CHAPTER 11

NAFTA and the Environment: Decades of Measured Progress

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Introduction

The conclusion of the North American Free Trade Agreement (NAFTA) in 1992 marked a decisive turning point in how preferential trade agreements (PTAs) address environmental protection. Along with its environmental side agreement, formally called the North American Agreement

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on Environmental Cooperation (NAAEC), NAFTA created 46 new environmental provisions that were never included in any PTA beforehand (Morin et al. 2017). Many of these provisions, including, for instance, on the inappropriateness to relax environmental measures to encourage investment, or on the enforcement of domestic environmental laws, became templates for dozens of later PTAs (see Jinnah and Morin 2020).

Interestingly, despite the Trump administration's numerous rollbacks on US environmental policy,[1] the United States–Mexico–Canada Agreement (USMCA) includes far more environmental provisions than its predecessor. The United States Trade Representative (USTR) even asserts that NAFTA parties "have agreed to the most advanced, most comprehensive, highest-standard chapter on the Environment of any trade agreement" (USTR 2018) and regards the USMCA in general as "a new paradigm for future agreements" (USTR 2019, p. 11).

This chapter extends existing analyses of the USMCA's environmental provisions (e.g., Tienhaara 2019; Vaughan 2018) by investigating how these provisions compare with those included in NAFTA[2] and with the renegotiating objectives of the three parties. It argues that the provisions that the USMCA eliminated from NAFTA are equally, if not more, interesting from an environmental governance perspective than those it added. Nevertheless, the agreement mainly replicates environmental provisions that were already included in previous PTAs, especially in the Trans-Pacific Partnership (TPP), and still falls short in some areas, most notably a lack of climate provisions.

The chapter is organized as follows. Using the Trade and Environment Database (Morin et al. 2018), the first section presents the three NAFTA parties' renegotiation objectives as they relate to the environment and discusses how each country approaches environmental governance within its trade agreements. The second section provides a detailed comparison of the environmental provisions within NAFTA and the USMCA to explain how the agreements differ. The third section examines two contested NAFTA measures that were jettisoned from the USMCA. Finally, the conclusion briefly summarizes our findings and highlights some of the USMCA's missed opportunities.

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Comparative Negotiating Objectives on the Environment

States define environmental negotiating objectives for their trade agreements in various ways. In the US case, these negotiating objectives are highly specific, reflecting concrete legal requirements that the President must include specific environmental provisions within a trade agreement in order to avoid Congressional amendment or filibuster. In particular, the President is bound by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015), which is the current basis for Trade Promotion Authority, colloquially referred to as "fast-track authority," under which NAFTA was renegotiated. Trade Promotion Authority requires, for example, that the US includes, within its negotiating objectives, environmental provisions related to eliminating fisheries subsidies; addressing illegal, unreported, and unregulated fishing; and requiring trading partners to implement their obligations under seven listed multilateral environmental agreements (MEAs). It is not surprising, therefore, that the USMCA's environmental provisions are largely consistent with previous US PTAs, which were also negotiated under "fast-track authority."[3]

Reflective of the well-documented practice of replicating or "boilerplating" of environmental provisions in trade agreements over time (Allee and Elsig 2019; Jinnah and Lindsay 2016; Jo and Namgung 2012; Morin et al. 2017), some of the US negotiating objectives for the USMCA echo provisions included in NAFTA's environmental side agreement (USTR 2017). These include provisions preventing NAFTA parties from derogating from enforcing their environmental regulations in order to attract investment; establishing means for stakeholder participation; and ensuring there are adequate procedures for enforcing environmental laws (see Charnovitz 1994). While US environmental provisions were previously only related to the environment in general, the United States has recently adopted the use of sectoral provisions as well, which address specific environmental issue areas, such as fisheries, forests, and endangered species (Morin and Rochette 2017). Additionally, it is now standard practice in US agreements to subject the environmental provisions to the agreement's dispute settlement mechanism (Jinnah 2011).[4]

In contrast to the United States, where negotiation objectives are defined by TPA-2015, Canada has a parliamentary system that provides the executive branch with full control over trade negotiations. As such, we

must rely on public speeches to identify Canada's negotiating objectives. As outlined in a 2017 speech by the Foreign Affairs Minister, the Trudeau government championed a "progressive" trade agenda that would address indigenous rights, gender equality, strong labor standards, enhanced environmental provisions, and the right of the government to regulate in the public interest. Importantly, with regard to the environment, Canada's objective was to integrate "enhanced environmental provisions to ensure no NAFTA country weakens environmental protection to attract investment, for example, and that fully supports efforts to address climate change" (Global Affairs Canada 2017).

