



CISDL

Trading Our Way Out of the Climate Crisis?

Addressing Environmental Protection in the EU-
Mexico Global Agreement Renegotiation Process

2022



Trading Our Way Out of the Climate Crisis? Addressing Environmental Protection in the EU-Mexico Global Agreement Renegotiation Process

By Christian Delev

Edited by Marie-Claire Cordonier Segger & Markus Gehring

This project was made possible through the generous
support of the European Climate Foundation



Disclaimer

The views expressed in this publication are those of its authors and do not represent the views of the European Climate Foundation (ECF), the Centre for International Sustainable Development Law (CISDL), or any affiliated or partner institutions. CISDL makes no representation or warranty, express or implied, as to the accuracy or completeness of the information set forth in this report. ECF has not independently verified any of the information contained in the report and accepts no liability whatsoever for any of the information contained in the report, or for any misstatement or omission therein. This report remains the property of the CISDL.

Reproduction of this document in whole or in part and in any form for educational or non-profit purposes may be made without special permission from the copyright holders, provided acknowledgment of the source is made. The partners would appreciate receiving a copy of any publication or material that uses this document as a source.

Except where otherwise noted, this work is protected under a Creative Commons Attribution Non- commercial-No Derivative Works License.



About the Project

CISDL undertook a multi-year program of work exploring EU-Latin America FTAs and climate change in relation to leading trade and investment agreements and through creation of a regional community of practice to enhance legal capacity in both the EU and Latin American states, and more broadly. Expert workshop were conducted in September 2022 to discuss legal options in light of progressive practices found in regional and bilateral instruments.

Contact Information

Centre for International Sustainable
Development Law (CISDL) Chancellor Day
Hall, 3644 Peel Street
Montreal, Quebec H3A 1W9, Canada
Tel +1 818-685-9931 | Fax +1 514-398-4659
www.cisd.org

Trading Our Way Out of the Climate Crisis? Addressing Environmental Protection in the EU-Mexico Global Agreement Renegotiation Process

Christian Delev*

Executive Summary: The Global Agreement concluded between the European Union and Mexico is facing a renegotiation process. This legal brief considers the opportunity for enhancing its current environmental protection disciplines. It relies on the Parties' nationally determined contributions (NDCs) under the Paris Agreement to determine areas of shared concern. After discussing the existing treaty disciplines, the 2018 Agreement in Principle is evaluated and its environmental effects as modelled by LSE Consulting are summarised. Finally, proposals are made for adopting a broad range of disciplines under negotiation based on the Parties' NDCs. These include incorporating obligations from a broader range of multilateral environmental agreements, broader obligations to cooperate on environmental issues, trade liberalisation commitments and rules of origin easing for sustainable goods, and the extension of the binding dispute settlement system to cover the Trade and Sustainable Development Chapter.

1. Introduction

The relationship between international trade agreements and the protection of the environment is deeply entangled. Trade liberalisation has commonly been treated as a precondition for market-based strategies to mitigate climate change, which emphasise the efficient allocation of sustainable goods to consumers.¹ At the same time, and perhaps more starkly, unfettered free trade could often lead to market failures which put pressure on the environment by expediting the depletion of essential natural resources, erosion of delicate ecosystems, and harm experienced by environmentally vulnerable communities.² These tensions between trade and environmental protection-related policy objectives, particularly vis-à-vis climate change, are well-recognisable and form the obstacle course which trade negotiators must navigate across to satisfy their international environmental commitments.

This legal note considers the Global Agreement concluded between Mexico and the European Union (EU), as well as the on-going renegotiation of the trade pillar of the

* The author is a PhD researcher in international law at St Catharine's College, University of Cambridge, and Legal Research Fellow at the Centre for International Sustainable Development Law (CISDL). He is thankful for comments and feedback from Professor Javiera Caceres, Professor Bradly Condon, Dr Markus Gehring, María Florencia Sarmiento, and Marios Tokas on earlier versions.

¹ For instance, Ministerial Declaration (14 November 2001) WT/NIN(01)/DEC/1, paras 6, 31(iii). See discussion in J Bacchus, *Trade Links: New Rules for a New World* (CUP 2022) ch 7.

