailbox companies bring disputes under the ECT"[236] although they do not operate in their country of legal residence with substantive business activities.

Two points mentioned in the proposal are particularly important:

First, the European Commission proposes that "the Modernised ECT should include appropriate standards of protection for investors and investments, in line with the EU law, in particular (and in a non-exhaustive manner): Right to regulate; Most favoured nation treatment provision, which under the ECT covers also national treatment; Clarification of 'most constant protection and security'; Fair and equitable treatment and full protection and security, which are appropriately circumscribed for interpretation purposes; Expropriation, covering direct and indirect expropriation, and appropriately defined to clarify the nature of indirect expropriation; Umbrella clause; Transfers: allowing free transfers relating to an investment, together with appropriate exceptions and safeguards for financial difficulties or crises; and Denial of benefits."[237]

Second, the recommendation includes the suggestion that "the Modernised ECT should include provisions on sustainable development, including on climate change and clean energy transition, in line with recently concluded agreements and EU positions in ongoing negotiations".[238]

234 See European Commission, Recommendation for a COUNCIL DECISION authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, (2019), available at: https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157884.pdf (26/02/2020), p. 1.

235 Ibid.

236 *Frédéric*, EU asserts 'right to regulate' as part of energy charter treaty reform, (2019), available at: https://www.euractiv.com/section/energy/news/eu-asserts-right-to-regulate-as-part-of-energy-charter-treaty-reform/ (26/02/2020).

237 *European Commission*, ANNEX to the Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, (2019), available at: http://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157885.pdf (26/02/2020), p. 2.

238 Ibid.

On July 15th of 2019, the EU Member States approved the European Commission's proposal to start the negotiation to modernise the investment protection standards contained in the ECT.[239] The Council particularly supported the modernisation of the ECT in the area of the "right to regulate" regarding health, safety and the environment and insisted on the reflection of climate change and clean energy transition as important factors in the modernised ECT.[240]

The negotiating directives approved by the Council for the first time connect the ECT explicitly to clean energy and climate change, thereby showing that the European Commission is trying to actively inscribe the Sustainable Development Goals into not only its Free Trade Agreements but also other multilateral agreements. It, therefore, has an important signalling effect in showing to trade and investment partners that current agreements are updated in terms of climate and environmental considerations. If the Treaty is expanded to more signatory states that are still starting their renewable energy transition, technology transfer in terms of energy efficiency technologies could result in decreasing the costs for renewable energies in those countries and therefore contribute to the goals of a) clean and b) affordable energy simultaneously.

3. Criticism

Although the reform suggestions regarding the ECT show that the urgency of linking the ECT to the energy transition and climate protection goals has been recognised, the modernisation process is being accompanied by harsh critique.

Particularly prominent is the extremely critical paper "One treaty to rule them all: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition" which was published by Corporate Europe Observatory and the Transnational Institute in June 2018. The authors label the ECT "an obscure international agreement"[241] which is "granting corporations enormous powers over our energy systems including the ability to sue governments, which could obstruct the transition from climate-wrecking fossil fuels towards renewable energy. And the ECT is in the process of expansion, threatening to bind yet more countries to corporate-friendly energy policies".[242] They particularly criticise the ISDS clause, claiming that, although similar policy mechanisms have achieved great public criticism, thinking for example of the protests surrounding the Transatlantic Trade and Investment Partnership (TTIP), the ECT has escaped such public outrage. This comes despite very prominent cases which have been raised under the ECT. Here, the authors for example refer to Vattenfall which "sued Germany over environmental restrictions on a coal-

239 *European Commission*, Energy Charter Treaty modernisation: Commission welcomes Council's mandate, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=2049 (26/02/2020).

240 Ibid.

241 *Eberhardt/Olivet/Steinfort*, ONE TREATY TO RULE THEM ALL. The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition, p. 6.

242 Ibid.

red power plant and for phasing out nuclear power"[243] and to "Oil and gas company Rockhopper [which] is suing Italy over a ban on offshore oil drilling".[244] Also, the lack of transparency and public awareness regarding the agreement is under sceptical scrutiny by the authors.

