

Snipings

The rubric ‘Snipings’ is intended for contributions which, while rigorous, offer early analyses of issues of immediate policy relevance for the multilateral trading system. They would normally be shorter and possibly be less extensively documented than our standard articles with a view to stimulating current debates. They are subject to standard, albeit expedited, refereeing procedures. Further submissions under this heading are welcome.

NAFTA 2.0: The Greenest Trade Agreement Ever?

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Abstract: The renegotiation of what US President Trump called ‘the worst trade deal ever’ has resulted in the most detailed environmental chapter in any trade agreement in history. The USMCA mentions dozens of environmental issues that its predecessor, the North American Free Trade Agreement (NAFTA), overlooked, and in line with contemporary US practice, brings the vast majority of environmental provisions into the core of the agreement, and subjects these provisions to a sanction-based dispute settlement mechanism. It also jettisons two controversial NAFTA measures potentially harmful to the environment. However, this paper argues that the USMCA only makes limited contributions to environmental protection. It primarily replicates most of the environmental provisions included in recent agreements, and only introduces three unprecedented environmental provisions. Moreover, it avoids important issues such as climate change, it does not mention the precautionary principle, and it scales back some environmental provisions related to multilateral environmental agreements.

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Introduction

During the 2016 US presidential campaign, Donald Trump claimed that the North American Free Trade Agreement (NAFTA) was the worst trade deal ever signed by the United States, and therefore initiated the renegotiation of NAFTA in August 2017. Despite Trump's anti-regulatory and nationalist leanings, notably exemplified by his repeated threats toward the World Trade Organization Appellate Body (see Shaffer *et al.*, 2017), the 'updated' 2018 agreement, formally called the United States of America, the United Mexican States, and Canada Agreement (USMCA),¹ and agreed in November 2018, is more progressive than its predecessor in many respects. 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, 2019a) and regards the agreement in general as 'a new paradigm for future agreements' (USTR, 2019b, 11). Despite these claims, the USMCA faces important challenges within the US congress surrounding ratification, with Democrats arguing that the agreement does not adequately address environmental and labor issues and pushing for reopening negotiations on these issues (see Tankersley, 2019; Lynch, 2019).²

This article evaluates these competing claims about USMCA's environmental provisions. It extends existing analyses of USMCA's environmental provisions (Vaughan, 2018; Tienhaara, 2019) by comparing USMCA's environmental provisions with those included in 690 trade agreements signed since 1947 (Dür *et al.*, 2014), and with a specific emphasis on how USMCA's environmental provisions compare with those included in both its predecessor, NAFTA, and its contemporary, the Comprehensive and Progressive Trans Pacific Partnership (CPTPP).³ Using the Trade and Environment Database (Morin *et al.*, 2018), we demonstrate that while the US Trade Representative's assertion is correct in that the USMCA includes *more* environmental provisions than any previous trade agreement, it is far less innovative than NAFTA in terms of the number of new environmental provisions introduced. Further, the provisions that USMCA eliminated from NAFTA are equally, if not more, interesting from an environmental governance perspective than those it added. Nevertheless, the agreement still falls short in some areas, most notably a lack of climate provisions and few linkages to multilateral environmental agreements (MEAs).

¹ Canada calls the agreement 'CUSMA' (Canada, United States, Mexico Agreement), and Mexico calls it 'T-MEX' (Tratado entre México, Estados Unidos y Canadá).

² The Trump administration can now submit implementing legislation to Congress, but is unlikely to do so until Democratic leadership signals support for the Agreement. At time of writing, US Trade Representative Robert Lighthizer is working with congressional Democrats to address their concerns. See Inside US Trade (2019), Kudlow: Administration waiting for Pelosi's nod before submitting USMCA bill, <https://insidetrade.com/daily-news/kudlow-administration-waiting-pelosis-nod-submitting-usmca-bill>.

³ 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).

The article is organized as follows. The first section compares 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 comparison of the environmental provisions within NAFTA and USMCA to explain how the agreements differ. The third section explains the few novel contributions USMCA makes to environmental governance, and the fourth section provides a detailed examination of two contested NAFTA measures that were jettisoned from USMCA. The fifth section discusses several of USMCA's missed opportunities to improve environmental governance in North America, and the final section concludes by briefly summarizing our findings.