Canada's approach to including environmental provisions in its trade agreements is similar to that of the US. All but two of Canada's post-NAFTA trade agreements include significant numbers of environmental provisions, although these agreements include slightly fewer provisions on specific issue areas (see Fig. 11.1). Prior to 2016, Canada, like the US, took a more general approach to environmental provisions. However, recent Canadian agreements have also included large numbers of sectoral provisions that address specific issue areas, such as monitoring of genetically modified organisms and protection of migratory species. Moreover, Canada has only very recently (since 2016) begun to subject its environmental provisions to the agreement's dispute settlement mechanism, which would allow for use of sanctions in the case of non-compliance.[5]

Finally, the best public articulation of Mexico's renegotiation priorities for NAFTA is found in an August 2017 article by the Ministry of

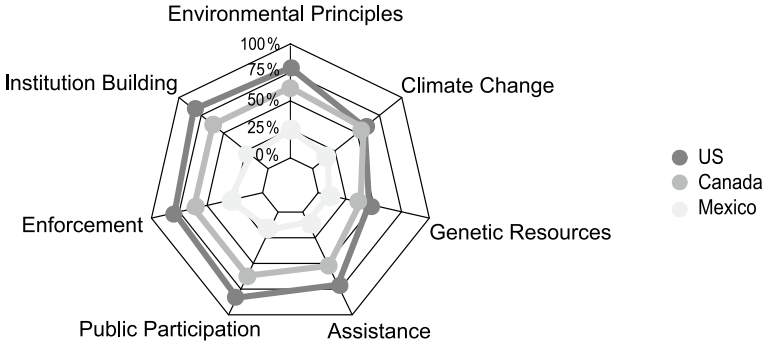

Fig. 11.1 Percentage of USMCA parties' PTAs that include specific environmental provisions

Economy. Mexico's priorities were grouped into four themes: strengthen the competitiveness of North America; move toward inclusive and responsible trade; take advantage of twenty-first century opportunities; and promote the certainty of trade and investment (Secretaría de Economía 2017). Specific references to the environment were sparse, but Mexico aimed to strengthen cooperation and dialogue on trade and environment issues. An additional priority was to take advantage of opportunities for private investment in its recently liberalized oil, gas, petrochemicals, and electricity sectors (Oxford Business Group, n.d.).

In contrast to the US and Canada, Mexico has been far less consistent with including environmental provisions in its trade agreements. NAFTA, the USMCA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[6] stand out as the only agreements Mexico is party to that include significant numbers of environmental provisions. Otherwise, while most of Mexico's agreements concluded after NAFTA include provisions related to environmental exceptions, few additional environmental provisions are included. Outside of NAFTA, the USMCA, and CPTPP, provisions on specific environmental issues are scarce in Mexico's PTAs (see Fig. 11.1). Additionally, Mexico lacks an overall approach to compliance; apart from the USMCA, CPTPP, and NAFTA, Mexico's agreements generally do not have compliance mechanisms for environmental provisions, except for a few agreements negotiated in the 1990s that provide for an intergovernmental committee.

Comparing NAFTA and the USMCA's Environmental Provisions

NAFTA's and the USMCA's environmental provisions are similar in many respects. The USMCA maintains 75% of the environmental provisions originally included in NAFTA (see Table 11.1). This is not surprising given that, as mentioned above, most US negotiating objectives for the USMCA mirror provisions already included in NAFTA. In addition to comparable provisions on regulatory sovereignty, enforcement of domestic environmental laws, and public participation, the USMCA and NAFTA share the same approach to environmental cooperation. For example, they both encourage trade in environmental goods, the exchange of scientific information related to the environment, joint studies, and the harmonization of environmental measures. They also include similar environmental exceptions to trade in goods, services,

Table 11.1 List of NAFTA's environmental provisions

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Preamble refers to the environment	■	
Prevention principle		
Sovereignty over resources	■	■
Sovereignty in determining level of environmental protection according to state priorities	■	
Sovereignty in the enforcement of environmental measures	■	■
No extraterritorial enforcement activities	■	■
No right of action under a party's domestic law		
Recognition of a development gap or of different capabilities	■	
Inappropriate to encourage investment by relaxing environmental measures	■	
Maintain existing level of environmental protection	■	■
States should provide for high levels of environmental protection	■	■
States should enhance, strengthen, or improve levels of environmental protection	■	
Definition of environmental laws	■	■
Scientific knowledge when conducting environmental risk assessment		
Public participation in the adoption of environmental measures	■	■

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Publication of environmental laws, regulations, and administrative rulings	■	■
Commitment to monitor the state of the environment		
Requirement to conduct environmental assessment	■	■
Commitment to strengthen state's own capacities in environmental research and science		
Coherence between the environment and economic activities or development	■	
Coherence between the environment and domestic trade and/or investment policies	■	■
Commitment to enforce domestic environmental measures	■	
Specific governmental action for enforcement of environmental measures		
Private access to remedies, procedural guarantees, and appropriate sanctions	■	■
Commitment to consider alleged violation brought by a citizen	■	■
Factual report on enforcement of domestic environmental measures	■	■
Education or public awareness on environmental matters	■	■
Promotion of voluntary measures	■	■

(continued)

Table 11.1 (continued)