Furthermore, the ECT Secretariat itself is under heavy criticism. Masami Nakata, the Energy Charter's assistant secretary, prepared a report in which she blames failed management and structuring methods for the current difficult situation. Those concerns are reflected in the suggestions regarding transparency improvements by the European Commission. The assistant secretary also questions that the modernisation will actually succeed in aligning the ECT with the Paris Agreement on Climate Change. Here, Energy Charter's assistant secretary general Masami Nakata stated that "it is unlikely that Contracting Parties would reach an agreement to align the Treaty with the Paris Climate Agreement"[245] since the Member States are in very different phases regarding their internal clean energy transition and have different takes on fossil fuels, with the EU,[246] Japan and Switzerland trying to implement decarbonisation strategies while other contracting parties either heavily rely on fossil fuel export or present transit countries.

4. Reform potential for clean energy and climate action

The harsh criticism, first of all, shows that the ECT is an agreement of great importance and that a modernisation of the agreement comes at a time which is overdue. Although many activists call for a withdrawal of the treaty instead of seeking to modernise it, it is questionable whether this would be the solution since the sunset clause means that companies are able to sue countries even after they have pulled out from the treaty, as the example of Rockhopper shows which is suing Italy although the country withdrew from the agreement in 2016. As existing investments will stay protected until 2036 after Italy's withdrawal, it means that leaving the treaty would only have a very lagged effect which is detrimental as the next two decades are very important years in terms of climate action and an acceleration of the energy transition. In this sense, a reform of the treaty seems more reasonable than a withdrawal which will not have an effect until it might already be too late to accelerate climate action.

243 Ibid.
244 Ibid.
245 See the views of Masami Nakata in *Frédéric*, Leaked report reveals 'misfunctioning' of Energy Charter Treaty amid EU reform calls, available at: https://www.euractiv.com/section/energy/news/leaked-report-reveals-misfunctioning-of-energy-charter-treaty-amid-eu-reform-calls/ (26/02/2020).
246 The Commission recently presented the EU's 2050 long-term strategy. The vision aims at decarbonising the EU's energy supply through electrification on a large scale and to become climate-neutral by 2050. The paper outlines the steps necessary to achieve this vision. Although it has not been poured into legal actions yet, energy outlooks forecast that by 2050 renewable energies will make up 87% of the EU energy mix (BNEF BNEF (2018). New Energy Outlook (BNEF, July 2018), available at: https://www.bnef.com/core/insights/18819/view (26/02/2020).

In terms of reform potential, a substantive provision clarifying the host states' right to regulate would be able to prevent investors suing host states for advancing their clean energy transition by restricting fossil fuel investments on their ground. This would be a crucial alteration particularly in the years ahead, in which the EU Member States will have to revise their own internal regulations in order to keep up with the greenhouse gas emission goals defined by the European Union. Many countries will, in this sense, have to restrict fossil fuel investments and could potentially face a challenge under the umbrella of the ECT.

At the same time, adding the proposed provisions on climate change and clean energy in line with recently concluded agreements and EU positions in ongoing negotiations would be a game-changer as the EU's proclaimed position in the climate regime, as already outlined, is quite ambitious and since it declared to make an alignment to the Paris Agreement a prerequisite for investment or trade treaties. As the scope of the ECT is planning to be extended to more signatory countries, the ECT modernisation could add another layer of enforcement to the Paris Agreement.

Those potential positive reform effects, however, have to be evaluated in terms of their likelihood: Since, as outlined, the positions of the signatory states are very far apart, it seems not very probable that a renegotiation of the agreement will result in substantive provisions which would then restrict the opportunity for power of coal,[247] oil and gas companies to sue host states in order to slow down or even bring to a stop clean energy transition ambitions of host states. Hence, if the treaty in its current state with only vague provisions on sustainable development is expanded to other developing countries around the globe, it might result in increasing investments in fossil fuels and could in this sense potentially impede clean energy ambitions in fast-growing industrialising states.