Comparative negotiating objectives on the environment

States define environmental negotiating objectives for their trade agreements in various ways. Sometimes they are reflected in publicly available documents that provide clear baseline requirements for environmental provisions to be included in all trade agreements. 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),⁴ 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, requiring trading partners to implement their obligations under seven listed MEAs. It is not surprising, therefore, that the USMCA's environmental provisions are largely consistent with previous US preferential trade agreements (PTAs), which were also negotiated under 'fast-track authority'.⁵

Reflective of the well-documented practice of replicating or 'boilerplating' of environmental provisions in trade agreements over time (Allee and Elsig, 2016; Jinnah and Lindsay, 2016; Jo and Namgung, 2012; Morin *et al.*, 2017), some of the US negotiating objectives for USMCA echo provisions included in the 1993 NAFTA side agreement, formally called the North American Agreement on Environmental Cooperation (NAAEC) (USTR, 2017). These include provisions

⁴ Many required negotiating objectives within TPA-2015 can be found in previous developments in US trade policy, including Executive Order 13141, the Trade Act of 2002, and the 2007 Bipartisan Agreement on Trade Policy, also called the May 10th agreement. It is largely through these developments in US trade policy that environmental governance has been strengthened in the context of US trade agreements.

⁵ For a description of environmental provisions in US trade agreements, see Jinnah and Morgera (2013).

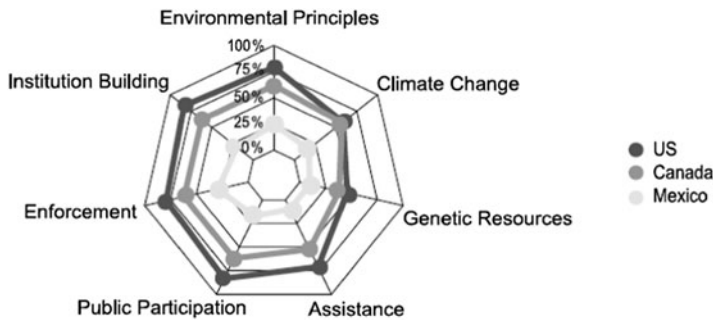
preventing NAFTA parties from derogating from enforcing their environmental regulations in order to attract investment; establishing means for stakeholder participation; and ensuring there are adequate procedures for enforcing environmental laws (see Charnovitz, 1994). While US environmental provisions were previously only related to the environment in general, the US 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, the US has for years used compliance mechanisms that are both managerial (cooperative and based on increasing capacity) and legalistic (coercive and based on sanctions or penalties) (Tallberg, 2002; see also Jinnah and Morin, 2020). Within the legalistic approach, the US shifted in the 2000s away from including provisions that suspend a partner's trade benefits for failure to enforce domestic laws, and towards including provisions that suspend trade benefits for non-compliance with the agreement's environmental provisions (see the online Annex, part 1). Additionally, it is now standard practice in US agreements to subject the environmental provisions to the agreement's dispute settlement mechanism (Jinnah, 2011).⁶ On the managerial side, the US has been less consistent in including provisions related to technical assistance and technology transfer.

In contrast to the US, 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. Beyond these issue areas, it is unclear what exactly a 'progressive' trade agreement means to the Trudeau government.⁷ Importantly, with regards to the environment, Canada's objective was to integrate 'enhanced environmental provisions to ensure no NAFTA country weakens environmental

⁶ The US 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). It should be noted further that externally imposing environmental regulations on developing countries, for example by threatening trade sanctions if environmental reforms are not implemented, may not lead to improvements in environmental governance (Jinnah, 2011).

⁷ Notably, and in contrast with other 'progressive' viewpoints on trade, the Trudeau administration maintains that investor–state dispute settlement does not restrict the government's ability to regulate in the public interest. See Global Affairs Canada. Myths and realities, <https://tinyurl.com/y2b8tqmv> (accessed 26 February 2019).

Figure 1. Percentage of USMCA parties' PTAs that include specific provisions



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 Figure 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. Canada also uses both legalistic and managerial forms of compliance, although managerial provisions are more frequent (see the online Annex 1). On the legalistic side, few Canadian agreements include provisions that allow for the suspension of benefits in the case of non-compliance with environmental provisions (or for failure to enforce domestic laws), and 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.⁸ Overall, the environmental provisions in Canada's trade agreements mirror those of the US.

Finally, the best public articulation of Mexico's NAFTA renegotiation priorities for NAFTA is found in an August 2017 article by the Ministry of Economy. Mexico's priorities were grouped into four themes: strengthen the competitiveness of North America; move towards inclusive and responsible trade; take advantage of twenty-first century opportunities; and promote the certainty of trade and investment (Economía de Secretaría, 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

⁸ For example, TPP, Art. 20.23(1); CETA, Art. 24.15(2); Canada-Ukraine, 2016, Art. 12.21(8).

electricity sectors.⁹ In short, the public articulation of Mexico's negotiation objectives are about as opaque as Canada's.