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Economic instruments	■	■
Joint scientific research		
Specific means to conduct scientific cooperation on environmental matters	■	■
Joint environmental assessment and study or monitoring of environmental concerns	■	■
Specific means to exchange information on environmental matters	■	■
Provision of information when taking measures to protect the environment	■	
Communication between customs authorities on offenses related to environmental protection	■	■
Harmonization of environmental measures	■	
Harmonization of non-environmental measures not to be used as an obstacle to environmental protection		
Prohibit the export to the other party of environmentally harmful goods whose use or import is prohibited within that party's territory		
General exceptions for trade in goods: life (or health) of animal and/or plant	■	
General exceptions for trade in goods: conservation of natural resources	■	

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Right to prepare, elaborate, adopt, or apply TBT measures related to the environment	■	
Right to derogate from the regular adoption procedure of a TBT measure in case of emergency	■	
General exception for investment	■	
Specific exception for establishment	■	
Specific exception for performance requirements		
Exclusion of environmentally harmful inventions from patentability	■	
General exception for procurement	■	
General exceptions for trade in services: life (or health) of animal and/or plant	■	
Other environmental restrictions related to a specific sector of services	■	
SPS measures and the environment	■	
Technical assistance, training, or capacity-building provided to another party	■	■
Emergency assistance in case of natural disaster		
Other norms on disasters	■	■
Seas and oceans	■	■
Management of transboundary waterways	■	■

(continued)

Table 11.1 (continued)

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Endangered species and their illegal trade	■	■
Invasive or alien species	■	■
Protected areas, parks, and natural reserves	■	■
Air pollution	■	■
Environmental standards on vehicles	■	
Hazardous waste	■	
Pesticides, fertilizers, toxic, or hazardous products and chemicals	■	
Contact point on environmental matters	■	
Commitment to communicate the decisions or recommendations of joint environmental institutions	■	■
Public participation in the implementation of the agreement	■	■
Creation of an intergovernmental committee	■	
Establishment of an international secretariat to administer environmental norms of the treaty		
Environmental experts for state-state dispute over failure to enforce environmental measures or other environmental provisions of the agreement	■	■

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Environmental report in state-state dispute over failure to enforce environmental measures or other environmental provisions of the agreement	■	■
Environmental report in state-state dispute over trade provisions of the agreement		
Environmental report in investor-state dispute		
Non-jurisdictional mechanism for failure to enforce domestic environmental law		
Monetary enforcement assessments for failure to enforce domestic environmental law		
Suspension of benefits in case of failure to enforce domestic environmental law or to pay		
Non-jurisdictional DSM for environmental provisions	■	■
General DSM applying to environmental provisions	■	
General suspension of benefits applying to environmental provisions	■	
Exclusion of multilateral environmental agreements' DSM		
Implementation of 1972 Stockholm Declaration		
Implementation of 1992 Rio Declaration		

(continued)

Table 11.1 (continued)

NAFTA's environmental provisions	*Also included in theUSMCA and/or the ECA*	*Originally only included in the NAAEC and now included in the USMCA's main text*
Implementation of other agreements related to the environment	■	
Prevalence of CITES	■	
Prevalence of Montreal Protocol	■	
Prevalence of Basel Convention		
Prevalence of other agreements related to the environment	■	
Other references to other institutions related to the environment	■	
International standards or risk assessments carried out by international organizations should be used or taken into account when designing environmental measures	■	
Party should use methods of risk assessment developed by international organizations		

intellectual property, sanitary and phytosanitary measures, and technical barriers to trade.

Furthermore, the USMCA (art. 24.25.3) maintains the Commission for Environmental Cooperation (CEC) created by the NAAEC, which is intended to foster cooperation among the NAFTA partners to address environmental issues on the North American continent.[7] Therefore, the CEC Secretariat will continue to be responsible for submissions on enforcement matters—allowing citizens and non-governmental organizations to allege that a USMCA party is failing to effectively enforce its domestic environmental laws—and for preparing a factual record if the submission warrants so. This procedure has been widely criticized by scholars, notably due to its slowness (Knox 2014). While the CEC Joint Public Advisory Committee recommended in 2001 a maximum timeline of two years between the filing of a submission and the publication of a factual record, the procedure actually took an average of five years for the years 2003 to 2008, and more than seven years in 2012 (Knox 2014, pp. 89–90). It is therefore noteworthy that the USMCA provides shorter time requirements than were included in the NAAEC, which could speed up the submission on enforcement matters procedure.[8] In addition, the CEC's activities will be complemented by the action of the "Environment Committee for Monitoring and Enforcement" established under the US USMCA Implementation Act. This committee will be tasked to monitor the implementation of the USMCA's environmental obligations and to carry out assessments of Canada and Mexico's environmental laws and policies.[9]

Despite the similarity between NAFTA's and the USMCA's environmental provisions, more than two and a half decades have passed since the adoption of the former. In that time, the way trade agreements address environmental issues has evolved significantly, and the USMCA reflects many of these developments. These developments are both structural and substantive. Structurally, for example, 33 environmental provisions that were only included in NAFTA's environmental side agreement (the NAAEC) now appear in the main text of the USMCA,[10] including, but not limited to, environmental dispute settlement, public participation, submissions on enforcement matters, and specific environmental issues such as endangered species and air pollution (see Table 11.1). Therefore, one way in which the USMCA is stronger than NAFTA is by including environmental provisions within the main trade agreement, and subjecting them to the agreement's dispute settlement mechanism, as is

now standard practice in recent US trade agreements. Importantly, this means that environmental provisions are now fully enforceable through the use of trade sanctions, rather than just through the use of highly circumscribed penalties.