Therefore, unless substantive provisions are reached in the modernisation process, the EU has to consider if pulling out from the treaty could not have an important signalling effect and will prevent an outdated Treaty from being expanded to host states in which the judicial system is not capable of taking up big investment disputes with large multinational corporations. As the Member States of the European Union represent around 50% of the Energy Charter Conference membership as well as of the Signatory Parties to the ECT, leaving the treaty would make it less attractive for potential new members to sign up and could prevent an insufficient treaty being expanded to more countries.

247 A note on coal deserves to be made. Asia accounts for 75% of the world's coal demand, where China consumes half of it. There are risks to using coal: 1) environmental, in that emissions from coal plants, both already built and planed ones, will mean that there will be more CO2 emissions and therefore temperatures will go up; 2) economic, in that banks have announced that they will stop funding new coal plants; and 3) politics, in that voters in liberal democracies are increasingly concerned about climate change. See *The Economist*, Coal and climate change: Betting on black, 24/08/2019, p. 8. The good news is that the number of new coal-fired plants receiving investment approval in Asia has been declining sharply since 2016. See *The Economist*, Power generation: Down and dirty, 24/08/2019, pp. 39-40, at p. 40.

Apart from the provisions in the Treaty itself, it is fundamental that the suggested improvements regarding transparency are implemented. Whereas the EU has made the involvement of the Civil Society an integral part of all its newer generation Free Trade Agreements, the ECT is yet excluded from this framework. However, including Civil Society Actors, for example, Non-Governmental Organisations or experts into the process could lead to both an improvement of the agreement itself as well as to increased legitimacy of the Treaty. Since Civil Society Actors constitute an important monitoring "watchdog" role, their involvement in the ECT would serve as an additional layer of detecting breaches of the new sustainable development clauses and would, therefore, prevent further criticism from NGOs.

5. Evaluation and Outlook

The modernisation debate around the ECT, although overdue, shows that in European trade and investment governance, climate considerations have now even reached agreements which have long escaped public attention. The reform process offers the chance to improve the long-neglected treaty and might serve to trigger a public debate which would improve concerns with regards to transparency. If the EU manages to include substantive provisions regarding the host states' right to regulate, as well as a connection to multilateral agreements like the Paris Agreement, the ECT could become a treaty advancing the clean energy agenda. This becomes important, particularly as more states still at the beginning of their clean energy journey are expected to become signatory states to the ECT.

However, it remains to be seen what the European Commission finally manages to negotiate as signatory states have widely differing views on the fossil fuel sector. If the EU does not reach the incorporation of substantive climate protection provisions, pulling out from the Treaty might, despite negative effects of the sunset clause, have an important signalling effect as the ECT is expanded to developing states. In any case, the modernisation process itself has the potential to transform a sector which is a crucial component for the EU to reach its 2050 clean energy goals and to start a debate around a treaty which could become important leverage in contributing to reaching SDGs 7 and 13. The further modernisation process, therefore, requires close monitoring and an update as soon as negotiations have started.

E. Final conclusions

In 1748, the French philosopher Montesquieu wrote in *The Spirit of the Laws* that "two nations that trade with each other become reciprocally dependent… so the natural effect of commerce is to lead to peace." In as much as we are in support of free trade, striking a balance between economic prosperity thanks to trade and environmental protection is not easy. We believe this dualism does not have to be perceived as a trade-off. In fact, one can grow economically and cleanly at the same time. How? The answer lies in technology and clean trade, namely trading environmental goods

and services. And the evidence is in California, whose GHG emissions between 2000 and 2016 fell by 9%, despite the fact that its economy and population grew.[248]

Based on the findings in this paper, we conclude that EU FTAs have the potential to be the true enforcer of environmental and climate change obligations. The EU leads the world as a signatory to the largest number of FTAs. The recently concluded or negotiated European FTAs contain detailed, precise and binding commitments, with references to crucial MEAs such as the Kyoto Protocol and the Paris Agreement. However, for these binding and precise obligations to have any impact on environmental protection and climate change mitigation, the environmental provisions would need to be directly enforceable by means of a binding and final decision of a third party. Unfortunately, European FTAs continue to favour dispute settlement by means of soft mechanisms, such as consultations and (non-binding) panel reports. Consequently, European FTAs remain toothless and favour soft power. Without strong enforcement mechanisms, the environmental provisions in the EU's FTAs are nothing more than artifices to "greenwash" trade agreements. The only way for the EU to be at the forefront of climate change mitigation is to follow the American approach of including the FTA's environmental chapter within the scope of the general dispute mechanism of the FTA.