In contrast to the US and Canada, Mexico has been far less consistent with including environmental provisions in its trade agreements. NAFTA, USMCA, and the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) 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, USMCA, and CPTPP, provisions on specific environmental issues are scarce in Mexico's trade agreements (see [Figure 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, apart from a few agreements negotiated in the 1990s that provide for an intergovernmental committee (see the online Annex 1).

Comparing NAFTA and USMCA's environmental provisions

NAFTA and USMCA's environmental provisions are similar in many respects. USMCA maintains 72% of the environmental provisions originally included in NAFTA (see online Annex part 2). This is not surprising given that, as mentioned above, most US negotiating objectives for USMCA mirror provisions already included in NAFTA. Besides comparable provisions on regulatory sovereignty, enforcement of domestic environmental laws, and public participation, 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, intellectual property, sanitary and phytosanitary measures, and technical barriers to trade.

Furthermore, USMCA maintains the Commission for Environmental Cooperation created by the North American Agreement on Environmental Cooperation, which is intended to foster cooperation among the NAFTA partners to address environmental issues on the North American continent. Specifically, the USMCA provides that: 'Activities that the Parties undertake pursuant to the Environmental Cooperation Agreement will be coordinated and reviewed by the Commission for Environmental Cooperation' (art. 24.25 (3)).¹⁰ The Secretariat

⁹ See 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 9 February 2019).

¹⁰ USMCA, Art. 24.25(3). The Environmental Cooperation Agreement (ECA) further restates the functions of the Commission's Council, Secretariat, and Joint Public Advisory Committee. In particular, Art. 10 of the ECA requires the Council to define a 'Work Program' (art. 10) establishing environmental areas of cooperation between the parties that reflect common practice in other US ECAs.

of the Commission for Environmental Cooperation will therefore continue to be responsible for submissions on enforcement matters – allowing citizens and NGOs 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, 2013). While the Joint Public Advisory Committee of the Commission for Environmental Cooperation 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, 2013, 89–90). It is therefore noteworthy that USMCA provides shorter time requirements than were included in the North American Agreement on Environmental Cooperation, which could speed up the submission on enforcement matters procedure.¹¹

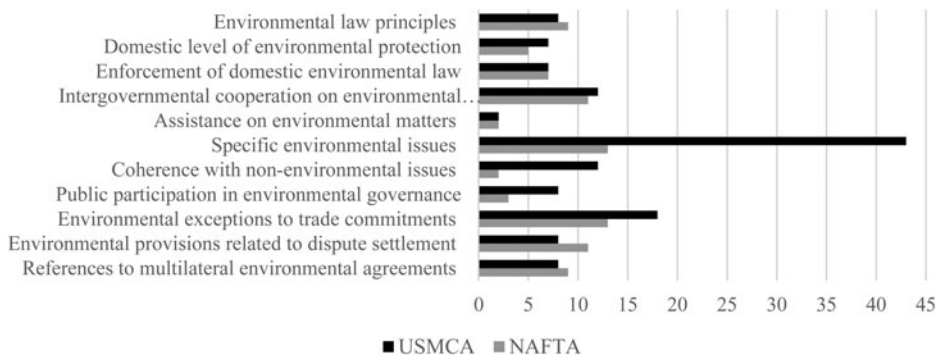
Despite the similarity between NAFTA and USMCA's environmental provisions, more than two and a half decades have passed since the adoption of the former. In that time, the way trade agreements address environmental issues has evolved significantly, and USMCA reflects many of these developments. These developments are both structural and substantive. Structurally, for example, 26 environmental provisions that were only included in NAFTA's environmental side agreement (the North American Agreement on Environmental Cooperation) now appear in USMCA's main text,¹² 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 Annex 2). Therefore, one way in which 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 (Jinnah, 2011). 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 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 Figure 2). In total, USMCA addresses

¹¹ For instance, the Secretariat must henceforth determine within 30 days of receipt of the submission whether the submission merits requesting a response from the Party. The Secretariat is also required to submit a draft factual record to the Council within 120 days of the Council's instruction to prepare a factual record (art. 24.28). 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.

¹² As in the case of NAFTA, an ECA was signed alongside USMCA's main text. Concluding environmental side agreements in addition to the PTA's Environment Chapter is common practice among US and Canada (see, for example, Canada–Panama, 2010; Canada–Honduras, 2013; US–Chile, 2003; US–Singapore, 2003; US–Peru, 2006; US–Panama, 2007). However, unlike its predecessors, USMCA includes far more detailed and numerous environmental provisions in its Environment Chapter than in its ECA.