² L Bartels, 'Social Issues: Labour, Environment and Human Rights' in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (CUP 2009) 343–344 describing the “mutual supportiveness” of trade and social protection’ as ‘ambiguous at best’. See further C Fischer, ‘Does Trade Help or Hinder the Conservation of Natural Resources?’ (2010) 4(1) *Review of Environmental Economics and Policy* 103, 107–115; A Peeters, ‘Global Trade Impacts on Biodiversity and Ecosystem Services’ in S Jacobs, N Dendoncker and H Keune (eds), *Ecosystem Services: Global Issues, Local Practices* (Elsevier 2014) 196–209; S Dasgupta et al, ‘Environment During Growth: Accounting for Governance and Vulnerability’ (2006) 34(9) *World Development* 1597 on the importance of environmental governance in environmentally vulnerable communities.

agreement.³ It investigates to what extent the current Global Agreement and 2018 Agreement in Principle⁴ support nationally determined contributions (NDCs) made by Mexico and the EU under Article 4 Paris Agreement.⁵ The conclusion reached is clearly consequential as regards bilateral trade: the EU is the second largest export market for Mexican goods, and a majority of non-agricultural Mexican exports generally comprise industrial products and fossil fuels.⁶ Similarly, the EU is the third largest importer to Mexico, with EU products representing 10.4% of goods imports entering Mexico in 2020.⁷ More broadly, it should be noted that both EU and Mexican markets are intricately linked to global value chains, with the latter being ‘highly integrated’ within United States value chains owing to Mexico’s membership of the United States-Mexico-Canada Agreement (USMCA).⁸

The analysis is divided into three substantive sections. Section 2 reviews the NDCs of Mexico and the EU, identifying both their general environmental commitments and intended sector-specific mitigation measures where the renegotiated trade pillar of the Global Agreement is impactful. Section 3 focuses on how effectively the current Global Agreement and 2018 Agreement in Principle, respectively, contribute to the achievement of these objectives. This analysis is supplemented by a table comparing disciplines found in the Global Agreement and Agreement in Principle, with intended NDC mitigation measures available in Technical Annex A. Finally, Section 4 presents a brief set of proposals for advancing environmental protection objectives during the present treaty renegotiation process.

2. Mexican and EU Trade-Related Nationally Declared Contributions

Under Article 4 Paris Agreement, Parties are required to ‘prepare, communicate and maintain successive’ NDCs and ‘pursue domestic mitigation measures’ aimed at ‘achieving the objectives of such contributions’.⁹ While the legal form, bindingness, and interpretative function of NDCs remain disputed questions of international law, these instruments are nonetheless significant in framing Parties’ obligation to adopt mitigation measures and buttressed by the non-regression clause found in Article 4(3) Paris Agreement.¹⁰ At the very

³ Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [1997] OJ L 276/45 (Global Agreement).

⁴ For access to all segments of the Agreement in Principle, see European Commission, ‘New EU-Mexico agreement: The Agreement in Principle and its texts’ (26 April 2018) <trade.ec.europa.eu/doclib/press/index.cfm?id=1833> accessed 7 October 2022.

⁵ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) <unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 7 October 2022 (Paris Agreement).

⁶ WTO, ‘Mexico – Trade Profile’ <www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/MX_e.pdf> accessed 7 October 2022.

⁷ *ibid.*

⁸ S Cigna, V Gunnella and L Quaglietti, ‘Global Value Chains: Measurement, Trends and Drivers’ (European Central Bank Occasional Paper Series No 289, January 2022) 9 <www.ecb.europa.eu/pub/pdf/scpops/ecb.op289~95a0e7d24f.en.pdf> accessed 7 October 2022.

⁹ Article 4(2) Paris Agreement.

¹⁰ Various views have emerged in the literature on this question and a brief (albeit inexhaustive) survey is thus useful. JE Viñuales, ‘The Paris Climate Agreement: An Initial Examination (Part II of III)’ (*EJIL:Talk!*, 8 February 2016) <www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-ii-of-iii/> accessed 7 October 2022 has argued that NDCs may potentially qualify under international law as both binding unilateral acts and subsequent practice in the meaning of Article 31(3)(a) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15 (VCLT IO), which applies as customary international law to treaties between States and International Organizations. See similarly B Mayer, ‘International Law Obligations Arising in relation

least, they may be seen as interstitial norms setting essential policy objectives which Parties pursue through otherwise legally binding measures.¹¹

In Mexico's recent 2020 NDC update, it is stated that the Mexican 'unconditional contributions', i.e. commitments requiring no external assistance, are a 'reduction of 22% of greenhouse gas emissions (GHG) and 51% of black carbon emissions by 2030 as compared to the baseline business-as-usual scenario (BAU)'.¹² Moreover, its conditional contributions – 'which require the support of financial, technical and technological instruments, as well as capacity-building' – are 'a reduction of up to 36% of GHG emissions and 70% of black carbon emissions by 2030 compared to the BAU scenario'.¹³ Given that achieving the more ambitious latter range of commitments requires external cooperation, trade agreement renegotiations may create a potential mechanism for trading partners to collaborate and coordinate.