Substantively, Chapter 24 of the USMCA contains issue-specific provisions on water, coastal areas, plastic pollution, wetlands, contaminated lands, fisheries, forests, genetic resources, ozone layer depletion, and genetically modified organisms that were not included in NAFTA (see Fig. 11.2). In total, the USMCA addresses 30 environmental issues that were not mentioned in NAFTA. While the inclusion of issue-specific environmental provisions was until recently primarily a characteristic of European trade deals, NAFTA parties increasingly add issue-specific provisions to more general environmental provisions in their PTAs. This gradual shift is particularly noticeable since the signature of the US–Peru PTA in 2006 (Morin and Rochette 2017). Moreover, while the NAAEC only dealt with interactions between environmental policies and economic development, the USMCA addresses interactions between the environment and energy policies, social issues, indigenous communities,

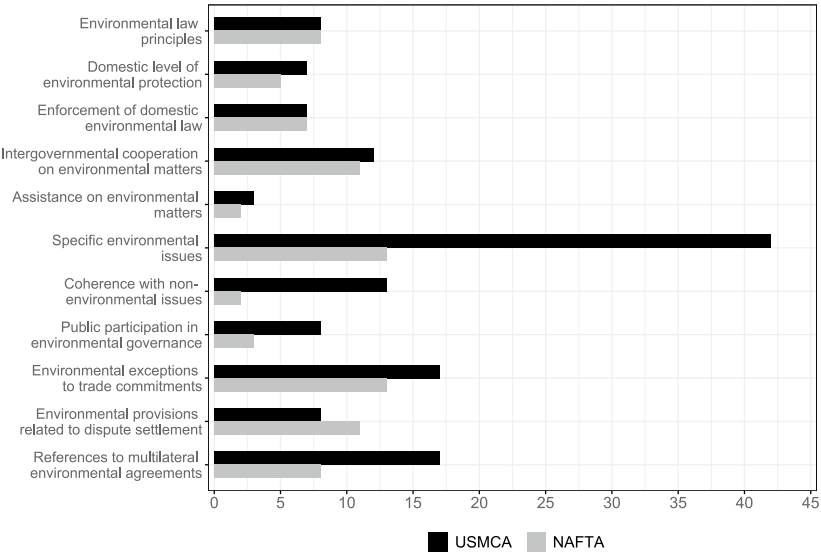

Fig. 11.2 Number of environmental provisions in NAFTA and the USMCA

and human health (see Fig. 11.2). The USMCA also adds provisions that were introduced in post-NAFTA PTAs, including on public participation in environmental impact assessments, public sessions of joint institutions, indirect expropriation of investments, and subsidies harmful to the environment.

The USMCA is also stronger than its predecessor in terms of obligations related to MEAs. Specifically, the Protocol of Amendment to the USMCA, agreed on December 10, 2019, restores NAFTA's Article 104 on the prevalence of MEA commitments in case of inconsistency with USMCA provisions. This protocol extends NAFTA's list of covered MEAs to include the International Convention for the Prevention of Pollution from Ships, the Ramsar Convention on Wetlands, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Inter-American Tropical Tuna Convention. Article 24.8.4 of the USMCA further encourages the parties to fulfill their obligations under the seven covered MEAs, and Articles 1.3 and 24.8.5 enable adding additional MEAs in the future. These late additions to the USMCA's original text formed part of Democrats' demands for the agreement to be ratified in Congress[11] and echo the list of MEAs that must be mentioned in US PTAs, as set in the Bipartisan Agreement on Trade Policy signed on 10 May 2007, often referred to as the "May 10th agreement."

Finally, Fig. 11.2 shows that, as an exception, NAFTA includes more provisions related to dispute settlement than USMCA. This has to do with the fact that the NAAEC included a specific dispute settlement mechanism providing for consultations (art. 22), an arbitral panel (art. 24), a monetary enforcement assessment (art. 34.4), and a suspension of benefits (art. 36) should a party fail to enforce its domestic environmental laws. The USMCA, for its part, only addresses disputes in case of non-compliance with the environmental provisions of the agreement.