Figure 2. Number of environmental provisions in NAFTA and USMCA



30 environmental issues that were not specifically mentioned in NAFTA. While the inclusion of issue-specific environmental provisions was until recently primarily a characteristic of European trade deals, it is interesting that 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 Peru–US Agreement in 2006 (Morin and Rochette, 2017). Moreover, while the North American Agreement on Environmental Cooperation only dealt with interactions between environmental policies and economic development, USMCA addresses interactions between the environment and energy policies, social issues, indigenous communities, and human health (see Figure 2). USMCA also adds provisions that were introduced in PTAs post-NAFTA, including on public participation in environmental impact assessments, public sessions of joint institutions, indirect expropriation of investments,¹³ and subsidies harmful to the environment.

Finally, Figure 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 North American Agreement on Environmental Cooperation included a specific dispute settlement mechanism (Part V) – providing for consultations (Article 22), an arbitral panel (Article 24), a monetary enforcement assessment (Article 34, para 4), and a suspension of benefits (Article 36) – should a party fail to enforce its domestic environmental laws. USMCA, for its part, only addresses disputes in case of non-compliance with the environmental provisions of the agreement.

In sum, 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

¹³ Since 2003, as a result of several cases under NAFTA’s chapter 11 where investors claimed that environmental regulations had the indirect effect of expropriating their business, all US PTAs include a provision stating that regulatory actions designed to protect the environment do not constitute indirect expropriation (Morin and Rochette, 2017).

NAFTA's signature, or that reflect current practices in US PTAs. However, a more detailed comparison of the USMCA with recent PTAs, especially with the CPTPP, casts considerable doubt on the USMCA's novel contribution to environmental protection.

USMCA's limited novel contribution to environmental protection

PTAs' contribution to environmental protection can be assessed in various ways. Legalization addresses the legal strength of environmental provisions; replication addresses the environmental provisions' presence across PTAs; and distribution addresses the type of countries that have endorsed environmental provisions (see Morin and Jinnah, 2018). Here, we only evaluate USMCA's innovation, i.e. the inclusion of environmental provisions that were not included in any PTA beforehand. Despite the increased number of environmental provisions in USMCA (see Figure 2), it is poorly innovative, especially when compared to NAFTA. Indeed, NAFTA remains the most innovative PTA ever negotiated, because it created 46 new environmental provisions, including, for instance, on endangered species and on regulatory sovereignty in the enforcement of environmental measures (Morin *et al.*, 2017). This far exceeds the norm in this regard, with 96% of global PTAs containing merely two innovations or fewer. For example, the CPTPP only includes one innovation on subsidies harmful to the environment.¹⁴ Even the second most innovative PTA, the 2006 Peru–US Agreement, only includes 18 environmental innovations, including on the prior informed consent from the appropriate authority when accessing genetic resources, and on the fight against illegal exploitation of forests. As for USMCA, it merely contains three innovations, related to plastic pollution, wildlife trafficking, and food waste.

Further underscoring its lack of innovation, the USMCA largely copies CPTPP's environmental provisions, with a Jaccard distance coefficient close to zero, meaning there is a high degree of similarity between the two agreements' environmental provisions (see Figure 3's top right corner). Among US PTAs, only US–Colombia 2006 and US–Peru 2006 are as similar as CPTPP and USMCA. As referenced above, the best explanation for this similarity between CPTPP and USMCA is the 'boilerplating' of environmental provisions from one trade agreement to the next. This practice contributes to coherence and consistency across PTAs, but negotiators' reliance on replicating provisions may also stifle innovation.

Nevertheless, USMCA does contain three environmental provisions that have never been included in any previous PTAs. The first relates to increased enforcement of wildlife trafficking. USMCA states that 'each Party shall ... treat intentional transnational trafficking of wildlife protected under its laws as a serious crime, as defined in the United Nations Convention on Transnational Organized

¹⁴ CPTPP's article 20.16 seeks to prevent fisheries subsidies that contribute to overfishing and overcapacity.

Figure 3. Distance between US trade agreements in terms of environmental provisions