There are eight economic sectors identified in the Mexican NDC where mitigation measures are intended to be adopted. These are transport, power generation, the residential and commercial sector, oil and gas, industry, agriculture and livestock, waste, and land use, land-use change and forestry, respectively.¹⁴ Among the specific mitigation measures which the NDC identifies, the following five actions have the potential to be supported by norms established within the renegotiated Global Agreement: the promotion of clean and alternative transportation solutions, adapting to alternative energy sources and consumption practices, redesigning agricultural practices 'considering environmental and climatic variables', and adopting ecological restoration and net-zero deforestation programmes.¹⁵

At the same time, it should be noted that Mexico has recently adopted electricity sector reforms which seem to prioritise domestic energy production and constrain market access of foreign electricity providers, including for renewable energy.¹⁶ This reform has led to the initiation of consultations between the United States and Mexico concerning alleged USMCA breaches, including the duty to grant market access and the USMCA-incorporated Article III:4 GATT national treatment obligation.¹⁷

to Nationally Determined Contributions' (2018) 7(2) *Transnational Environmental Law* 251, 259–270 arguing that NDCs are legally binding instruments under international law. However, A Savaresi, 'The Paris Agreement: A Rejoinder' (*EJIL:Talk!*, 16 February 2016) <www.ejiltalk.org/the-paris-agreement-a-rejoinder/> accessed 7 October 2022 has cast doubt on whether NDCs could qualify as unilateral acts, while agreeing that there is an interpretative function of NDCs and classifying them as falling under Article 31(3)(b) VCLT IO. See also, for a more critical appraisal which contends that NDCs are not legally binding as a matter of international law, D Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2017) 110(2) *American Journal of International Law* 288, 304–307.

¹¹ This view may be compatible with conservative readings of NDCs, such as *In the Matter of Decisions Made under the Climate Change Response Act 2002 and Public Decisions Made in relation to the UNFCCC*, CIV 2015-485-919 [2017] NZHC 733, para 38.

On the concept and potential legal value of interstitial norms, see V Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 212–219.

¹² UNFCCC, 'Nationally Determined Contributions 2020 – Mexico' (30 December 2020) preface <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Mexico%20First/NDC-Eng-Dec30.pdf> accessed 7 October 2022.

¹³ *ibid.*

¹⁴ *ibid.*, 23–24.

¹⁵ *ibid.*, 23–26.

¹⁶ Articles 4(VI), 26, 101 and 108 Ley de la industria eléctrica (adopted 11 May 2022) <diputados.gob.mx/LeyesBiblio/pdf/LIElec.pdf> accessed 7 October 2022.

¹⁷ Office of the United States Trade Representative, 'Consultation Request' (20 July 2022) <ustr.gov/sites/default/files/US%20Cons%20Req%20Mexico%20energy_072022.pdf> accessed 7 October 2022.

The EU similarly adopts the target of ‘an at least 40% reduction in greenhouse gas emissions as compared to 1990 levels’ by 2030 in its updated 2020 NDC.¹⁸ According to a 2020 European Commission Communication, the ‘priority areas for reform and investments’ feature, inter alia, ‘decarbonisation of industry and renewable energy’, ‘sustainable mobility’, and ‘energy system integration including infrastructure, batteries and renewable hydrogen’.¹⁹ While neither the NDC nor Communication specify specific mitigating measures involving international cooperation with the exception of targeting emissions from aviation, economic sectors including energy, ‘industrial processes and product use’, agriculture, waste, as well as land use and forestry have been identified by the EU as ones in which mitigating measures are set to be developed and adopted.²⁰ These may serve as areas of overlap where the EU and Mexico may negotiate better alignment and scope for cooperation of their climate and trade commitments.

3. Environmental Protection Norms under the Global Agreement and 2018 Agreement in Principle

This section provides a brief analysis of how the existing Global Agreement and 2018 Agreement in Principle address issues of environmental protection. It further considers the effects of the Agreement in Principle in supporting the adoption of mitigation measures by Mexico and the EU in accordance with their NDCs. Technical Annex A further provides a table comparing disciplines adopted in each instrument which may supplement intended Mexican and EU mitigation measures in focal economic sectors.

3.1 Environmental Protection Norms under the Global Agreement

The existing Global Agreement contains sparse text and disciplines on environmental protection. With the chief exceptions of its preambular reference to ‘the proper implementation of the principle of sustainable development, as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development’ and obligations to cooperate on tourism, energy, as well as natural resources and the environment,²¹ the agreement left essential disciplines – including the scope of treaty exceptions – to be subsequently negotiated within the Joint Council.²² The adopted text of the general exception appears to have eventually been modelled on the text of Article XX General Agreement on Tariffs and Trade (GATT).²³

¹⁸ UNFCCC, ‘The Update of the Nationally Determined Contribution of the European Union and its Member States’ (UNFCCC, 17 December 2020) 5, at para 25 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/EU_NDC_Submission_December%202020.pdf> accessed 7 October 2022 (EU NDC). See, for general breakdown, European Commission, ‘An EU-wide Assessment of National Energy and Climate Plans: Driving Forward the Green Transition and Promoting Economic Recovery through Integrated Energy and Climate Planning’ [2020] COM(2020) 564 final (Commission Communication).