There is a need to globalise climate change obligations to successfully decarbonise the economy and fight climate change. The MEA and Trade mechanisms have been negotiated in parallel; however, the two should interlink for the fight against climate change to have a discernible effect. The MEAs were a step in the right direction, as they have established adaptation and mitigation climate change obligations. The multilateral system in the WTO and MEAs share the problems relating to lengthy and complex negotiations due to its extensive membership.

Therefore, the recent proliferation of PTAs can be used to successfully enforce climate change obligations through trade, as countries are more willing to enter into trade agreements due to the benefits of extending their markets. PTAs could lead to the multilateralism of the climate agenda as there could be a replication of agreements with existing climate-related provisions within major economies. these are easier and faster to negotiate and could be a breakthrough in tackling climate change. It would be an opportunity to bring together major GHG emitters and promote the cooperation in innovating new cleaner technologies and improving the environment.

Recent EU FTAs offer very solid substantive wording to protect the environment. However, it is most surprising that EU FTAs do not cover the environmental protection chapter in their dispute settlement chapter, arguably because international agreements are the outcome of a political compromise. For an actor that claims to lead on environmental protection (and more specifically, on climate change mitigation), the EU should make it possible to enforce the environmental protection chapters in all its FTAs. Doing so will certainly make the EU a champion in environmental protection.

248 The Economist, Environmental policy: The great divide, 29/06/2019, pp. 34-35, at p. 34.

F. Annexes

Annex 1

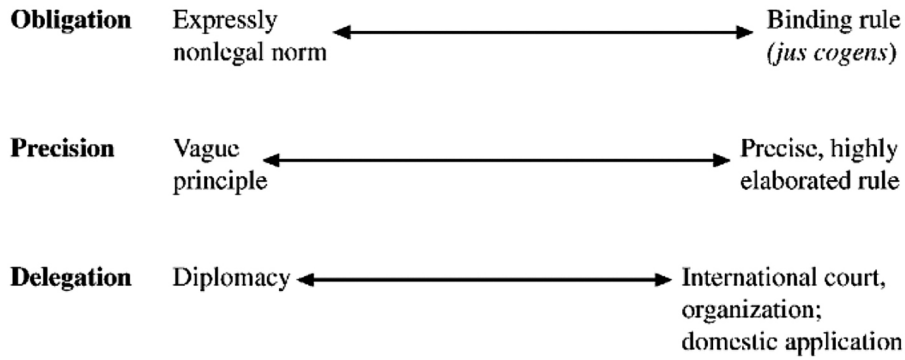


FIGURE 1. *The dimensions of legalization*

Source: K. Abbot et. al., 'The Concept of Legalization', *International Organization*, 54/3 (2000), p. 401-404.

Annex 2

	Obligation	Precision	Delegation
0. Low	Not binding	General references	Political mechanism
1. Moderate	Optional commitment	Broad areas of discretion	Limited judicial mechanism
2. High	Binding commitment	Specific targets	Full (independent and binding) judicial mechanism

Annex 3

FTA	Obligation	Precision	Delegation	Total
USA-Peru TPA (2006)	1	2	2	5
USA-Colombia TPA (2006)	1	2	2	5
USA-Panama TPA (2007)	1	2	2	5
USA- Korea FTA (2007)	1	2	2	5
UMSCA (2018)	1	2	2	5
EU-South Korea FTA (2010)	1	1	0	2
EU-Peru/Colombia FTA (2012)	1	2	0	3
EU-Moldova Agreement (2014)	1	0	0	1
EU-Georgia Agreement (2014)	1	0	0	1
EU-Ukraine Agreement (2014)	1	1	0	2
CETA (2016)	1	1	0	2
EU-Japan EPA (2018)	2	2	0	4
EU-Singapore FTA (2018)	2	2	0	4
EU-Vietnam FTA	2	2	0	4
EU-Mexico (draft) Agreement	2	2	0	4