USMCA 2018	1	1	0.9	0.6	0.8	1	0.6	0.8	0.7	0.6	0.7	0.7	0.7	0.6	0.6	1	0.6	0.6	0.8	0.7	0.8	0.2	0		
CPTPP 2018	1	1	0.9	0.6	0.8	1	0.6	0.7	0.6	0.6	0.7	0.7	0.6	0.7	0.6	0.6	1	0.6	0.6	0.8	0.7	0.8	0	0.2	
Colombia 2013	1	1	1	0.8	0.8	1	0.7	0.8	0.8	0.8	0.8	0.7	0.9	0.7	0.8	0.9	0.8	0.8	0.4	0.5	0	0.8	0.8		
Korea 2012	1	1	1	0.7	0.8	1	0.8	0.8	0.8	0.8	0.8	0.9	0.7	0.8	0.9	0.9	0.8	0.8	0.6	0	0.5	0.7	0.7		
Panama 2012	1	1	1	0.8	0.8	1	0.8	0.8	0.7	0.7	0.8	0.8	0.7	0.9	0.7	0.8	0.9	0.9	0.7	0	0.6	0.4	0.8	0.8	
Panama 2007	1	1	1	0.9	0.6	0.8	0.9	0.6	0.7	0.4	0.4	0.6	0.6	0.6	0.3	0.6	0.3	0.9	0.4	0	0.7	0.8	0.8	0.6	0.6
Korea 2007	1	1	1	0.9	0.6	0.8	0.9	0.6	0.6	0.6	0.6	0.5	0.6	0.6	0.4	0.6	0.4	1	0	0.4	0.9	0.9	0.8	0.6	0.6
Sec. CAFTA 2006	1	1	1	0.9	0.9	1	1	0.9	0.9	0.9	0.9	1	1	0.9	0.9	0.9	0	1	0.9	0.9	0.9	0.9	1	1	
Peru 2006	1	1	1	0.9	0.6	0.8	0.9	0.6	0.6	0.5	0.5	0.6	0.6	0.6	0.2	0.6	0	0.9	0.4	0.3	0.8	0.8	0.8	0.6	0.6
Oman 2006	1	1	1	0.9	0.6	0.7	0.9	0.5	0.5	0.5	0.5	0.3	0.5	0.4	0.6	0	0.6	0.9	0.6	0.6	0.7	0.7	0.7	0.6	0.6
Colombia 2006	1	1	1	0.9	0.7	0.8	0.9	0.6	0.6	0.6	0.5	0.6	0.6	0.7	0	0.6	0.2	0.9	0.4	0.3	0.9	0.9	0.9	0.7	0.7
Bahrain 2004	1	0.9	0.9	0.6	0.7	0.9	0.5	0.5	0.5	0.5	0.4	0.4	0	0.7	0.4	0.6	1	0.6	0.6	0.7	0.7	0.7	0.6	0.7	
Australia 2004	1	0.9	0.9	0.6	0.7	0.9	0.5	0.4	0.3	0.5	0.4	0	0.4	0.6	0.5	0.6	1	0.6	0.6	0.8	0.9	0.8	0.7	0.7	
Morocco 2004	1	0.9	0.9	0.6	0.7	0.9	0.5	0.3	0.4	0.4	0	0	0.4	0.4	0.6	0.3	0.6	0.9	0.5	0.6	0.8	0.8	0.8	0.7	0.7
CAFTA - DR 2004	1	1	1	0.9	0.5	0.7	0.9	0.5	0.6	0.2	0	0.4	0.5	0.5	0.5	0.5	0.5	0.9	0.6	0.4	0.7	0.8	0.8	0.6	0.6
CAFTA 2004	1	1	1	0.9	0.6	0.7	0.9	0.4	0.5	0	0.2	0.4	0.3	0.5	0.6	0.5	0.5	0.9	0.6	0.4	0.7	0.8	0.8	0.6	0.7
Singapore 2003	1	0.9	0.9	0.7	0.7	0.9	0.5	0	0.5	0.6	0.3	0.4	0.5	0.6	0.5	0.6	0.9	0.6	0.7	0.8	0.8	0.8	0.7	0.8	
Chile 2003	1	1	1	0.9	0.6	0.7	0.9	0	0.5	0.4	0.5	0.5	0.5	0.5	0.5	0.6	1	0.6	0.6	0.8	0.8	0.7	0.6	0.6	
Vietnam 2000	0.7	0.8	0.8	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	1	0.9	0.9	1	1	1	1	1	1
Jordan 2000	0.9	0.9	0.9	0.8	0.9	0.9	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.8	0.7	0.8	0.9	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8
NAFTA 1992	1	1	1	0.9	0.8	0.9	0.6	0.7	0.6	0.5	0.6	0.6	0.6	0.7	0.6	0.6	0.9	0.6	0.6	0.8	0.7	0.8	0.6	0.6	
Canada 1988	0.8	0.8	0	0.9	0.9	0.8	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	0.9	1	0.9	0.9	1	1	1	0.9	0.9	
Israel 1985	0.3	0	0.8	1	0.9	0.8	1	0.9	1	0.9	0.9	1	1	1	1	1	1	1	1	1	1	1	1	1	1
APTA 1965	0	0.3	0.8	1	0.9	0.7	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

Note: Measure of the dissimilarity between environmental provisions (Jaccard distance). A coefficient of 0 means maximum similarity and a coefficient of 1 means minimum similarity.