In sum, the USMCA reaffirms NAFTA's approach to environmental protection, and enhances it by bringing the environmental provisions into the main agreement and by adding environmental provisions that have either been introduced in PTAs after NAFTA's signature, or that reflect current practices in US PTAs. More specifically, the USMCA largely copies the TPP's environmental provisions. As referenced above, the best explanation for the similarity between the TPP and the USMCA is the "boilerplating" of environmental provisions from one trade agreement to the next. This practice contributes to coherence and consistency across PTAs, but it considerably limits the novel contribution of recent PTAs to

environmental governance, and the USMCA makes no exception to this trend.

The Jettisoning of Two Contested Measures from the USMCA

The USMCA's contribution to environmental governance is perhaps more important as result of two NAFTA provisions that were removed from the agreement. Specifically, one of NAFTA's innovations consisted of strikingly detailed and comprehensive protections for investors (Chapter 11), including an investor–state dispute settlement (ISDS) system to enforce those protections. These provisions have been widely criticized by environmentalists, public interest groups, scholars, and politicians alike for giving foreign investors the power to sue governments for regulations that are designed to protect people or the environment (see McCarthy 2004; Nolan 2016).

There have been over 30 such cases under NAFTA as of 2018, which challenged policies in host countries related to environmental protection or resource management. Historically, these cases have been interpreted quite narrowly with ISDS tribunals ruling in favor of private investors (Sinclair 2018). For example, in one recent dispute, the US concrete company Bilcon initiated arbitration against Canada after a proposed quarry and marine terminal in the Canadian province of Nova Scotia, which would have been constructed and operated by Bilcon, was rejected after a lengthy environmental assessment. The environmental assessment found that the project would have had a significant and adverse impact on the "community core values" of the town of Digby Neck, the site of the proposed project. The project was rejected by the Nova Scotian and Canadian governments on these grounds. Bilcon argued that the environmental impact process unfairly and unreasonably considered "community core values," and that Nova Scotia officials had encouraged Bilcon to pursue the project, thereby providing Bilcon with a legitimate expectation that the project would have been approved. A majority of the tribunal found that by considering "community core values" in the environmental assessment process, Canada violated the national treatment standard (art. 1102) and minimum standard of treatment obligation (art. 1105) under NAFTA.[12] The arbiter appointed by Canada, Professor Donald McRae, provided a dissenting opinion wherein he cautioned that the tribunal's decision constituted an intrusion into domestic jurisdiction and that the

decision risked creating a chill on environmental review processes.[13] Though Bilcon initially claimed over US$400 million in damages, the tribunal awarded Bilcon only US$7 million plus interest because Bilcon could not prove that the project "in all probability" would have been approved had the environmental review process been conducted fairly.[14] In other environment-related disputes, regulations that prevent the export of toxic polychlorinated biphenyl (PCB) wastes, phase out coal-fired electricity generation, prevent the conversion of land to extractive industrial use, and ban the disposal of radioactive wastes at sea have been challenged under NAFTA's ISDS procedures. Some argue that ISDS leads to a very real risk of regulatory chill, whereby regulators refrain from creating or enhancing environmental regulations to avoid being subject to costly litigation (see Sinclair 2018; Tienhaara 2018).

Important changes to ISDS under the USMCA signal a sharp divergence from both NAFTA and prior US and Canadian trade policy. Indeed, the removal of ISDS from the USMCA after a three-year period gives to this agreement a far more progressive stance on environmental issues than NAFTA, even if done unintentionally. However, it should be noted that it will still be possible, under certain circumstances discussed more thoroughly in Chapter 6 of this book on investment, for US and Mexican investors to bring claims against host governments for cases of direct expropriation or for violation of national treatment or most-favored-nation obligations. Moreover, the USMCA still allows for indefinite access to ISDS for US and Mexican investors on a wider range of claims for "covered government contracts" (annex 14-E 6.a) in certain sectors, including oil and natural gas. Therefore, in a win for multinational energy companies, such as Chevron and ExxonMobil, the USMCA will allow these companies to use ISDS to protect their investments in Mexico's newly liberalized oil and gas sector, which is particularly important for these companies after the election of President Obrador in Mexico, who has displayed opposition to the sector's liberalization. Nevertheless, the elimination of Canadian involvement in the USMCA's ISDS and the restricted availability of ISDS between Mexico and the US will have important implications for how US–Mexico–Canada trade and investment relations will shape environmental governance in North America, since many of the investor disputes previously brought against Canada and the other parties will no longer be possible under the USMCA.[15]

The second controversial element of NAFTA that was left out of the USMCA is the energy proportionality rule (art. 605), which requires that

Canada exports to the US at least the same proportion of its energy output as it did during the previous three years. This includes 74% of the oil and 52% of the natural gas that Canada produces (Laxer 2018). The withdrawal of this rule will make it easier for Canada to meet its mitigation commitments under the Paris Agreement. This is because the extraction of oil and gas accounts for more of Canada's greenhouse-gas (GHG) emissions than does its consumption. This means Canada's ability to reduce its GHG emissions through, for example, a carbon tax is restrained if it must continue to produce high volumes of oil and gas for export. If Canada were to reduce its oil and gas extraction with the proportionality rule still in place, it would be required to export more of what it produces, and rely on greater levels of oil imports to meet its domestic needs (Laxer 2018; see also Hughes 2010; Laxer and Dillon 2008). Therefore, in order to simultaneously meet Canadian domestic needs for oil and gas, and meet its commitments under the Paris Agreement, it must wind down its oil and gas exports (Laxer 2018; Ackerman et al. 2018). With the jettison of the proportionality rule in the new agreement, Canada will be able to rely on its own oil and gas for domestic use until replacements are viable.