¹⁹ Commission Communication (n 18).

²⁰ EU NDC (n 18) 9.

²¹ Preamble and Articles 23, 25(1) and 34 Global Agreement.

²² Articles 5(k) and 6 Global Agreement.

²³ Article 22(b) and (f) Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 [2000] OJ L157/10 modelled on General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT).

3.2 Environmental Protection Norms in the Agreement in Principle

By contrast to the overwhelming focus on political collaboration under the current Global Agreement, the Agreement in Principle emerged as an attempt to modernise the agreement in view of the parties' changing priorities.²⁴ With respect to environmental protection, the most notable development is the introduction of a specific Trade and Sustainable Development (TSD) chapter.²⁵ Further scope for allowing the Parties to regulate trade and cooperate on renewable energy is established through the General Exceptions and Energy and Raw Materials (ERM) chapters, respectively.²⁶

The TSD chapter contains a wide range of rights and obligations, which seem to build on level-playing-field obligations found within other EU-negotiated trade agreements.²⁷ The specific norms adopted could broadly be categorised as comprising i) reaffirmation of the right to regulate, ii) obligations to comply with and cooperate in implementing relevant multilateral environmental treaties, including the Paris Agreement and United Nations Framework Convention on Climate Change, iii) obligations to encourage and promote sustainable trade and domestic production processes, and iv) obligations to promote best practices in the public and private sectors (including through corporate social responsibility).

To a large extent, the TSD chapter serves three core normative functions: i) accumulating and facilitating existing international legal norms, ii) establishing additional *fora* to ensure compliance and cooperation, and iii) ensuring the harmonious interpretation of the treaty with international obligations. These functions are supplemented by a non-binding dispute settlement mechanism for enforcing obligations under the TSD chapter.

The first function is a strictly normative one, whereby the chapter repeats existing legal obligations mainly found within environmental treaties and creates various supplementary obligations for the Parties to cooperate or promote the achievement of specific objectives.²⁸ Interestingly, one such norm which is repeated from the *same* treaty is the right to regulate found in Article 2, TSD chapter. Seemingly drawing on the Appellate Body approach of equating the right to regulate trade with the applicability general exception

²⁴ Secretaría de Economía, 'Visita del Secretario de Economía a Bruselas, Bélgica' <www.sice.oas.org/tpd/mex_eu/Modernization_process/MEX_EU_upgrade_s.pdf> accessed 7 October 2022 referring to the need to adopt the Global Agreement to the new economic reality ('la nueva realidad económica internacional'). See also G Grieger, 'Modernisation of the trade pillar of the EU–Mexico Global Agreement' (European Parliamentary Research Service PE 608.680, October 2020) <[www.europarl.europa.eu/RegData/etudes/BRIE/2017/608680/EPRS_BRI\(2017\)608680_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608680/EPRS_BRI(2017)608680_EN.pdf)> accessed 7 October 2022.

²⁵ European Commission, 'Trade and Sustainable Development' <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156822.pdf> accessed 7 October 2022 (TSD Chapter).

²⁶ Articles 10 and 11 European Commission, 'Energy and Raw Materials' <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156800.pdf> accessed 7 October 2022 (ERM Chapter); and Article XX European Commission, 'EU-Mexico Free Trade Agreement – Exceptions' <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156830.pdf> accessed 7 October 2022.

²⁷ For a review of level-playing-field obligations within international trade agreements concluded by the EU, see M Gillis, 'Let's Play?: An Examination of the 'Level Playing Field' in EU Free Trade Agreements' (2021) 55(5) *JWT* 715, 723–732.

²⁸ Norm accumulation refers to circumstances where norms are either 'confirm[ed]' or where complementing 'rights and obligations' are created: see J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 161–162. In the context of the renegotiated Global Agreement, this may signal – or perhaps reframe as establishing a 'level playing field' – environmental obligations as setting a minimum level of environmental protection which Parties must attain. See, on the purposes of level playing field language, *ibid*, 717–723.

provisions in *China – Audiovisual Products*,²⁹ here the framing of the right largely builds on the *mutatis mutandis* incorporation of Article XX GATT in the Exceptions chapter of the Global Agreement.³⁰ Similarly, the related ‘right of each Party to determine its sustainable development policies and priorities’ reflects the well-established conclusion within Appellate Body and panel jurisprudence that WTO Members maintain the right to set their own level of protection of non-trade values covered under general exceptions subject to a general non-regression obligation per Article 2(5).³¹ It is unclear, however, in what circumstances a violation of the non-regression obligation would be able to qualify as being done ‘in order to encourage trade or investment’.³²