Crime’,¹⁵ which means an act punishable by at least four years of incarceration (article 24.22,7, b). This is consistent with a resolution adopted by the Economic and Social Council (2013) and subsequently recalled in a resolution on wildlife trafficking by the United Nations General Assembly (2015) that encourages parties to consider organized trafficking of protected species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as serious crimes. Additionally, the 2017 US Executive Order 13773 on strengthening enforcement with respect to transnational crime addresses wildlife trafficking explicitly (see section 2(a)(i)). This reflects President Trump’s somewhat surprising prioritization of this issue, and helps explain why his administration included in the US negotiating objectives for USMCA similar provisions to protect and conserve protected flora and fauna by combating wildlife trafficking.

The second innovation from USMCA requires the signatories to ‘take measures to prevent and reduce marine litter’ (article 24.12). USMCA is indeed the first trade deal to include a provision related to marine plastic pollution. It should however be noted that this innovation – as most environmental innovations in the trade

¹⁵ United Nations Convention against Transnational Organized Crime, Art. 2(b), 15 November 2000, 2225 UNTS 209 (‘Serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’).

regime— is actually a combination of existing provisions (see Morin *et al.*, 2017, 378–380). Indeed, some previous PTAs already addressed domestic waste on the one hand, and sea pollution on the other.¹⁶ The inclusion of an article on marine litter in USMCA reflects growing international attention to this topic. For example, ending plastic pollution was the 2018 Earth Day theme, and USMCA also follows a series of resolutions and reports from the United Nations Environment Program (UNEP) on the subject of marine plastic pollution. For example, Resolutions 1/6 and 2/11 (UNEP, 2014, 2016a) urge the states to promote sound management, prevention, and clean-up of plastic debris in the marine environment, and a report published in 2016 discusses the sources and impacts of plastic pollution (UNEP, 2016b). This issue was also debated during the 2018 G7 Summit in Charlevoix where Canada, France, Germany, Italy, and the United Kingdom endorsed the Ocean Plastics Charter. The fact that this Charter was the initiative of the Canadian government and that the US refused to join may indicate that Canadian negotiators proposed the inclusion of the provision in USMCA.

Lastly, USMCA's Environmental Cooperation Agreement introduces a third environmental innovation to the trade regime related to food waste. The Agreement states that 'The Work Program may include short-, medium- and long-term cooperative activities in areas such as: ... (aa) promoting sustainable production and consumption, including reducing food loss and food waste' (art. 10, 2). It is less clear from where this provision was derived but it is possible that it was a joint effort, because the provision follows a 2017 report by the Commission for Environmental Cooperation showing that approximately 396 kg and 415 kg of food loss and waste per capita are generated each year in Canada and the US respectively, placing both countries among those with the highest estimated per-capita food loss and waste (CEC, 2017). This provision is unlikely to make a significant contribution to environmental protection in the three countries, however. Unlike the innovations on wildlife trafficking and marine pollution, which include the term 'shall' and therefore have a relatively high degree of commitment, the reduction of food waste is only an area of cooperation that the parties 'may' consider. Moreover, promoting the reduction of food waste is not an obligation that will lead the three parties to deviate importantly from the current domestic status quo.

The jettisoning of two contested measures from USMCA

Although the USMCA is limited in terms of environmental innovations, its contribution to environmental governance is perhaps more important as a result of two

¹⁶ For example, the 2012 Agreement Establishing an Association Between Central America and the European Union provides that 'Cooperation shall in particular address: ... (b) the fight against pollution of fresh and marine waters, air and soil, including through the sound management of waste, sewage waters, chemicals and other dangerous substances and materials' (art. 50.3).

NAFTA provisions that were removed from the Agreement. Specifically, one of NAFTA's innovations was strikingly detailed and comprehensive protections for investors (Chapter 11), including an investor–state dispute settlement (ISDS) system to enforce those protections.¹⁷ These provisions, which have important environmental implications, have been substantially altered or removed from the USMCA. Specifically, under NAFTA Chapter 11, private foreign investors can sue host governments for violating obligations related to discriminatory, unfair, or arbitrary treatment by the host government. These ISDS provisions have been widely criticized by labor, 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 be constructed and operated by Bilcon, was rejected after a lengthy environmental assessment. The environmental assessment found that the project would have a significant and adverse impact on the 'community core values' of the town of Digby Neck, the site of the proposed project, wherein many members of the community expressed strong concerns regarding the operation of an industrial-scale marine terminal and quarry in an environmentally sensitive area. 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 be approved. A majority of the Tribunal found that by considering 'community core values' in the environmental assessment process, Canada violated the national treatment standard (Article 1102) and minimum standard of treatment obligation (Article 1105) under NAFTA.¹⁸ The arbiter appointed by Canada, Professor Donald McRae, provided a dissenting opinion wherein McRae cautioned that the Tribunal's decision constituted an intrusion into domestic jurisdiction and that the decision risks creating a chill on environmental review processes.¹⁹ Though Bilcon initially claimed over USD 400 million in damages, the Tribunal awarded

¹⁷ For a discussion on how NAFTA's Chapter 11 has influenced international investment law, see Puig and Kinnear (2010).

