

ENVIRONMENTAL OBLIGATIONS BY BRAZIL AND THE UNITED STATES OF AMERICA AS BUILDING BLOCKS TO A BILATERAL AGENDA

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To : American Chamber of Commerce for Brazil

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LIST OF ABBREVIATIONS

Agreement	Agreement on Trade and Economic Cooperation between Brazil and the US
CBD	Convention on Biological Diversity
Chapter 24	Environmental Chapter of the USMCA
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSR	Corporate social responsibility
EU	European Union
EU-Mercosur	European Union-Mercosur free trade agreement
FAO	Food and Agriculture Organization of the United Nations
FTA	Free Trade Agreement
FTAs	Free Trade Agreements
HCFCs	Hydrochlorofluorocarbons
ILO	International Labor Organization
LMO	Living Modified Organisms
MEA	Multilateral Environmental Agreement
MEAs	Multilateral Environmental Agreements
NAFTA	North American Free Trade Agreement
ODS	Ozone Depleting Substances
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD Chapter	Trade and Sustainable Development Chapter of the EU-Mercosur FTA
TSD Sub-Committee	Sub-Committee on Trade and Sustainable Development
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFCCC	The United Nations Framework Convention on Climate Change
US	United States of America
USMCA	United States-Mexico-Canada free trade agreement
WTO	World Trade Organization

EXECUTIVE SUMMARY

This Report compares selected environmental commitments undertaken by Brazil and the United States of America (“US”) and assesses the level of convergence between them. The Report focuses on obligations under Multilateral Environmental Agreements (“MEAs”) containing trade provisions and on the environmental chapters of two specific Free Trade Agreements (“FTAs”): the European Union-Mercosur (“EU-Mercosur”) FTA and the United States-Mexico-Canada FTA (“USMCA”), since these are the most comprehensive and modern trade agreements negotiated, respectively, by Brazil and the US in terms of environmental protection provisions.

Brazil and the US have adhered to various MEAs. Although there are differences in terms of participation in MEAs, there is also a certain degree of convergence in the two countries’ commitments in this area, which can be used as a focal point for future discussions between Brazil and the US.

The same is true regarding the commitments undertaken in the environmental chapters of the EU-Mercosur FTA (by Brazil) and of the USMCA (by the US). Both chapters include converging commitments related to the integration of sustainable development and environmental protection to the trade and investment relationship among their respective parties, and require their parties to implement the MEAs in which they participate.

The analysis of commitments under the EU-Mercosur FTA and the USMCA was divided in:

- (i) General aspects: scope, objectives, principles and main points of the FTAs. There is general recognition of the objective to respect and protect the environment and of the need for cooperation.
- (ii) Institutions: mechanisms to oversee, review and recommend measures towards the implementation of the agreements.
- (iii) Dispute Settlement: the USMCA allows the use of the mechanism established in Chapter 31 (applied to all of the provisions under the agreement), which can lead to the suspension of benefits. In the EU-Mercosur, this is not possible. This is one topic where the approaches significantly differ.

- (iv) Implementation: tools to achieve the implementation of the obligations assumed under the FTAs and the effective protection of the environment at a domestic level are provided in both FTAs, which rely on transparency and public participation. These elements could be explored in the design of implementation tools for environmental protection in future bilateral discussions between Brazil and the US.
- (v) Environmental commitments: the provisions in both FTAs incorporate elements of MEAs to which Brazil and the US are parties. Those commitments can be divided in 4 broad areas:
 - a. Climate change;
 - b. Air quality;
 - c. Biodiversity and sustainability development;
 - d. Corporate responsibility.

While the MEAs' approaches differ in several instances, the core of the resulting responsibilities for their respective parties is arguably similar, and their implementation rely on cooperation among the parties. There are also similarities in terms of the institutions designed to achieve compliance and foster transparency, and of the environmental commitments related to climate change and the conservation and protection of biodiversity. Finally, both FTAs generally acknowledge the importance of responsible business practices.

This Report illustrates that certain environmental commitments already undertaken by Brazil and the US are incorporated by the texts of the EU-Mercosur FTA and the USMCA, respectively. These converging commitments could arguably serve as building blocks to Brazil and the US bilateral trade agenda.

The Report also lists topics that an exploratory bilateral trade agenda could incorporate regarding environmental matters. These could include:

- (i) Cooperation in terms of shared initiatives related to environmental protection in the scientific and technological fields, joint measures for the promotion of sustainable development, exchange of scientific and technological knowledge, and exchange of information on environmental policies and best

practices for harmonization of trade and sustainable development measures.

- (ii) Mechanisms to monitor and advise on the implementation of environmental commitments, as well as to review them from time to time.
- (iii) Implementation tools through domestic regulation that ensure transparency and public participation in decision processes and monitoring of environmental commitments.
- (iv) Cooperation regarding commitments in areas such as climate change, protection and conservation of biodiversity, and sustainable management of resources, notably through the adoption of joint measures.
- (v) Cooperation on commitments related to the promotion of corporate social responsibility practices.
- (vi) If discussions between Brazil and the US regarding cooperation on trade-related-environmental matters evolve and the countries intend to design and incorporate a dispute settlement mechanism, transparency, effectiveness, and participation of civil society in monitoring the parties' compliance with resolutions reached under this mechanism.

Overall, prospects for future cooperation on environmental matters in the context of initiatives to foster Brazil-US trade relations are considered positive, provided that the current US Administration's stated policy on environmental protection is matched by Brazil's increasing and constructive engagement in international environmental discussions.