These incorporated norms are accordingly facilitated through obligations to cooperate, effectively implement treaty obligations, and promote best practices. The most notable areas where such obligations apply to are multilateral environmental agreements, climate change (including the Paris Agreement under Article 5(2)(a)), biological diversity, the sustainable management of forests, fisheries management, and supply chains.³³ Moreover, Article 9 ‘recognise[s] the ‘importance’ of supply chain management based on ‘responsible business conduct and corporate social responsibility’.³⁴

Second, the express incorporation of norms from other treaties may serve an important function for interpreting the Agreement in Principle as such. As a question of treaty interpretation, it should be noted that the ‘presumption of harmony’ between different sources of international law is a rebuttable one.³⁵ Under Article 31(3)(c) VCLT IO, interpreting in line with the principle of systemic integration is available in limited circumstances in which certain international environmental law norms are relevant for interpreting an international trade agreement. This requires considering various factors, such as the relevance of the international environmental norm, whether it is a ‘rule’ for the purposes of international law, and which States are bound by it.³⁶ By contrast, an express textual incorporation is significant

²⁹ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted 2010) WT/DS363/AB/R, paras 214–229 concerning the meaning of the phrase ‘right to regulate trade in a manner consistent with the WTO Agreement’ found in Protocol on the Accession of the People’s Republic of China (23 November 2001) WT/L/432, para 5.1. The Appellate Body ultimately equated this right to the application of Article XX GATT based on reasoning by analogy (para 229).

³⁰ Article XX(1) European Commission, ‘EU-Mexico Free Trade Agreement – Exceptions’ <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156830.pdf> accessed 7 October 2022. Bartels (n 2) 369–370 notably differentiates such conditional exceptions from the more ‘intrusive’ proportionality test found under European Union law *vis-à-vis* free movement of goods.

³¹ See, for instance, Appellate Body Report, *Korea – Various Measures on Beef* (adopted 10 January 2001) WT/DS161/AB/R; WT/DS169/AB/R, paras 176–178; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (adopted 17 December 2007) WT/DS332/AB/R, para 210 (‘the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context.’). Notably, see discussion in DH Regan, ‘The meaning of ‘necessary’ in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing’ (2007) 6(3) WTR 347.

³² For existing jurisprudence on the area of trade and labor rights when such a determination was required, see Arbitral Panel, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (14 June 2017) Final Report para 594 emphasising actual trade effects; avoiding the need for establishing such a link, see Panel of Experts Report, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement* (20 January 2021), paras 61–68.

³³ Articles 4(4), 5(2)(c), 6(2), 7(2), 8(2)(g)-(i) and 9(4) TSD Chapter (n 25).

³⁴ Article 9 (1) TSD Chapter (n 25).

³⁵ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682, para 32.

³⁶ Article 31(3)(c) VCLT IO expressly refers to ‘any relevant rules of international law applicable in the relations between the parties’. The views on what this entails are, however, varied and conflicting. Compare, for instance,

as this forms part of the text and context of the incorporating treaty, and treaty interpreters may more easily justify taking account of it. This latter point is summarised by Merkouris as follows:³⁷

When rules have been incorporated, they are exactly that part of the *corpus* of the treaty being interpreted. They do not help in interpreting the text. *They are the text.* (original emphasis)

Third, the TSD chapter provides for a mechanism for solving disputes, including *vis-à-vis* level-playing-field disciplines. Should the Parties disagree on ‘the interpretation or application of’ the TSD chapter, then they may resolve their dispute through largely non-judicial dispute settlement mechanisms when there is political will to do so.³⁸ These include relying on consultation procedures in pursuit of a ‘mutually satisfactory resolution’³⁹ (Article 16) and receiving non-binding findings and recommendations from a panel of experts (Article 17). As Article 15 specifies, these procedures are set to be applied ‘exclusively’ and to operate as a carve-out from the intended Agreement in Principle dispute settlement chapter.⁴⁰ Such an approach is common within trade agreements concluded by the EU and differs from the USMCA model, which typically requires adverse effects on trade or investment for recourse to dispute settlement to be available.⁴¹ One consequence is that this model of dispute settlement does not result in legally binding obligations to comply or any scope for retaliation.

Finally, it is important to underline that outside of the TSD chapter, the Trade in Goods (TG), Cross-Border Trade in Services (CBTS), and ERM chapters provide protections for the import, production, and export of sustainable goods and services. In addition to the elimination of customs duties (Article X.3), the Trade in Goods chapter incorporates *mutatis mutandis* the prohibition on quantitative restrictions under Article XI GATT through Article X.8 TG chapter, as well as the national treatment obligation under Article III GATT through Article X.2 TG chapter.⁴² The CBTS chapter similarly restricts quantitative restrictions on service suppliers, service transactions, and service operations under Article 4.⁴³ Article 6 further creates an obligation ‘treatment no less favourable than that it accords, in like situations, to its own services and service suppliers’ to be provided by both the State and the

U Linderfalk, *On the Interpretation of Treaties* (Springer 2001) 177–192 and P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill/ Nijhoff 2015) ch 1.