¹⁸ Clayton/Bilcon v. Canada. Award on Jurisdiction and Liability. 17 March 2015. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.

¹⁹ Clayton/Bilcon v. Canada. Dissenting Opinion of Professor Donald McRae. 10 March 2015. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.

Bilcon only USD 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.²⁰ In other environment-related disputes, regulations that prevent the export of toxic 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 USMCA signal a sharp divergence from both NAFTA and prior US and Canadian trade policy. Despite the US proposal during USMCA negotiations to allow parties to either opt-in or opt-out to ISDS (Sinclair, 2018; Davis, 2017), the final text replaces this optional approach with a more certain removal of the ISDS mechanism after a three-year period. This effectively removed ISDS from the USMCA, marking a far more progressive stance on environmental issues than its predecessor, even if done unintentionally. However, USMCA maintains some options for investors to submit certain types of claims against host governments to arbitration. First, investors can make claims during this three-year period on ‘legacy investments’, which are investments made prior to the termination of NAFTA. Additionally, Mexico and the United States negotiated a separate Annex that provides a limited ISDS indefinitely, in which claims brought by US or Mexican investors are permitted for cases of direct expropriation or for violation of National Treatment or Most Favored Nation obligations, and only if investors have first attempted to resolve the dispute through domestic court or administrative proceedings. USMCA also allows for indefinite access to ISDS for US and Mexican investors on a wider range of claims for ‘covered government contracts’²¹ in certain sectors, including oil and natural gas. These investors will not be required to first exhaust domestic options. Therefore, in a win for multinational energy companies, such as Chevron and ExxonMobil, 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 this agreement’s ISDS and the restricted availability of ISDS between Mexico and the US constitutes a dramatic change in the North American trade framework. Many of the investor disputes previously brought against Canada and the other parties will no longer be possible under USMCA.

²⁰ Clayton/Bilcon v. Canada. Award on Damages. 10 January 2019. UNCITRAL Permanent Court of Arbitration (PCA) Case No. 2009–04.

²¹ USMCA Annex 14-E 6(a) (‘covered government contract’ is ‘a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector’.)

Despite these environment-relevant improvements under USMCA, it is important to note that ISDS will still be available for Canadian investors in Mexico and vice versa under Chapter 9 of the CPTPP. However, the CPTPP's ISDS mechanism does include modest safeguards designed to ensure that investor protections do not restrict the state's ability to regulate in the public interest. Still, this overlap and contradiction between trade agreements effectively dilutes the benefits gained from progress in one.²² The changes to ISDS in the USMCA nevertheless have important implications for how US–Mexico–Canada trade and investment relations will shape environmental governance in North America.

The second controversial element of NAFTA that was left out of the USMCA is the energy proportionality rule (article 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 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.

USMCA's missed opportunities

Besides USMCA's lack of innovation, the agreement also avoids significant environmental issues that other PTAs do address. For instance, as stressed by many analysts,²³ USMCA does not explicitly mention climate change, global warming, or greenhouse gases. 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. However, USMCA's Environmental Cooperation Agreement does allow for the

²² Moreover, USMCA 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).

²³ See Lilliston (2018); Mertins-Kirkwood (2018); Weber (2018); Kaufman (2019); and Tienhaara (2019).

Commission for Environmental Cooperation's Council to work on cooperative activities relating to reducing emissions, including developing low emissions technologies and 'all clean, efficient energy sources that enhance energy security' (art. 9, m). Nevertheless, the potential for USMCA – as for PTAs generally – to address climate change remains untapped (Morin and Jinnah, 2018). In the case of USMCA, 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. This marks a setback for the Trudeau government's progressive trade agenda, especially since the Comprehensive Economic and Trade Agreement (CETA) includes provisions on climate change (art. 24.9 and 24.12,2).

Another missed opportunity is that the USMCA 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' (1992 Rio Declaration, Principle 15). This principle usually appears in European PTAs and was first included in a Canadian trade deal with the signature of CETA in 2016. However, aside from some tangentially provisions related to technical barriers to trade in NAFTA which have also diffused to some Mexican PTAs,²⁴ 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'.