INTRODUCTION

The environment is shaping up to be an inescapable driver of the Brazil-US bilateral relations in the coming years. The current US administration has placed the issue at the center of its domestic and foreign policies.¹ Brazil, for its part, holds the greatest biological diversity in the world and is home to the largest part of the Amazon Forest. Accordingly, Brazil draws the world's attention to its policies and is expected to be part of any relevant global discussion on environmental issues.

Brazil and the US have led, stood behind and adhered to a number of environmental initiatives at the multilateral level through the ratification of MEAs, and on the trade area through the negotiation of FTAs containing relatively advanced environmental protection provisions. To what extent do these commitments by Brazil and the US in MEAs and FTAs converge? Could these commitments offer a basis for further cooperation leading to an enhanced trade agenda between the two countries? The answer to these questions might pave the way for improving the bilateral relationship.

This Report aims to answer the above questions and suggests measures that might be included in the bilateral trade agenda. Part I presents the international regulatory framework regarding trade and environment and analyses the positions of Brazil and the US concerning selected MEAs that contain trade provisions. This analysis leads to the conclusion that Brazil and the US adherence to MEAs significantly converges.

Part II analyses how the USMCA and the EU-Mercosur FTA approach environmental obligations and MEAs. The USMCA and the EU-Mercosur FTA are trade agreements with relatively advanced environmental provisions recently negotiated by the US and Brazil, respectively. The obligations negotiated by the US and Brazil in these FTAs converge to a significant extent, providing grounds for further cooperation between these countries.

The analysis carried out in Parts I and II evidences that international environmental commitments by Brazil and the US are more likely to be building

¹ See "*Biden's climate summit zeroes in on technology to help fight global warming*" available on Reuters website, at <<https://www.reuters.com/business/environment/bidens-climate-summit-zeroes-technology-help-fight-global-warming-2021-04-23/>>.

than stumbling blocks in their bilateral trade agenda. Based on this finding, the Report suggests topics that Brazil and the US could explore to further discussions for future bilateral cooperation on environmental matters and their relation to trade.

PART I: INTERNATIONAL ENVIRONMENTAL COMMITMENTS UNDERTOOK BY BRAZIL AND THE UNITED STATES OF AMERICA

1. MEAs as common legal denominators

MEAs are a critical component of the international landscape for the protection of the environment. According to the United Nations Environmental Programme (“UNEP”), “MEA” is a generic term for treaties, conventions, protocols and other binding instruments related to the environment, usually applied to instruments of a geographic scope wider than that of a bilateral agreement (i.e. between two states).² As legally binding instruments under international law, MEAs are an expression of international cooperation.

Where two countries have both ratified, accepted, or acceded to a MEA,³ these countries’ policies have converged towards the acceptance of the commitments under the MEA. Because MEAs are the outcome of voluntary negotiating processes involving different countries and reflect broad, possible consensus expressed by means of legal commitments, they can be depicted as minimum common legal denominators for global, regional, bilateral and national environment-related initiatives. In addition, the ratification of a MEA by two countries gives rise to common international commitments that are likely to influence their domestic policies, which should converge in line with the MEA’s

² Definition obtained from the Glossary of Terms for Negotiators of Multilateral Environmental Agreements (2007), prepared by UNEP and available on UNEP’s website, at <<https://wedocs.unep.org/bitstream/handle/20.500.11822/7569/-Glossary%20of%20Terms%20for%20Negotiators%20of%20Multilateral%20Environmental%20Agreements-2007762.pdf?sequence=3&isAllowed=>>>.

³ According to the UN Glossary of terms relating to Treaty actions, ratification “(...) defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.” As per the same Glossary, the acts of acceptance and accession have the same legal effects as ratification. The acceptance (or “approval”) has been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state. The accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states, and usually occurs after the treaty has entered into force. This Glossary is available on the UN’ website, at <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>.

provisions on the subject.⁴ Hence, countries' joint participation in MEAs (through ratification of the relevant instrument) can be considered as an indicator of convergence regarding international environmental obligations.

The mere participation in a given MEA does not imply full policy convergence between any two countries. A complete determination of policy convergence would arguably require specific analysis, including as to the degree of density of the legal provisions at issue, countries' historical and current domestic and foreign policies in the light of these provisions, countries' engagement with the objectives and institutions of the respective MEA, and countries' compliance with the obligations in question.

This Report does not specifically analyze policy convergence in these terms. More specific studies would be necessary to assess the association between formal adherence to a given international legal regime and policy convergence in environmental matters.

Yet, participation in MEAs is a simple, objective and verifiable indicator of shared international environmental commitments, and, thus, a criterion of convergence. Additionally, to the extent that it is true that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time",⁵ participation in MEAs is arguably a significant indicator of convergence between two countries' environmental policies.

On the other hand, the absence of joint participation in a specific MEA does not necessarily imply policy divergence between any two countries. Lack of adherence to an international legal regime can be explained by reasons other than simple opposition to the regime's substantive rules. For instance, the US has not ratified the United Nations Convention on the Law of the Sea ("UNCLOS"). It has been argued that the reason for non-ratification may be

⁴ In an article that investigates the relationship between national environmental legislation and international environmental commitments, Brandi, Blümer and Morin indicated that their research results support the hypothesis of a positive relationship between both international environmental agreements and preferential trade agreements with domestic legislative change. For more information on the research carried out. See article "When Do International Treaties Matter for Domestic Environmental Legislation?", available at <<https://direct.mit.edu/glep/article/19/4/14/14959/When-Do-International-Treaties-Matter-for-Domestic>>.