FTA	Score	
USA-Peru TPA	5	Moderate obligation (1), because strong use of mandatory language and commitments. For example: "shall adopt, maintain and implement" (art. 18.2); "shall not fail to effectively enforce" (art. 18.3); "shall ensure" (art. 18.4 and 18.13). However, no maximum score on obligation because of the limited number and scope of the Covered Agreements. Also, when it comes to non-covered environmental agreements to which both signatory states are party, the commitment is weak (art. 18.13 merely provides that parties "shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements which they are all party") High precision (2), with references to a closed list of precisely identified Covered Agreements (art. 18.2) and confirmation that each party shall not fail to effectively enforce *its own* environmental laws (art.18.3). High delegation (2), because pursuant to article 18.12(6) parties have full recourse to the Dispute Settlement provisions of the Agreement.
USA-Colombia TPA (2012)	5	Moderate obligation (1), because strong use of mandatory language. For example: "shall adopt, maintain and implement" (art. 18.2); "shall not fail to effectively enforce" (art. 18.3); "shall ensure" (art. 18.4 and 18.13). However, no maximum score on obligation because of the limited number and scope of the Covered Agreements. Also, when it comes to non-covered environmental agreements to which both signatory states are party, the commitment is weak (Article 18.13 merely provides that parties "shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements which they are all party") High precision (2), with references to a closed list of precisely identified Covered Agreements (art. 18.2) and confirmation that each party shall not fail to effectively enforce *its own* environmental laws (art.18.3). High delegation (2), because pursuant to article 18.12(6) parties have full recourse to the Dispute Settlement provisions of the Agreement.

FTA	Score	
USA-Panama TPA (2012)	5	Moderate obligation (1), because strong commitments. For example: "shall adopt, maintain and implement" (art. 17.2); "shall not fail to effectively enforce" (art. 17.3); "shall ensure" (art. 17.4). However, no maximum score on obligation because of the limited number and scope of the Covered Agreements. Also, when it comes to non-covered environmental agreements to which both signatory states are party, the commitment is weak (by stating in Article 17.13 that parties "shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements which they are all party") High precision (2), with references to a closed list of precisely identified Covered Agreements (art. 18.2) and confirmation that each party shall not fail to effectively enforce *its own* environmental laws (art.18.3). High delegation (2), because pursuant to article 18.12(6) parties have full recourse to the Dispute Settlement provisions of the Agreement.
USA- Korea FTA (2012)	5	Moderate obligation (1), because consistent use of "shall" (for example. art. 20.2 and art. 20.4. See also art. 20.3, which provides that "neither party shall fail to effectively enforce its environmental laws"). However, no maximum score on obligation because of the limited number and scope of the Covered Agreements. Also, when it comes to non-covered environmental agreements to which both signatory states are party, the commitment is weak (by stating in art. 20.10 that parties "shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements which they are all party") High precision (2) as a result of multiple references to the Covered Agreements in Annex 17.2 of the FTA (see art. 20.2 and 20.3). High delegation (2), because pursuant to article 20.9(4), parties have recourse to all provisions of the Dispute Resolution Chapter of the FTA.

FTA	Score	
UMSCA (2018)	5	Moderate obligation (1), because, although some of the provisions contain strong commitments (for example, art. 24.4(1) which provides that "no Party shall fail to effectively enforce its environmental laws" or art. 24.9(1) pursuant to which each party "shall take measures"), other provisions lack strength and merely acknowledge existing commitments (for example, art. 24.3(2) provides that each party "shall strive to ensure" that its environmental laws provide for high levels of protection). Also, with respect to MEAs, parties only agree to "affirm" their commitments to implement the MEA to which they are party (see art. 24.8). Art. 24.8 is a departure from earlier texts of USA-FTAs on MEAs, which historically provided that parties "shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements which they are all party". Notably, compared to earlier USA FTAs, UMSCA includes more detailed provisions/ protection on specific environmental issues (for example. 24.9; 24.10; 24.17) High Precision (2). UMSCA contains various specific targets, in particular in relation to important issue areas such as the Ozone Layer (see art. 24.9, which provides that each party shall take measures to control the production and trade in substances that can significantly deplete and otherwise modify the ozone layer. Footnote 6 supplements this provision in more detail by regulating when a party shall be deemed in compliance with this provision – and when not), the Protection of the Marine environment (see art. 24.10) and sustainable fisheries management (see art. 24.18, with footnote 13 including a specific reference to instruments). High delegation (2), because pursuant to article 24.32, parties have recourse to all provisions of the Dispute Resolution Chapter of the FTA (including the establishment of a Panel that has renders a binding report).