In addition, the USMCA does not do as much as it could to encourage the implementation of multilateral environmental agreements (MEAs). Centrally, it only encourages its signatories to fulfill their obligations under three multilateral environmental agreements (MEAs), namely the Convention on International Trade in Endangered Species of Wild Fauna (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the MARPOL Convention for the Prevention of Pollution from Ships. Although USMCA's parties recognize that enhanced environmental cooperation 'brings benefits that can ... support implementation of international environmental agreements to which they are a party' (art. 24.2, 3), the PTA does not include any requirement to ratify or implement MEAs such as the Convention on Biological Diversity, its Nagoya and Cartagena Protocols, or MEAs related to climate change. This is not surprising as it would be politically fraught and thus highly unlikely for the US to obligate itself to ratify a new environmental agreement through requirements in a trade agreement. Further, although 92% of PTAs globally do not refer to the

²⁴ The NAFTA's provision, subsequently included in four Mexican PTAs (Bolivia–Mexico, 1994, Group of Three 1994, Chile–Mexico, 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 regulation in the light of that assessment' (art. 907, 3).

implementation or ratification of any MEA, this marks a retreat in the US approach to this issue. Specifically, the Bipartisan Agreement on Trade Policy signed on 10 May 2007 between the George W. Bush administration and the Democrats in Congress, often referred to as the ‘May 10th agreement’, set a list of 7 MEAs that must be mentioned in US PTAs. This agreement also expanded NAFTA’s list of three covered MEAs to include the MARPOL Convention on Marine Pollution, the Inter-American Tropical Tuna Convention, the Ramsar Convention on Wetlands, the International Convention for the Regulation of Whaling, and the Convention for the Conservation of Antarctic Marine Living Resources.²⁵ As such, the USMCA now lists fewer MEAs than do several other US PTAs negotiated after 2007. Further, provisions that require ratification and/or implementation of MEAs are increasingly reflected in other countries’ PTAs, such as the Colombia–Peru–European Community PTA that refers to the implementation of eight MEAs. Finally, the USMCA has no equivalent to NAFTA’s article 104 on the legal prevalence of MEAs provisions in the event of inconsistency with the provisions of the PTA, which constitutes a notable setback for environmental protection.

Conclusion

The USMCA is notable in that it contains the largest number of environmental provisions of any PTA negotiated to date. Further, the USMCA could potentially enhance environmental governance in North America by its jettisoning of two controversial NAFTA provisions: the investor–state dispute settlement mechanism and the energy proportionality rule. The USMCA also 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. However, despite its high number of environmental provisions, the USMCA is not particularly innovative in terms of introducing new environmental provisions. In comparison to NAFTA, which included 46 innovations, the USMCA only includes three related to marine plastic pollution, wildlife trafficking, and food waste. Indeed, the USMCA could do much more to improve environmental governance in the context of North American trade relations. USMCA could address trade-related aspects of climate policy, such as removing fossil fuel subsidies and encouraging the diffusion of climate-friendly technologies. It could also require that parties fulfill their obligations under the Paris Agreement or cooperate on adaptation projects. Additionally, USMCA could encourage parties to fulfill their obligations under or join additional multilateral environmental agreements beyond the three listed agreements.

²⁵ The reasons for the exclusion from USMCA of the last four MEAs are at this point unknown. It should be noted, however, that some of the obligations included in the seven listed MEAs are covered in USMCA Environment Chapter. For instance, the protection of whales is addressed in article 24.19 (2).

It should be noted that a comparative impact assessment of the environmental provisions contained in NAFTA and USMCA is outside the scope of this analysis, but would make excellent fodder for future research evaluating the potential environmental contribution of trade agreements. In addition, although innovation is only one of several valuable metrics in evaluating the environmental contribution of trade agreements,²⁶ it is an important proxy for the commitment that states are making to environmental protection through trade agreements. This is particularly the case for the US, which has since 2004 included strong enforcement provisions in its trade agreements for countries' failure to enforce their environmental laws (Jinnah and Morin, 2020).

Overall, USMCA maintains NAFTA's approach, and integrates environmental provisions from the CPTPP and other prior agreements. This outcome is largely consistent with the negotiating objectives of the US, Canada, and Mexico, which, as related to the environment, focused on upgrading the agreement to reflect recent practices in preferential trade agreements. In short, despite some important contributions there is far more that should be done for USMCA to genuinely claim its mantle as the greenest trade agreement ever.

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²⁶ See Morin and Jinnah (2018) for additional metrics that could also be considered, including legalization, replication, and distribution.

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