⁵ HENKIN, Louis (1979). *How Nations Behave*, New York, Columbia University Press in PICKERING, Heath (2014), *Why Do States Mostly Obey International Law?*, available at <<https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/>>.

related to disagreement regarding deep seabed mining and to sovereignty-related concerns.⁶ Nonetheless, the US has expressed the view that the UNCLOS reflects customary international law⁷ and adheres to many of its provisions,⁸ invoking UNCLOS to assert the freedom of navigation and to challenge excessive maritime claims.⁹ Thus, the lack of ratification by the US does not appear to be due to a blunt refusal of the content of the UNCLOS' provisions. It is well-known that political difficulties faced during the domestic ratification process of international treaties may prevent their ratification, even though countries may have signed the respective agreement (and have therefore shown a certain inclination to adhere to the MEA in question).

In Brazil, the ratification process requires the submission of international treaties for the consideration and approval of the National Congress. In the US, international agreements are submitted to the Senate, which may "advise and consent". In both countries, following the approval by the legislative power, the international treaty must be ratified by the President. Thus, the ratification of international treaties in both countries is subject to complex proceedings where political considerations impact on ratification.

2. The MEAs landscape

The Stockholm Conference of 1972 is a key starting milestone for the shaping of international environmental law.¹⁰ At that Conference, awareness about the destructive human action on the environment took shape on a global

⁶ Information obtained at publication "*Hypocrisea: The United States' Failure to Join the UN Convention on the Law of the Sea*" available on Harvard International Review's website, at <<https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/>>.

⁷ Information obtained at publication "*U.S. Ratification of the Law of the Sea Convention – Measuring the raison d'État in the Trump era*" available on The Diplomat's website, at <<https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>>.

⁸ Information obtained at publication "*Freedom of Navigation in the South China Sea: A Practical Guide*" available on Belfer Center for Science and International Affairs, Harvard Kennedy School's website, at <<https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>>.

⁹ Information obtained at publication "*U.S. Ratification of the Law of the Sea Convention – Measuring the raison d'État in the Trump era*" available on The Diplomat's website, at <<https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>>.

¹⁰ Information obtained at publication "United Nations Conference on the Environment. 5-16 June 1972, Stockholm" available on the United Nations' website, at <<https://www.un.org/en/conferences/environment/stockholm1972>>.

scale in the form of a law-making exercise.¹¹ The discussions held at the Conference resulted in a basic common framework as to how countries should address the challenge of preserving the environment.

The Stockholm Conference resulted from the mobilization of the international community within the United Nations (“UN”), where certain countries (especially developed ones) were concerned about growing transboundary pollution and the increase of environmental disasters during the 1960s. This led a group of countries to discuss and seek the adoption of measures to preserve the environment at the multilateral level.

The Conference had representatives from 113 countries and 400 governmental and non-governmental organizations.¹² It resulted in the adoption of three main documents: (i) the Stockholm Declaration, which sets out broad environmental policy goals and objectives; (ii) the Action Plan for the Human Environment, which contained recommendations for policies development; (iii) the resolution that created the UNEP, a subsidiary body of the UN that functions as its leading environmental authority.¹³

Since the Stockholm Conference, the breadth and scale of environmental issues has raised dramatically. So has awareness about them. This evolution has been reflected in the negotiation and conclusion of numerous MEAs: today, over 250 MEAs dealing with various environmental matters are in force.¹⁴

It has been argued that MEAs have positive social and economic impacts in addition to their role in setting out a framework for protecting the

¹¹ ACCIOLY; NASCIMENTO E SILVA; CASELLA. *Manual de Direito Internacional Público*. São Paulo: Saraiva, 24 ed., 2019. In this respect, it should be noted that, before 1972, relevant debates on international environmental law themes took place at the Trail Smelter Case (International Joint Commission, 1941) between US and Canada, and in the Corfu Channel Case (International Court of Justice, 1949) between the United Kingdom and Albania.

¹² Idem.

¹³ According to the UN description, “*UNEP uses its expertise to strengthen environmental standards and practices while helping implement environmental obligations at the country, regional and global levels. UNEP’s mission is to provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations*”. More information on UNEP’s functions is available on its website (<https://www.un.org/youthenvoy/2013/08/unep-United-nations-environment-programme/>).

¹⁴ Information obtained at publication “*The Doha mandate on multilateral environmental agreements (MEAs)*”, available on the World Trade Organization’s website, at <https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm>.

environment. MEAs can have a strong link to trade, as they can harmonize standards and practices to develop environmental protection, facilitate the technical and legal implementation of standards and technical regulations, and inform consumers in their decision-making.¹⁵

Annex 1 provides, in table format, an overview of 18 selected MEAs containing provisions related to trade. These MEAs were selected on the basis of the MEAs indicated by the WTO¹⁶ as containing provisions relevant for trade relations. It should be noted that this list covers all MEAs deemed by the UNEP as particularly relevant to trade.¹⁷ Annex 1 is therefore indicative of the multiplicity of existing MEAs relevant to international trade.

While broadly speaking all of the listed instruments have a similar goal (i.e. the protection of the environment), they regulate a wide range of more specific topics, such as climate change, biodiversity, and the conservation of marine life. Considering that ratification of MEAs is an indicator of convergence between two countries' environmental policies and the relevance of the listed MEAs for trade, Section 1.3 below tracks Brazil's and the US' participation in these MEAs as a means to assess the level of convergence between the two countries' environmental commitments at the international level.

3. Brazil and the US' MEAs

Brazil and the US have ratified several of the MEAs mentioned in Annex 1. It is submitted that these MEAs can be used as initial focal points in the bilateral agenda. Table 1 below compares Brazil's and the US' participation in the MEAs listed in Annex 1: it identifies whether each country has signed, ratified, accepted or acceded to the MEA at issue.

¹⁵ See "Harmonization, trade and the environment", STEVENS, Candice. 1993. *International Environmental Affairs* 5 (1): 42-49, available on the CIESIN website, at <<http://www.ciesin.org/docs/008-062/008-062.html>>.