³⁷ Merkouris (n 36) 69.

³⁸ Article 15 TSD Chapter (n 25).

³⁹ Article 16(2).

⁴⁰ Article 15.

⁴¹ 24.4(1) United States–Mexico–Canada Trade Agreement (signed 13 March 2020, entered into force 1 July 2020) <ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 7 October 2022. See also Article 1 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (concluded 4 February 2016, entered into force 30 December 2018) <www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents> accessed 7 October 2022 incorporating Article 20.23 Trans-Pacific Partnership Agreement (concluded 5 October 2015, not in force) <www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents> accessed 7 October 2022.

⁴² Articles X.2 and X.8 European Commission, ‘Chapter on Trade in Goods’ <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a68b6b8f-c509-448a-9453-7575a4d4f59d/details> accessed 7 October 2022.

⁴³ Article 4 European Commission, ‘Cross-Border Trade in Services’ <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/0a1fec82-0eda-4c6e-879e-83d31fcad47c/details> accessed 7 October 2022 (Cross-Border Services Chapter).

regional level of government.⁴⁴ Finally, the ERM chapter establishes access to the exploration and production of energy goods, as well as to energy transport infrastructure with conditional scope for derogations.⁴⁵

3.3 Environmental Effects of the Agreement in Principle

The practical implications of implementing trade liberalisation commitments envisioned in the Agreement in Principle alongside TSD disciplines have been evaluated through impact assessments. Notably, the extensive 2019 LSE Consulting-authored Sustainability Impact Assessment (SIA) report – which had been prepared for the European Commission – adopts a baseline change modelling using mixed methods.⁴⁶ The report clarifies that the disciplines are expected to have ‘low’ effects, ‘in particular for the EU’.⁴⁷ The TSD chapter is expected to positively affect the agriculture and agri-food, chemical and industrial production, as well as land and other transportation sectors for both Mexico and the EU.⁴⁸ However, the water transportation sector in Mexico is projected to experience negative externalities compared to the baseline.⁴⁹

At the same time, the SIA specifies that the Agreement in Principle more broadly is expected to have ‘negative/minor’ impact on the enforcement of the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement due to increased greenhouse gas emission projections from the energy sector, agriculture, and mining sectors.⁵⁰ A similar conclusion is reached concerning compliance with the Rotterdam and Stockholm Conventions owing to a projected increase in the use of EU-originating fertilizers and pesticides in Mexico, which are expected to ‘undermin[e] efforts to protect human health and the environment’ in Mexico.⁵¹ The significance of these conclusions seems to be accepted in a Commission position paper on the SIA, which ‘largely agree[s]’ with the analysis even though it subsequently claims that ‘the modernised Agreement’s provisions on TSD and on energy efficiency and sustainable energy could help mitigate any potential negative environmental effects’ without specifically challenging any of the concerns raised in the SIA.⁵²

There are two important points of clarification when reviewing the conclusions reached by the SIA. First, the SIA does not directly specify to what extent the Mexican and EU NDCs are relevant instruments which informed the technical analyses and recommendations. Rather, the report only notes that ‘they will undoubtedly have trade impacts once they enter into force’.⁵³ Second, assuming that the technical analysis took the then-intended NDCs into

⁴⁴ Article 6 Cross-Border Services Chapter.

⁴⁵ Articles 6 and 7 ERM Chapter (n 26).

⁴⁶ For the utility of SIAs as tools for measuring the socio-economic effects of international trade agreements, see discussion in M-C Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena’s Treaties* (OUP 2021) 34–36.

⁴⁷ LSE Consulting, ‘Sustainability Impact Assessment (SIA) in Support of the Negotiations for the Modernisation of the Trade Part of the Global Agreement with Mexico’ (European Commission, August 2019) 119 <trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158558.pdf> accessed 7 October 2022 (EU-Mexico SIA).

⁴⁸ *ibid*, 119–120.

⁴⁹ *ibid*, 119.

⁵⁰ *ibid*, 128–129.

⁵¹ *ibid*, 129.

⁵² European Commission, ‘European Commission Services’ Position Paper on the Sustainability Impact Assessment in Support of Negotiations for the Modernisation of the Trade Part of the Global Agreement with Mexico’ January 2020, 13 <trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158559.pdf> accessed 7 October 2022.