Conclusion

The USMCA is notable in that it contains the largest number of environmental provisions of any PTA negotiated to date. Further, the agreement reflects a strengthening of environmental governance over NAFTA's approach by, in line with other recent US PTAs, bringing environmental provisions into the main agreement, and subjecting them to the same dispute settlement mechanism. This outcome is largely consistent with the negotiating objectives of the United States, Canada, and Mexico, which, as regards the environment, focused on upgrading the agreement to reflect recent practices in PTAs. In addition, the agreement could potentially enhance environmental governance in North America by its jettisoning of the ISDS mechanism and the energy proportionality rule. Therefore, NAFTA's renegotiation led to clear improvements in terms of environmental content.

Despite its high number of environmental provisions, however, the USMCA could do more to improve environmental governance in the context of North American trade relations. For instance, the agreement does not acknowledge the precautionary principle, providing that "where

there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Rio Declaration, principle 15). This principle usually appears in European PTAs and was first included in a Canadian trade deal with the signature of the Comprehensive Economic and Trade Agreement (CETA) in 2016. Yet, aside from some tangential provisions related to technical barriers to trade in NAFTA, which have also diffused to some Mexican PTAs,[16] the US tends to avoid including the precautionary principle in any of its PTAs. Indeed, one of its NAFTA renegotiation objectives was to ensure that regulating practices were "evidence-based."

Finally, as stressed by many analysts,[17] the USMCA does not explicitly mention climate change, global warming, or greenhouse gases. This can largely be explained by the US's TPA-2015, which prohibits the US from including obligations to reduce carbon emissions in its PTAs as a condition of fast-track authority (see Jinnah and Morin 2020, p. 170). This marks a setback for the Trudeau government's progressive trade agenda, especially since the CETA includes provisions on climate change (arts. 24.9 and 24.12.2). More generally, in light of the urgency of reducing greenhouse gases emissions and the potential for trade agreements and obligations to either stifle or support this task (see Das et al. 2018), this is an important missed opportunity.

Notes

1. For a list of measures related to the environment taken by the Trump administration, see, for instance, Greshko et al. (2017).
2. For a general discussion of trade and environment issues, see Esty (2001); for a discussion on how NAFTA addresses the environment and the impacts on Mexico, see Gallagher (2004).
3. For a description of environmental provisions in US trade agreements, see Jinnah and Morgera (2013).
4. The US has linked some environmental provisions, such as those related to failure to enforce environmental laws, to dispute settlement since 2004 in a limited capacity. However, the 2007 Bipartisan Agreement on Trade Policy has since required that *all* US PTA environmental obligations "will be enforced on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions" (USTR 2007, p. 2). It should be noted that in practice, the use of such remedies, procedures, and sanctions to enforce environmental obligations is rare. At least part

of the reason for this may be that environmental NGOs appear to favor "constructive engagement" over trade sanctions to encourage progress on environmental commitments, at least in the case of Peru (Peinhardt et al. 2019).

5. Example, TPP, art. 20.23.1; CETA, art. 24.15.2; CUFTA, art. 12.21.8.
6. The CPTPP is the successor to the TPP following the US withdrawal in January 2017.
7. The Environmental Cooperation Agreement (ECA) further restates the functions of the CEC's Council, Secretariat, and Joint Public Advisory Committee.
8. For instance, the Secretariat must henceforth submit a draft factual record to the Council within 120 days of the Council's instruction to prepare a factual record (USMCA, art. 24.28.5). Moreover, the delay for a party to provide comments on the draft factual report, as well as the delay to publish the final report following its submission to the Council, are reduced from 45 to 30 days (USMCA, art. 24.28.5).
9. Executive Order on the Establishment of the Environment Committee for Monitoring and Enforcement under the USMCA Implementation Act, February 29, 2020.
10. As in the case of NAFTA, an ECA was signed alongside the USMCA's main text. Concluding environmental side agreements in addition to the PTA's Environment Chapter is common practice among the US and Canada (see, e.g., Canada–Panama 2010; Canada–Honduras 2013; US–Chile 2003; US–Singapore 2003; US–Peru 2006; US–Panama 2007). However, unlike its predecessors, the USMCA includes far more detailed and numerous environmental provisions in its Environment Chapter than in its ECA.
11. For a more detailed account of adds-on to the USMCA's original text, see United States (2019).
12. *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, March17, 2015. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.
13. *Clayton/Bilcon v. Canada*, Dissenting Opinion of Professor Donald McRae, March10, 2015. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.
14. *Clayton/Bilcon v. Canada*, Award on Damages, January 10, 2019. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.
15. However, the USMCA's Chapter 28 on "Good Regulatory Practices" provides alternative avenues for firms to influence regulation by allowing them to comment on regulations under development and to suggest improvements on existing regulations (Tienhaara 2019).
16. The NAFTA's provision, subsequently included in four Mexican PTAs (Mexico–Bolivia1994; Group of Three 1994; Mexico–Chile 1998; and