¹⁶ See "WTO Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements (MEAs)", available on the World Trade Organization's website, at https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm.

¹⁷ See "Environment and Trade: a handbook" (second edition/2005). The handbook is available on the International Institute for Sustainable Development's website, at https://www.iisd.org/system/files/publications/envirotrade_handbook_2005.pdf. The latest version available of the UNEP list is from 2005.

Brazil holds a relevant position in the discussion of environmental matters in international forums.¹⁸ Historically, the Brazilian Government has played an important role at negotiations of environmental matters in the UN at least since the UN Conference on Environment and Development held in Rio de Janeiro in 1992.¹⁹

The US has also played a leading role in the negotiation of MEAs, and quickly joined almost all of the negotiated agreements from the early 1970s through the early 1990s.²⁰ However, it should be noted that, in the two decades following the 1990s, although the US continued negotiating new MEAs and often signed them, it almost never ratified them.

Table 1: MEAs signed, ratified, accepted or acceded to by Brazil or the US

Treaty	Brazil	US
International Plant Protection Convention	Ratified in September 1961	Ratified in August 1972
Convention on International Trade in Endangered Species of Wild Fauna and Flora	Ratified in November 1975	Ratified in January 1974
United Nations Convention on the Law of the Sea	Ratified in February 1989	Did not sign
Vienna Convention for the protection of Ozone Layer	Acceded in March 1990	Ratified in May 1987
Montreal Protocol	Acceded in March 1990	Ratified in 1988
Basel Convention	Ratified in October 1992	Signed in 1990
Convention on Biological Diversity	Ratified in May 1994	Signed in June 1993
United Nations Framework Convention on Climate Change	Ratified in February 1994	Ratified in November 1992
Kyoto Protocol	Ratified in August 2002	Signed in 1998
Rotterdam Convention	Ratified in June 2004	Signed in September 1998

¹⁸ See “*Meio Ambiente na Agenda Internacional: Implementação no Brasil das Convenções do Rio sobre Biodiversidade, Clima e Desertificação*” prepared by Instituto de Pesquisa Econômica Aplicada (IPEA) and available on IPEA’s website at <https://www.ipea.gov.br/portal/images/stories/PDFs/TDs/12122016td_2259.pdf>.

¹⁹ See “*O Brasil e os cinco anos do Acordo de Paris*” available on Clima Info’s website, at <<https://climainfo.org.br/2020/12/08/brasil-5-anos-acordo-de-paris/>>.

²⁰ KNOX, John H.. The United States, Environmental Agreements, and the Political Question Doctrine (June 2, 2015). *North Carolina Journal of International Law and Commercial Regulation*, Vol. 40, 2015, Wake Forest Univ. Legal Studies Paper No. 2613681, Available at SSRN: <<https://ssrn.com/abstract=2613681>>.

Treaty	Brazil	US
Cartagena Protocol	Ratified in February 2004	Did not sign
Stockholm Convention	Ratified in June 2004	Signed in May 2001
International Tropical Timber Agreement	Ratified in October 2013	Signed in April 2007
Agreement on Port State Measures to Prevent, Deter and Eliminate illegal, unreported and unregulated fishing	Signed in November 2009	Ratified in February 2016
Nagoya Protocol	Ratified in March 2021	Did not sign
Nagoya – Kuala Lumpur Supplementary Protocol	Signed in March 2012	Did not sign
Paris Agreement	Ratified in September 2016	Accepted in January 2021
Minamata Convention on Mercury	Ratified in August 2017	Accepted in November 2013

Brazil has ratified or acceded to 17 of the 18 MEAs listed above, while the US has ratified or accepted 9 of them. This simple comparison indicates that there is still a large room for cooperation as far as common participation in significant MEAs is concerned. However, the fact that either Brazil or the US has not joined a given MEA does not necessarily mean a divergence of approach towards environmental policies.

The US approach to the UNCLOS appears to offer an example in which a country has incorporated commitments expressed in the treaty without either signing or ratifying it. Even though the US is not a party to UNCLOS, in practice the country has accepted and adheres to many of its provisions,²¹ invoking UNCLOS to assert the freedom of navigation and challenge excessive maritime claims.²² In 1983, President Ronald Reagan issued the United States Oceans Policy Statement, supported by National Security Decision Directive 83, which documents the US' view that the UNCLOS reflects customary international law and fulfills US' interest in "a comprehensive legal framework relating to competing uses of the world's oceans".²³

²¹ See "Freedom of Navigation in the South China Sea: A Practical Guide" available on Belfer Center for Science and International Affairs Harvard Kennedy School's website, at <<https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>>.

²² See "U.S. Ratification of the Law of the Sea Convention – Measuring the *raison d'État* in the Trump era" available on The Diplomat's website, at <<https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>>.

²³ *Idem*.

As another illustration, the US signed the Convention on Biological Diversity (“CBD”) in 1993 but has not ratified it. However, the US has expressly acknowledged the importance of the instrument and has declared itself to be committed to the objectives of the CBD, “both at home and abroad”. In a statement to the Sixth Conference of the Parties to the CBD on April 17, 2002, Jeffry Burnam, Deputy Assistant Secretary of State for Environment expressed that:

The United States recognizes the importance of the Convention on Biological Diversity (CBD) as a valuable forum for international discussions on issues related to biological diversity. We appreciate the opportunity to participate in this Conference of the Parties, as we have in previous CBD deliberations, **with the aim of furthering our shared goals related to biological diversity.** (...)