FTA	Score	
EU-South Korea FTA (2011)	2	Moderate obligation (1), because the parties merely reaffirm their existing commitments. Although art. 13.5(2) refers to reaffirming the commitments to "effective implementation" of the MEAs to which they are party, art. 13.5(3), which relates to particular climate change MEAs such as the UNFCC, only refers to the parties' commitment to reach "the ultimate objective" of the ENCCC and the Kyoto Protocol. No higher score, because (contrary to for example EU-Japan) the FTA does not include further, stronger binding commitments. Moderate Precision (1): art. 13.5(3) merely refers to the parties' commitment to reach "the ultimate objective" of the UNFCC and the Kyoto Protocol. Low delegation (0), because art. 13.16 explicitly confirms that with respect to any matter arising under the 'Trade and Sustainable Development" Chapter, the parties only have recourse to Government Consultations and the Panel of Experts. The report of the Panel is, however, not binding (see art. 13.15(2)).

FTA	Score	
EU-Colombia/Peru FTA (2013)	3	Moderate obligation (1) Although art. 270 refers to reaffirming the commitments of the Parties to "effective implementation" of certain identified MEAs, other provisions on climate change and environmental issues contain weak commitments (for example, art. 267(2), which provides that Parties "reiterate their commitment to address global environmental challenges", and art. 275, which bears in mind the UNFCC and the Kyoto Protocol, but only to subsequently state that Parties "recognise that climate change is an issue of common and global concern that calls for the widest possible cooperation". However, the FTA unfortunately fails to impose strong and binding commitments on the parties to address these global climate concerns. High Precision (2), because art. 270 includes a detailed list of applicable MEAs that parties should effectively implement in their laws. It should be noted, however, that none of the agreements referred to (except for the Kyoto Protocol) relates to climate change. Furthermore, art. 272 contains a specific reference to the parties commitment to conserve and sustainability use biological diversity "in accordance with the CBD and other relevant international agreement to which the Parties are party". Low delegation (0), because art. 285(5) explicitly provides that the chapter on Trade and Sustainable Development is not subject to the formal dispute settlement chapter of the FTA.

FTA	Score	
EU-Moldova Agreement (2014)	1	Moderate obligation (1), because the (albeit few) environmental provisions included in this Agreement use strong wording referring to binding commitments (for example, art. 86 and 92 provide that the parties "shall" develop and strengthen their cooperation on environmental issues and to combat climate change. However, many other provisions dealing with environmental issues focus on cooperation and dialogue, rather than binding commitments of the parties (see, for example, art. 87 which confirms that "cooperation shall aim at preserving, protecting, improving and rehabilitating the quality of the environment"). Low precision (0), although relatively strong on the obligation dimension, the Agreement lacks precision and merely acknowledges the environmental problems and climate change. Low delegation (0), since no enforcement or dispute settlement mechanism is in place, but parties merely agree that "a regular dialogue will take place " on the issues covered by the Environmental chapter (art. 96)