Mexico–Northern Triangle 2000), reads as follows: "Where a Party conducting an assessment of risk determines that available scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional technical regulation on the basis of available relevant information. The Party shall, within a reasonable period after information sufficient to complete the assessment of risk is presented to it, complete its assessment, review and, where appropriate, revise the provisional technical regulationin the light of that assessment" (art. 907.3).

17. See, e.g., Lilliston (2018), Mertins-Kirkwood (2018), Weber (2018), and Tienhaara (2019).

References

Ackerman, Frank, Alejandro Álvarez Béjar, Gordon Laxer, and Ben Beachy. 2018. *NAFTA 2.0: For People or Polluters? A Climate Denier's Trade Deal versus a Clean Energy Economy*. Ottawa: The Council of Canadians.

Allee, Todd, and Manfred Elsig. 2019. Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements. *International Studies Quarterly* 63 (3): 603–613.

Charnovitz, Steve. 1994. The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making. *Temple International and Comparative Law Journal* 8 (2): 257–314.

Das, Kasturi, Haro van Asselt, Susan Droege, and Michael Mehling. 2018. *Making the International Trade System Work for Climate Change: Assessing the Options*. Climate Strategies, July. https://tinyurl.com/ycrs7yxz. Accessed on September 29, 2021.

Esty, Daniel C. 2001. Bridging the Trade-Environment Divide. *Journal of Economic Perspectives* 15 (3): 113–130.

Gallagher, Kevin. 2004. *Free Trade and the Environment: Mexico, NAFTA, and Beyond*. Palo Alto: Stanford University Press.

Greshko, Michael, Laura Parker, Brian C. Howard, Daniel Stone, Alejandra Borunda, and Sarah Gibbens. 2017. A Running List of How President Trump Is Changing Environmental Policy. *National Geographic*. https://tinyurl.com/yck2u8g5. Accessed on September 29, 2021.

Hughes, Larry. 2010. Eastern Canadian Crude Oil Supply and Its Implications for Regional Energy Security. *Energy Policy* 38 (6): 2692–2699.

Jinnah, Sikina. 2011. Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance. *The Journal of Environment & Development* 20 (2): 191–215.

Jinnah, Sikina, and Abby Lindsay. 2016. Diffusion Through Issue Linkage: Environmental Norms in US Trade Agreements. *Global Environmental Politics* 16 (3): 41–61.

Jinnah, Sikina, and Elisa Morgera. 2013. Environmental Provisions in US and EU Trade Agreements: A Comparative Analysis. *Review of European Comparative and International Environmental Law* 22 (3): 224–339.

Jinnah, Sikina, and Jean-Frédéric Morin. 2020. *Greening through Trade: How American Trade Policy Is Linked to Environmental Protection Abroad*. Cambridge: MIT Press.

Jo, Hyeran, and Hyun Namgung. 2012. Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime. *Journal of Conflict Resolution* 56 (6): 1041–1068.

Knox, John H. 2014. Fixing the CEC Submissions Procedure: Are the 2012 Revisions up to the Task? *Golden Gate University Environmental Law Journal* 7 (1): 81–107.

Laxer, Gordon. 2018. *Escaping Mandatory Oil Exports: Why Canada Needs to Dump NAFTA's Energy Proportionality Rule*. Ottawa: The Council of Canadians.

Laxer, Gordon, and John Dillon. 2008. *Over a Barrel: Exiting from NAFTA's Proportionality Clause*. Edmonton: Parkland Institute.

Lilliston, Ben. 2018. *"New NAFTA" Continues Damaging Climate Legacy*. Institute for Agriculture & Trade Policy, October. https://tinyurl.com/y58e4qm2. Accessed on September 29, 2021.

McCarthy, James. 2004. Privatizing Conditions of Production: Trade Agreements as Neoliberal Environmental Governance. *Geoforum* 35 (3): 327–341.

Mertins-Kirkwood, Hadrian. 2018. Updated NAFTA Deal a Profound Failure for Climate Action. *Behind the Numbers Blog*, October 12. https://tinyurl.com/y4wev3vu. Accessed on September 29, 2021.

Morin, Jean-Frédéric, and Myriam Rochette. 2017. Transatlantic Convergence of Preferential Trade Agreements Environmental Clauses. *Business and Politics* 19 (4): 621–658.