The United States is committed to the objectives of the Convention, both at home and abroad. This commitment is reflected in the vibrant, ever-growing range of public and private sector programs and activities occurring throughout the United States related to protecting and sustainably using biological resources. **The United States remains equally committed to assisting partner countries in their efforts to protect biodiversity through bilateral assistance,** through its contributions to regional and international organizations and financial institutions, through innovative debt reduction programs such as the Tropical Forest Conservation Act, and through a broad range of other benefit-sharing programs. (...)²⁴

The examples above appear to indicate that, even though the US has not ratified certain MEAs, it would not necessarily oppose the application or the incorporation of the content of these MEAs in agreements more limited in scope (e.g., focused bilateral agreements). In addition to the fact that participation in MEAs by Brazil and the US appears to indicate points of convergence, a case-by-case analyses of MEAs where either Brazil or the US do not participate could help to confirm whether there can be convergence even in these additional cases.

²⁴ Statement to the Ministerial Roundtable, Sixth Conference of the Parties to the Convention on Biological Diversity, obtained at the US Department of State Archive, available at <<https://2001-2009.state.gov/g/oes/rls/rm/2002/9577.htm>>

PART II: COMPARATIVE ANALYSIS OF THE USMCA AND THE EU-MERCOSUR CHAPTERS ON ENVIRONMENT

1. The relationship between FTAs and MEAs

The priorities of countries shape the FTA provisions to which they agree.²⁵ As the environmental agenda has gained relevance among countries' priorities, FTA negotiations have gradually assimilated it, to the extent that environmental provisions may have become necessary conditions for the conclusion of certain agreements.²⁶

In international instruments such as the 1992 Rio Declaration,²⁷ the Agenda 21,²⁸ and the 2002 Johannesburg Declaration and Plan of Implementation,²⁹ countries have acknowledged that, while trade and investment may pose negative consequences to the environment, they could also be tools to contribute to sustainable development. Partly as an early outcome of this recognition, the Marrakesh Agreement Establishing the WTO emphasizes in its Preamble that trade should be conducted in accordance with the objective of sustainable development,³⁰ and the 2001 Doha Ministerial

²⁵ GEHRING, Markus W.; SEGGER, Marie-Claire Cordonier; CORREA, Fabiano de Andrade; REYNAUD, Patrick; HARRINGTON, Alexandra; MELLA, Rodrigo. *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*. Available at <<https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf>>.

²⁶ Idem. In this respect, the authors note that “[p]owerful economic actors, such as the EU and the US, may pre-condition RTA negotiations on the inclusion of sustainable development, labour, environment and other provisions, though the exact measures adopted in each treaty vary”.

²⁷ The full text of the 1992 Rio Declaration is available on the UN's website, at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf>.

²⁸ The full text of the Agenda 21 is available on the UN' website, at <<https://digitallibrary.un.org/record/170126>>.

²⁹ The full text of the 2002 Johannesburg Declaration and Plan of Implementation is available on the UN' website, at <<https://digitallibrary.un.org/record/499757>>.

³⁰ According to the Preamble of the Marrakesh Agreement Establishing the WTO, “The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,”. The full text of the Marrakesh Agreement Establishing the WTO is available on the WTO' website, at <https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf>.

Declaration reaffirmed this commitment in its paragraph 6.³¹ In addition, paragraph 51 of the Doha Declaration entrusted the Trade and Development and Trade and Environment committees to act as fora to identify and debate developmental and environmental aspects of the negotiations, in order to having the objective of sustainable development appropriately reflected.³²

Parties to FTAs and international investment agreements have also progressively pushed for or accepted commitments related to sustainable development as part of the object and purpose of these treaties³³ and in specific provisions. For instance, the preamble of the North American Free Trade Agreement (“NAFTA”) acknowledged the need to promote sustainable development.³⁴

³¹ Paragraph 6 of the 2001 Doha Ministerial Declaration has the following content: “We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO’s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002”. The full text of the 2001 Doha Ministerial Declaration is available on WTO’s website, at <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

³² Paragraph 51 of the 2001 Doha Ministerial Declaration has the following content: “The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected”. The full text of the 2001 Doha Ministerial Declaration is available on WTO’s website, at <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

³³ GEHRING, Markus W.; SEGGER, Marie-Claire Cordonier; CORREA, Fabiano de Andrade; REYNAUD, Patrick; HARRINGTON, Alexandra; MELLA, Rodrigo. *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*. Available at <<https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf>>.

³⁴ Additionally, FTAs can refer to MEAs and ask that the FTA parties will effectively enforce the MEAs. For example, the EU-Mercosur agreement establishes that the parties will effectively implement the Paris Agreement. It has been argued that the EU required this obligation in response to EU member states’ demand for assurance that Mercosur countries, including Brazil, would comply with the Paris Agreement. In this respect, see DO AMARAL JUNIOR, Alberto, MARTES, Marina. (2021) The Mercosur-EU FTA and the Obligation to Implement the Paris Agreement: An Analysis from the Brazilian Perspective. In: *European Yearbook of*

FTAs have had three basic roles in relation to MEAs: (i) to reaffirm the parties' commitments to effectively implement environmental obligations undertaken in MEAs; (ii) to offer interpretive windows for regulatory flexibility, indicating that the FTA provisions are not intended to undermine the MEA regime; and (iii) to open doors for collaboration regarding the implementation of the MEA within the context of the FTA.³⁵ In addition, the reference to MEAs in FTAs may express a commitment to deepen, at the FTA level, the commitments already made in the referenced MEA.

The interrelationship between MEA commitments and reference to MEAs in FTAs can help to build convergence to MEAs. For instance, Countries "A" and "B" participation in FTA "X" that obliges the parties to effectively implement the MEA "Y" leads to further convergence with Country "C" that participates in MEA "Y" but is not a party to FTA "X". The next session therefore evaluates whether there is further convergence between Brazil and the US' environmental commitments, by means of their participation in MEAs that the EU-Mercosur FTA and in the USMCA refer to.