⁵³ EU-Mexico SIA (n 47) 158.

account, the SIA was concluded in 2019 and does not reflect the more ambitious legal and political commitments adopted by both Mexico and the EU prior to and during the 2021 Glasgow Conference of the Parties to the United Nations Framework Convention on Climate Change.

4. The Next Steps in Achieving NDC Compliance⁵⁴

Having highlighted existing concerns over how effective the TSD chapter of the Agreement in Principle is in supporting compliance with the Parties' NDCs, this section considers available policy alternatives which may supplement domestic mitigation measures adopted by Mexico and the EU. This section adopts a catch-all approach to examining the available disciplines and clarifications which the Parties may consider adopting, which is achieved by considering a wide range of available disciplines based particularly on previous treaty practices by the Parties. Even though the treaty negotiations presently appear to be at an advanced stage, there is scope for adapting disciplines prior to treaty adaption and through legal scrubbing. While it exceeds the scope of this study, the choice and design of specific disciplines must comply with WTO law, including the conditions established in relevant exception provisions.⁵⁵ The specific set of NDC-specific proposals is available in Table 1. In implementing these proposals, it is crucial to ensure that there is consistency within the different language versions of the adopted text.⁵⁶

In brief, the proposals aim to achieve increased cooperation between the Parties and incorporate specific disciplines on the protection of essential environmental interests. In restricting the negative externalities occurring from trade liberalisation, the proposals support the inclusion of specific clarifications on the scope of general exceptions, as well as the creation of specific exceptions, such as for the protection of the environmental rights of indigenous peoples.

Second, the proposals refer to the inclusion of obligations to cooperate and share information on a broader range of environmental subjects. Such mechanisms could be supplemented by enhanced level-playing-field obligations on air quality and ozone layer protection. Obligations to promote technology transfer could similarly be included.⁵⁷

Third, a set of proposals are made to incentivise trade in sustainable goods in the Market Access and Trade and Sustainable Development chapters of the agreement. The recommendations include restricting trade liberalisation for certain forest products, as well

⁵⁴ The proposals are based on C Delev and M Gehring, 'European Union Trade Agreement Negotiations with Latin American States: Next Steps in the Climate, Sustainable Development and Trade Agenda' (CISDL). The source is available on file with the author.

⁵⁵ See, notably, Articles XX and XXIV GATT and Articles V and XIV General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187. For discussion of broader available disciplines, see for instance C Delev, 'Straining the Spaghetti Bowl: Re-Evaluating the Regulation of Preferential Rules of Origin' (2022) 25(1) JIEL 25 concerning rules of origin. For intellectual property, see H Grosse Ruse-Khan, 'From TRIPS to FTAs and Back: Re-Conceptualising the Role of a Multilateral IP Framework in a TRIPS-Plus World' (2017) 48 NYIL 57.

⁵⁶ For potential impact of language discrepancies on treaty interpretation, see BJ Condon, 'Lost in Translation: Plurilingual Interpretation of WTO Law' (2010) 1(1) JIDS 191, 206–215; BJ Condon, 'The Concordance of Multilingual Legal Texts at the WTO' (2012) 33(2) Journal of Multilingual and Multicultural Development 525.

⁵⁷ Such provisions already exist in Articles 135(2)(g) and 142 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJL 289/3. For an overview of regional trade agreement practices, see I Martínez-Zarzoso and S Chelala, 'Trade Agreements and International Technology Transfer' (2021) 157 Review of World Economics 631.

as increasing liberalisation and adjusting preferential rules of origin *vis-à-vis* energy-efficient vehicles and sustainable goods. Moreover, it is suggested that sustainable transport services should be liberalised.

Finally, to promote the achievement of both Parties’ obligations, it is recommended for the TSD chapter to fall within the scope of dispute settlement procedures. While the availability of non-binding recommendations from panels of experts may be influential and put pressure on Parties to comply with their obligations, this could enhance the significance of environmental obligations and treat them as equivalent to all other norms within the modernised treaty.⁵⁸ Such a recommendation is consistent with the EU policy shift toward ‘binding’ obligations on sustainable development.⁵⁹

Table 1. Environmental Priorities and Possible Trade Renegotiation Initiatives	
Key Mitigation Measures for Achieving Nationally Declared Commitments	Possible Trade Agreement Disciplines
1. Promoting Clean and Alternative Transportation Solutions	<ul style="list-style-type: none"> - Obligations to cooperate on clean domestic and international transport strategies. - Liberalising sustainable transport services. - Creating flexible preferential rules of origin for energy-efficient vehicles in the Rules of Origin chapter. - Establishing broader general exceptions for achieving environmental commitments.
2. Adapting to Alternative Energy Sources and Consumption Practices	<ul style="list-style-type: none"> - Obligations to cooperate on and promote the transition to clean energy. - Including environmental commitments to achieving clean energy objectives. - Preferential treatment and greater market access obligations for trade in clean energy and clean energy-reliant technology. - Dedicated renewable energy chapter. - Establishing general exceptions for achieving international environmental commitments.