FTA	Score	
EU-Georgia Agreement (2014)	1	Moderate obligation (1), because the (albeit few) environmental provisions included in this Agreement use strong wording referring to binding commitments (for example, art. 301 and 307 provide that the parties "shall" develop and strengthen their cooperation on environmental issues and to combat climate change. However, many other provisions dealing with environmental issues focus on cooperation and dialogue, rather than binding commitments of the parties (see, for example, art. 302 which confirms that "cooperation shall aim at preserving, protecting, improving and rehabilitating the quality of the environment"). Low precision (0), because the Agreement lacks precision and specific targets. It merely acknowledges the environmental problems and climate change. Low delegation (0), since no enforcement or dispute settlement mechanism is in place, but parties merely agree that "a regular dialogue will take place " on the issues covered by the Environmental chapter (art. 305)

FTA	Score	
EU-Ukraine Agreement (2014)	2	Moderate obligation (1). Art. 269(1) contains a binding commitment by stating that the Parties "shall not fail to effectively enforce its environmental laws". Moreover, art. 269(2) provides that a party "shall not weaken or reduce" the environmental protection afforded by its laws to encourage trade or investment. Also, art. 292 refers to reaffirming the commitments of the Parties to "effective implementation" of the MEAs to which they are parties. However, other obligations are more ambiguous (for example, art. 295 only provides that parties "undertake to work together" in order to take effective measures to monitor and control fish and other aquatic resources). Moderate precision (1), because art. 292(2) refers to the implementation of obligations under the MEAs to which the signatory states are party. Moreover, this provision specifies that the Parties should implement these obligations "in their laws and practices". Also, art. 269(1) provides that Parties shall not fail to effectively enforce *its* environmental laws. However, other provisions lack precision and only refer to general issues such as the obligation of parties to "taking effective measures to monitor and control fish and other aquatic resources" (art. 295). Low delegation (0), since no enforcement or dispute settlement mechanism is available other than the (non-binding) Consultation and reports from the Group of Experts (see art. 300 and 301).

FTA	Score	
CETA (2017)	2	Moderate obligation (1). CETA contains a mix of weak and stronger commitments. For example, art. 24.2 merely states that parties "recognise" that the environment is a fundamental pillar of sustainable development. However, some other articles are stronger and contain binding commitments (for example, art. 24.5(2) provides that a Party "shall not" waive or otherwise derogate from its environmental law to encourage trade). Also, art. 24.4(2) refers to reaffirming the commitments of the Parties to "effective implementation" of the MEAs to which they are parties). Moderate precision (1), because the Agreement to a large extent only refers to general environmental issues and obligations, without specifying an elaborated rule or setting detailed targets. However, art. 24.4(2) refers to all MEAs to which the signatory states are party and is thus precise in the action the state is expected to take. Low delegation (0), because under the environmental chapter of CETA, the parties have only recourse to Consultations (24.14) and a Panel (art. 24.15). The final report of the Panel is non-binding and parties only commit to "engage in discussions" on the findings in such a report (see art. 24.16(1)).

FTA	Score	
EU-Japan EPA (2018)	4	High on obligation (2). Art. 16.4(2) "reaffirms" the parties' commitment to effectively implement the MEAs to which they are parties (including the Paris Agreement, see art. 16.4(4)). The FTA contains various other, stronger commitments. For example, a number of detailed provisions on biological diversity contain binding commitments (for example, art. 16.6(2) provides that each party "shall" implement effective measures to combat illegal trade in endangered species). Moreover, pursuant to art. 16.8(2) each party "shall adopt and implement" their respective effective tools for combating illegal fishing. High on precision (2), because the FTA contains many detailed rules that unambiguously make clear what is expected from the state. For example, art. 16.8(2) refers to compliance with, inter alia, the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Also, this provision provides that parties take measures to achieve the objectives and principles of the Code of Conduct for Responsible Fisheries adopted by the Conference of the Food and Agriculture Organisation on 31 October 1995. Notably, the FTA also specifically refers to the effective implementation of the Paris Agreement (see art. 16.4(4)). Low on delegation, since art. 16.17 excludes the Environmental chapter from the scope of the formal dispute settlement mechanism under the FTA.