This Report's focus on the EU-Mercosur FTA and the USMCA arises from the fact that they are the most comprehensive and modern trade agreements negotiated by Brazil and the US in terms of environmental protection provisions. Besides, US Congress approved the USMCA.

The obligations under the USMCA environmental Chapter meets the objectives regarding the environment of the Bipartisan Trade Act of 2015, which arguably signals the possibility that its commitments related to the environment are amenable for inclusion in future US agreements that meet the objectives of the Congress.³⁶

International Economic Law. Springer, Berlin, Heidelberg, available at <https://doi.org/10.1007/8165_2021_68>.

³⁵ GEHRING, Markus W.; SEGGER, Marie-Claire Cordonier; CORREA, Fabiano de Andrade; REYNAUD, Patrick; HARRINGTON, Alexandra; MELLA, Rodrigo. *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*. Available at <<https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf>>.

³⁶ GANTZ, David. *The US-Mexico-Canada Agreement: Labor Rights and Environmental Protection*. *Baker Institute Report*, 6. 2019. Available at: <<https://www.bakerinstitute.org/media/files/research-document/62174e56/bi-report-061319-mex-usmca-4.pdf>>

2. Convergence in MEAs in the USMCA and EU-Mercosur FTAs

Both the USMCA and the EU-Mercosur FTA contain a specific environmental chapter listing environmental protection commitments and principles, which also include the commitment for its parties to implement certain MEAs. After a brief description of these FTAs, this Report turns to the specific MEAs referred to in each of them, as a means to analyze potential convergence of MEA commitments between Brazil and the US.

The USMCA was signed by the US, Mexico and Canada, and entered into force on July 1, 2020, replacing the NAFTA. According to Steve Charnovitz, NAFTA's legal framework for environmental protection and for the promotion of sustainable development and trade was nebulous.³⁷ With the USMCA, the US sought to modernize the NAFTA environmental-related provisions and institutions. The USMCA reflects the U.S. Trade Priorities and Accountability Act of 2015, which requires that all bilateral and regional free trade agreements include environmental provisions, and that parties to such agreements (i) strive to ensure that they do not relax domestic environmental laws to encourage trade, and (ii) strive not to fail to enforce their environmental laws.³⁸

The EU-Mercosur FTA negotiations were concluded in 2019. By the delivery of this Report, the agreement is still subject to signature and ratification. With respect to its environmental-related provisions, the EU-Mercosur reflects the sustainable development strategy adopted by the European Union in 2001 (and later revised in 2006), which requires the European Union's internal and external policies to integrate environmental, social and economic decision-making.³⁹

³⁷ CHARNOVITZ, Steve. NAFTA: An Analysis of Its Environmental Provisions. *The Environmental Law Reporter*, 23 ELR, 10067. 1993. Available at: <<https://elr.info/sites/default/files/articles/23.10067.htm>>.

³⁸ Information obtained at publication on the US trade and investment agreements, available on the United States Environmental Protection Agency website, at <<https://www.epa.gov/international-cooperation/us-trade-and-investment-agreements>>.

³⁹ The Renewed EU Sustainable Development Strategy as adopted by the European Council on 15/16 June 2006 is available on the European Council's website, at <<http://register.consilium.europa.eu/pdf/en/06/st10/st10917.en06.pdf>>. Information obtained in GEHRING, Markus W.; SEGGER, Marie-Claire Cordonier; CORREA, Fabiano de Andrade; REYNAUD, Patrick; HARRINGTON, Alexandra; MELLA, Rodrigo. *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*. Available at <<https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in>>.

Both the USMCA and the EU-Mercosur FTA include commitments related to the integration of sustainable development and environmental protection to the trade and investment relationship among their respective parties. Noticeably, both FTAs either require effective implementation (EU-Mercosur, article 5.3), or affirm its parties' commitments to implementation (USMCA, article 24.8) of the MEAs in which their respective parties participate.⁴⁰

Annex 2 provides a list that displays the MEAs mentioned in the USMCA and EU-Mercosur agreements, and indicates whether the US and Brazil ratified each MEA at issue.

In the chapter regarding environmental matters of the USMCA ("Chapter 24"), all expressly mentioned MEAs shall be respected by the parties, each of which must "fulfill its respective obligations" under the MEA (article 24.8.4).

On the other hand, the Trade and Sustainable Development Chapter of the EU-Mercosur FTA ("TSD Chapter") has different language concerning the MEAs mentioned therein. For example, according to article 7.2.a of the TSD Chapter, parties shall promote the use of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), while article 6.2.a provides for the "effective implementation" of the Paris Agreement.

Despite the granularity of tone in the EU-Mercosur FTA, the information set out in Annex 2 indicates that Brazil and the US have already ratified the MEAs referred to in the EU-Mercosur and the USMCA's chapters on environmental matters, respectively.

Moreover, as Annex 2 shows, except for three of the listed MEAs (i.e., the Convention for the Establishment of an Inter-American Tropical Tuna Commission, the CBD and the UNCLOS), Brazil and the US have both ratified all the MEAs expressly mentioned in either the USMCA or the EU-Mercosur's

regional-trade-agreements-rtas.pdf>.

⁴⁰ It should be noted that in several articles both the USMCA and the EU-Mercosur agreement refer to the importance of the MEAs and to the necessity of respecting the minimum commitments already undertook. Besides, both highlight the parties to cooperate and consult about topics of mutual interest and that the parties should exchange information about negotiation, ratifications, and amendments regarding MEAs, so it can improve the protection of the environment.

chapters on environmental matters. Even though the MEAs expressly referred to in the USMCA and the EU-Mercosur FTA vary, Brazil and the US converge in the sense that they have ratified most of the MEAs listed in either the USMCA or the EU-Mercosur FTA. There is thus considerable convergence of international environmental commitments by Brazil and the US as referred to in the FTAs at issue.