Morin, Jean-Frédéric, Andreas Dür, and Lisa Lechner. 2018. Mapping the Trade and Environment Nexus: Insights from a New Data Set. *Global Environmental Politics* 18 (1): 122–139.

Morin, Jean-Frédéric, Joost Pauwelyn, and James Hollway. 2017. The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements. *Journal of International Economic Law* 20 (2): 365–390.

Nolan, Michael. 2016. Challenges to the Credibility of the Investor-State Arbitration System. *American University Business Law Review* 5 (3): 429–446.

Oxford Business Group. n.d. *Reforms, Liberalization open Mexico's Energy Sector to Private Investment and Emphasize Clean, Sustainable Energy*. http://tinyurl.com/y2dh4rek. Accessed on September 29, 2021.

Peinhardt, Clint, Alisha A. Kim, and Viveca Pavon-Harr. 2019. Deforestation and the United States-Peru Trade Promotion Agreement. *Global Environmental Politics* 19 (1): 53–76.

Sinclair, Scott. 2018. *Canada's Track Record Under NAFTA Chapter 11: North American Investor–State Disputes to January 2018*. Ottawa: Canadian Centre for Policy Alternatives. https://tinyurl.com/y7xxeyfm. Accessed on September 29, 2021.

Tienhaara, Kyla. 2018. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law* 7 (2): 229–250.

Tienhaara, Kyla. 2019. NAFTA 2.0: What Are the Implications for Environmental Governance? *Earth System Governance* 1: 100004.

Vaughan, Scott. 2018. USMCA Versus NAFTA on the Environment. *International Institute for Sustainable Development Blog*, October 3. https://tinyurl.com/y6pr5vcv. Accessed on September 29, 2021.

Weber, Bob. 2018. New Trade Deal Doesn't Address Climate Change: Environmentalists. *CTV News*, October 1. https://tinyurl.com/ya67u9jq. Accessed on September 29, 2021.

Official Documents

Bipartisan Congressional Trade Priorities and Accountability Act of 2015, S. 995, 114th Congress. https://tinyurl.com/vbsyrv7x. Accessed September 29, 2021.

Canada-Ukraine Free Trade Agreement (CUFTA), signed July 11, 2016, entered into force August 1, 2017. https://tinyurl.com/zsk893b4. Accessed September 29, 2021.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed March 8, 2018, entered into force December 30, 2018. https://tinyurl.com/2yyecefy. Accessed September 29, 2021.

Comprehensive Economic and Trade Agreement (CETA), signed October 30, 2016, entered provisionally into force September 21, 2017. https://tinyurl.com/eakp3j2c. Accessed on September 29, 2021.

Global Affairs Canada. 2017. *Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA)*. August 14. http://tinyurl.com/ybuuptvj. Accessed on September 29, 2021.

North American Agreement on Environmental Cooperation (NAAEC), signed September 14, 1993, entered into force January 1, 1994. https://tinyurl.com/j8awnfm8. Accessed on September 29, 2021.

North American Free Trade Agreement (NAFTA), signed December 17, 1992, entered into force January 1, 1994. https://tinyurl.com/2cayvy8a. Accessed on September 29, 2021.

Office of the United States Trade Representative (USTR). 2007. *Bipartisan Agreement on Trade Policy*. https://tinyurl.com/q9qlo9m. Accessed on September 29, 2021.

Office of the United States Trade Representative (USTR). 2017. *Summary of Objectives for the NAFTA Renegotiation*, July 17. http://tinyurl.com/ycgrwnnq. Accessed on September 29, 2021.

Office of the United States Trade Representative (USTR). 2018. *United States–Mexico–Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*. http://tinyurl.com/y5xppvlm. Accessed on September 29, 2021.

Office of the United States Trade Representative (USTR). 2019. *2019 Trade Policy Agenda and 2018 Annual Report*. https://tinyurl.com/jayrptv5. Accessed on September 29, 2021.

Protocol of Amendment to the United States-Mexico-Canada Agreement, signed December 10, 2019. https://tinyurl.com/3n8jsy4p. Accessed on September 29, 2021.

Rio Declaration on Environment and Development (Rio Declaration). https://tinyurl.com/3sta6ra6. Accessed on September 29, 2021.

Secretaría de Economía. 2017. *Prioridades de México en las negociaciones para la modernización del Tratado de Libre Comercio de América del Norte*. http://tinyurl.com/y5t5buwh. Accessed on September 29, 2021.

Trans-Pacific Partnership (TPP), signed February 4, 2016. https://tinyurl.com/2huw9x2x. Accessed on September 29, 2021.

United States. House of Representatives, Committee on Ways and Means. 2019. *Improvements to the USMCA*. https://tinyurl.com/t7qmabd. Accessed on September 29, 2021.

United States-Mexico-Canada Agreement (USMCA), signed November 30, 2018, entered into force July 1, 2020. https://tinyurl.com/rtaucx5v. Accessed on September 29, 2021.