FTA	Score	
EU-Singapore FTA (2018)	4	High obligation (2). In contrast to previous EU FTAs, art. 12.6 of the EU-Singapore FTA contains a strong and binding reference to the implementation of MEAs to which the signatory states are party ("the parties shall effectively implement in their respective laws (…)"). However, it should be noted that with respect to the environmental UNFCCC and Kyoto Protocol, parties again merely "reaffirm" their commitment to reaching the ultimate objectives of these agreements. Moreover, the FTA contains several other strong commitments with a binding nature (for example, art. 18.8(a) provides that parties "undertake to comply" with long-term conservation measures and sustainable exploitation of fish stocks) High precision (2), because the FTA contains various references to specific agreements, rules or protocols that regulate certain issues in a detailed manner. For example, art. 18.8(a) provides that parties "undertake to comply with long-term conservation measures and sustainable exploitation of fish stocks as defined in the international instruments ratified by the respective Parties". Moreover, art. 12.8(d) provides that parties will "uphold the principles of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and respect the relevant provisions of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing". Furthermore, art. 12.6(3) explicitly mentions the UNFCCC and its Kyoto Protocol. Low delegation (0), because pursuant to art. 12.16(1), the environmental chapter is excluded from the general Dispute Settlement chapter of the FTA.

FTA	Score	
EU-Vietnam FTA	4	High on obligation (2). Although art. 13.5(2) only "reaffirms" the parties' commitment to effectively implement the MEAs to which they are parties and respect to the Kyoto Protocol and Paris agreement, the parties merely reaffirm their commitment to reaching "the ultimate objective" of the respective instruments, the FTA contains other more binding commitments. For example, art. 13.7 on biological diversity provides that parties "shall adopt and implement appropriate effective measures" which are consistent with its commitments under international treaties to which it is a party, leading to a reduction of illegal trade in wildlife. Moreover, art. 13.9 provides that each party "shall comply with long-term conservation and management measures". High on precision (2) because the FTA contains various references to specific agreements, rules or protocols that regulate certain issues in a detailed manner (including the Paris Agreement). For example, art. 13.9(2) provides that parties shall comply with long-term conservation and management measures and sustainable exploitation of marine living resources "as defined in the United Nations Convention on the Law of the Sea of 1982". Low on delegation (0), since art. 12.16(1) excludes the FTAs environmental chapter from the scope of the general dispute settlement mechanism.

FTA	Score	
EU-Mexico (draft) Agreement	4	High obligation (2). In contrast to all other EU FTAs, art. 5.1 contains a strong and binding reference to the implementation of the UNFCC and the Paris Agreement ("each party shall effectively implement the UNFCC and the Paris Agreement (…)"). Moreover, with respect to other MEAs to which the signatory states are party, art. 4(2) equally provide that the parties "shall effectively implement" these agreements. High precision (2), because the FTA refers to various specific agreements, rules or protocols that regulate certain issues in a detailed manner (including the Paris Agreement). For example. art. 8(3)(a) provides that each party shall "implement long-term conservation and management measures and sustainable exploitation of marine living recourses as defined in the main UN and FAO instruments relating to these issues" (notably, in footnote 2 of the FTA a detailed list is provided of agreements that are classified as "main UN and FAO instruments"). See also art. 8(3)(b), that provides that each party shall "act consistently with the principles of the UN Convention on the Law of the Sea of 1982" (and many other agreements relating to aquaculture) Low delegation (0), since art. 15 provides that "In case of a disagreement between the Parties regarding the interpretation or application of this Chapter, the Parties shall have recourse exclusively to the dispute resolution procedures established under Article 16 [consultation] and Article 17 [experts].

Annex 4: 15-point action plan for improvement in the implementation and enforcement of Trade and Sustainable Development chapters in EU FTAs

Working Together

- Partnering with Member States and the European Parliament
- Working with international organizations

Enabling civil society including the Social Partners to play their role in implementation

- Facilitate the monitoring role of civil society including the Social Partners
- Extend the scope for civil society, including the Social Partners, to the whole FTA
- Take action regarding responsible business conduct

Delivering

- Country priorities
- Assertive enforcement
- Encourage early ratification of core international agreements
- Reviewing the TSD implementation effectiveness
- Handbook for implementation
- Step up resources
- Climate action
- Trade and labour

Transparency and Communication

- More transparency and better communication
- Time-bound response to TSD submissions

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