⁵⁸ The significance of recommendations from panels of experts should not be underestimated despite their non-binding nature. This is because they operate as a legitimate form of dispute settlement and, more generally, may contribute to the interpretation of *pari materia* treaty interpretation. See, for instance, Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement (20 January 2021) Report of the Panel of Experts, <trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf> accessed 7 October 2022, which highlighted the need for South Korea to adopt reforms to satisfy labour level-playing-field obligations under its agreement with the EU while contributing to the understanding of such obligations more generally.

⁵⁹ European Commission, ‘Trade Policy Review – An Open, Sustainable and Assertive Trade Policy’ (2021) COM(2021) 66 final, 14 <trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf> accessed 7 October 2022.

	<ul style="list-style-type: none"> - Establishing mechanisms promoting corporate social responsibility (see Article 24.14 USMCA).
3. Redesigning Agricultural Practices considering Environmental and Climatic Variables	<ul style="list-style-type: none"> - Cooperation commitments on agricultural practices, common standards on agricultural production, and agricultural technology transfer. - Commitment to reducing GHG emissions from agriculture. - Include reference to the 1978 revision of the International Convention for the Protection of New Varieties of Plants to protect farmers' user rights.
4. Adopting Ecological Restoration Programmes	<ul style="list-style-type: none"> - Cooperation commitments on environmental restoration. - Establishing general exceptions for achieving international environmental commitments. - Establishing exceptions for the protection of indigenous communities' rights (see, for instance, Article 32.5 USMCA).
5. Adopting Net-Zero Deforestation Programmes	<ul style="list-style-type: none"> - Establishing additional cooperation commitments on forestry management. - Exclusion of certain forest products from trade liberalisation or enhanced trade in sustainable forestry. - Broader general exceptions for achieving international environmental obligations. - Adopting level-playing-field obligations concerning air quality and the protection of the ozone layer (see Articles 24.9 and 24.11 USMCA). - Adopting information sharing commitments to tackle illegal logging (see Article 24.25(3) USMCA). - Allowing the TSD chapter to fall under the scope of regular dispute settlement procedures and involving panellists with expertise in environmental law (see Article 31.8(3) USMCA).

Technical Annex A

Environmental Protection Disciplines in the Existing EU-Mexico Global Agreement and 2018 Agreement in Principle		
Key Nationally Declared Commitments	Current EU-Mexico Agreement Disciplines	2018 Agreement in Principle
1. Promoting Clean and Alternative Transportation Solutions	<ul style="list-style-type: none"> - Article 24 on cooperation in transport. - Article 27(2), Decision 2/2001 of the EU-Mexico Joint Council creating a general exception for measures 'necessary to protect human, animal or plant life or health' (para b). 	<ul style="list-style-type: none"> - Article 3(1)(c) Cross-Border Trade in Services Chapter includes transport services in services liberalisation commitments. - International Maritime Transport Services Chapter establishes wider obligations to ensure maritime suppliers' market access.
2. Adapting to Alternative Energy Sources and Consumption Practices	Article 23 on cooperation in energy.	<ul style="list-style-type: none"> - Article 1(2) Energy and Raw Materials Chapter confirms the 'right to adopt, maintain and enforce measures necessary to pursue legitimate public policy objectives, such as [...] the environment'. - Article 11(h) Energy and Raw Materials Chapter creates an obligation to cooperate to 'promote internationally high standards of safety and environmental protection'.
3. Redesigning Agricultural Practices considering Environmental and Climatic Variables	Article 21 on cooperation in agriculture and the rural sector.	Articles X.18 and X.21 Chapter on Trade in Goods concerning cooperation on agriculture
4. Adopting Ecological Restoration Programmes	N/A	Article 13(k) and (p) Trade and Sustainable Development Chapter on promotion of restoration of ecosystems and the marine environment

<p>5. Adopting Net-Zero Deforestation Programmes</p>	<p>Article 27(2), Decision 2/2001 of the EU-Mexico Joint Council creating a general exception for measures 'necessary to protect human, animal or plant life or health' (para b).</p>	<ul style="list-style-type: none"> - Article 7(2)(b) on the duty to promote trade in forest products not giving rise to deforestation or forest degradation. - Article 13(o) on the promotion of conservation and sustainable management of forests with a view to halting deforestation and illegal logging.
------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



CISDL

Contact Information
Centre for International
Sustainable Development
Law (CISDL)

Chancellor Day Hall, 3644
Peel Street

Montreal, Quebec H3A
1W9, Canada

Tel +1 818-685-9931

Fax +1 514-398-4659

www.cisd.org