The specific commitments arising from each MEA listed in Annex 2 will be further discussed considering the USMCA and EU-Mercosur FTA in the following section of this Report, along with details on procedural tools and dispute settlement systems provided for in the USMCA and EU-Mercosur FTA.

3. Convergence in the provisions of the USMCA and EU-Mercosur FTA chapters on environment

The present section compares the provisions of the environmental protection chapters in the USMCA and in EU-Mercosur FTA: Chapter 24 of the USMCA and the yet unnumbered TSD Chapter of the EU-Mercosur FTA.

For comparison purposes, this section groups the commitments in these chapters in the following five broad categories: (i) general aspects; (ii) institutions; (iii) dispute settlement mechanisms; (iv) implementation; and (v) environmental commitments. This section demonstrates that, except for differences in the MEAs expressly mentioned in Chapter 24 and in the TSD Chapter, the core of the resulting responsibilities for their respective parties is arguably similar. There are also similarities regarding the institutions designed to achieving compliance and transparency, and the environmental commitments related to the conservation and protection of biodiversity.

3.1. General aspects

The USMCA and the EU-Mercosur FTA share the objective of achieving the protection of the environment through cooperation.⁴¹⁻⁴² Cooperation is to

⁴¹ As per article 24.2.2 of Chapter 24 of the USMCA, “The objectives of this Chapter are to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development”.

take place in accordance with specific principles: the promotion of sustainable development and respect for sovereignty. On the other hand, the EU-Mercosur FTA provides for the application of the precautionary principle to environmental protection,⁴³ which is not provided for in the USMCA.

With regard to the promotion of sustainable development, both FTAs state that international trade should not be carried out at the expense of the environment,⁴⁴ but rather in harmony with internal environmental laws and with commitments already undertaken by parties in MEAs.⁴⁵

As the respect for sovereignty, both FTAs expressly refer to the sovereign right of the parties to determine the level of domestic environmental protection and to set environmental priorities, as well as to establish or modify environmental laws and policies.⁴⁶

The EU-Mercosur FTA differs significantly from the USMCA as the former recognizes the precautionary principle, while the latter does not.⁴⁷ This principle allows countries to adopt measures with a view to protecting the environment even when the scientific evidence or information behind it is insufficient or inconclusive in relation to the matter at stake, provided that such matter poses a risk of serious environmental degradation in its territory.

The inclusion of the precautionary principle in the EU-Mercosur FTA was requested by the EU, and was accepted by the Mercosur countries after strong resistance, reportedly with the guarantee that it would not be used as means to disguise unjustified restrictions on trade.⁴⁸ Thus, as a counterpoint to

⁴² In this respect, article 1.4.(c) of the TSD Chapter of the EU-Mercosur FTA indicates that “Consistent with the instruments referred to in paragraph 2, the Parties shall promote sustainable development through: (c) enhanced cooperation and understanding of their respective labour and environmental trade-related policies and measures, taking into account the different national realities, capacities, needs and levels of development and respecting national policies and priorities. In addition, article 1.5 provides that “Recognizing the differences in their levels of development, the Parties agree that this Chapter embodies a cooperative approach based on common values and interests”.

⁴³ Article 10.2 of the TSD Chapter of the EU-Mercosur FTA.

⁴⁴ Article 24.4.3 of Chapter 24 of the USMCA and article 2.3 of the TSD Chapter of the EU-Mercosur FTA.

⁴⁵ Article 24.2 of Chapter 24 of the USMCA and article 5 of the TSD Chapter of the EU-Mercosur FTA.

⁴⁶ Article 24.3.1 of Chapter 24 of the USMCA and article 2.1 of the TSD Chapter of the EU-Mercosur FTA.

⁴⁷ Article 10.2 of the TSD Chapter of the EU-Mercosur FTA.

⁴⁸ Information obtained at the informative summary prepared by the Brazilian government on the EU-Mercosur FTA and issued on July 4, 2019, available on the Brazilian government’s website,

the application of the precautionary principle, the TSD Chapter prohibits the use of environmental laws and measures as disguised restrictions on trade or investment between parties to their respective agreements.⁴⁹

3.1.1. Conclusion

Taking into account the converging general aspects of the USMCA's and the EU-Mercosur FTA's environmental chapters, a framework for cooperation would appear to be possible. Cooperation could translate into shared initiatives related to environmental protection in the scientific and technological fields, as well as into joint measures for the promotion of sustainable development. It could also enable the exchange of scientific and technological knowledge and of information on environmental policies and best practices for harmonization of trade and sustainable development measures. Due to the resistance of the Mercosur countries towards the precautionary principle in the EU-Mercosur FTA, this principle would not appear to be an obstacle in practice in possible discussions between Brazil and the US.

3.2. Institutions

Both the USMCA and the EU-Mercosur FTA have established a specific forum for discussions of environmental matters among their respective signatories. The USMCA provides for an Environment Committee and the EU-Mercosur FTA provides for a Sub-Committee on Trade and Sustainable Development ("TSD Sub-Committee").⁵⁰ These bodies oversee the implementation of the environmental provisions, review the relevant provisions, and recommend modifications to them. In addition, they can follow up the

at https://www.gov.br/mre/pt-br/arquivos/documentos/politica-externa-comercial-e-economica/2019_10_24__Resumo_Acordo_Mercosul_UE_CGNCE.pdf.

⁴⁹ Article 10.4 of the TSD Chapter of the EU-Mercosur FTA.

⁵⁰ Article 24.26 of Chapter 24 of the USMCA and article 14 of the TSD Chapter of the EU-Mercosur FTA.

advice made by the Panel of Experts in dispute concerning Chapter 24 or the TSD Chapter respectively, recommending mutually satisfactory provisions.⁵¹

The bodies in both agreements are composed of senior officials (or their delegates) of the parties and operate by consensus.⁵² Neither Chapter 24 nor the TSD Chapter provide details on whether decisions would have binding effect, or on legal consequences for non-compliance with them. Given the consensual character of the decisions and the cooperative tone of the two FTAs, nonetheless, it is expected that the parties will have strong incentives to comply with decisions, including to avoid being subject to political harassment by their FTA partners.

3.2.1. Conclusion

Considering that the USMCA and the EU-Mercosur FTA set out similar forums for the discussion of environmental issues, a committee of similar format and function in the context of Brazil-US bilateral relations could be an interesting mechanism to explore in future discussions. This body could be a means to monitor and advise on the implementation of environmental commitments by the parties, as well as to review environmental commitments.

3.3. Dispute settlement mechanisms

Chapter 24 of the USMCA and the TSD Chapter of the EU-Mercosur FTA provide for similar consultation mechanisms, but different panel procedures for the settlement of disputes.

In the first step of the dispute resolution process under both FTAs, the parties to the dispute consult with each other.⁵³ If consultations fail to reach a mutually satisfactory resolution of the matter, the institutional bodies in place (i.e. the Environment Committee in the USMCA or the TSD Sub-Committee in the EU-Mercosur FTA) may convene to seek a mutually satisfactory resolution

⁵¹ Article 24.26.3.(c) of Chapter 24 of the USMCA and articles 16.5 and 17.11 of the TSD Chapter of the EU-Mercosur FTA.

⁵² Article 24.26.5 of Chapter 24 of the USMCA and article 14.2 of the TSD Chapter of the EU-Mercosur FTA.

⁵³ Article 24.29 of Chapter 24 of the USMCA and article 16 of the TSD Chapter of the EU-Mercosur FTA.

through negotiation and consultative functions among representatives and through recommendations, as a second step.⁵⁴ In the case of the USMCA, this is a necessary second step in the process, while in the case of the TSD Chapter, this is an optional second step. If the matter is not yet resolved, there is the possibility of a third step, which is different for the USMCA and the EU-Mercosur FTA.

As a third step to dispute resolution under the USMCA, the disputing parties may refer the matter to their ministers, who will seek to resolve it.⁵⁵ In case the ministerial consultation fails to reach a solution, the requesting party can request the establishment of a panel.⁵⁶ The establishment of this panel shall follow the rules of the dispute settlement chapter of the USMCA (Article 31.6 of the Chapter 31)⁵⁷ and the following procedural steps will be governed by the provisions of Chapter 31.⁵⁸

The panel issues a final report with its findings,⁵⁹ based on which the disputing parties shall endeavor to agree on the resolution of the dispute. If the disputing parties are unable to agree on that, the complaining party may suspend the application benefits to the responding party, equivalent to the effect of the non-conformity or the nullification or impairment, until the disputing parties agree on a resolution.⁶⁰

The TSD Chapter of the EU-Mercosur FTA, in turn, provides as a third step that, in case consultations between countries do not succeed, an independent panel of experts⁶¹ shall examine the matter and issue a report with

⁵⁴ Article 24.30 of the USMCA and article 16.5 of the TSD Chapter of the EU-Mercosur FTA.

⁵⁵ Article 24.31 of Chapter 24 of the USMCA.

⁵⁶ Article 24.32 of Chapter 24 of the USMCA.

⁵⁷ Article 24.32.1 of Chapter 24 of the USMCA.

⁵⁸ According to the Report made by the Nina M. Hart, legislative attorney at the Congressional Research Service US Congress, this is one of the most remarkable differences from the old mechanism settled in the NAFTA, which focused on cooperative resolution. In the USMCA, after several trials, the dispute settlement is used as a last resource. To this "last resource" it will be applicable all provisions contained on Chapter 31 of the USMCA Agreement. This information is contained at page 22 of the report is available at: <<https://crsreports.congress.gov/product/pdf/R/R46793>>.

⁵⁹ Articles 31.17 and 31.18 of Chapter 31 of the USMCA. In case the panel does not agree unanimously in a certain matter, it will issue separate opinions.

⁶⁰ Article 31.19.1 of Chapter 31 of the USMCA.

⁶¹ With respect to the composition of the panel of experts, at its first meeting after the entry into force of the EU-Mercosur Agreement, the TSD Sub-Committee shall establish a list of at least 15 individuals who are willing and able to serve as an expert of the panel. This list will be composed of three sub-lists: one proposed by the EU, one proposed by Mercosur, and one sub-

recommendations for the resolution of the dispute.⁶² The report will be public and, once the panel issues it, the parties discuss appropriate implementation measures in accordance with the recommendations.⁶³ The TSD Sub-Committee will follow-up on implementation.⁶⁴

However, in contrast to the USMCA, the TSD Chapter of the EU-Mercosur FTA does not provide that non-compliance with the report issued by the panel of experts could lead to a suspension of benefits under the FTA. Moreover, the TSD Chapter provides that none of the signatories of the EU-Mercosur FTA shall have recourse to the dispute settlement system of the agreement for matters arising under the TSD Chapter.⁶⁵

This has been one of the most controversial provisions of the EU-Mercosur FTA TSD Chapter. There is fear that the lack of a binding dispute settlement mechanism may weaken compliance with the environmental commitments under the TSD Chapter.⁶⁶ IMAZON, a Brazilian research institute whose mission is to promote conservation and sustainable development in the Amazon, has suggested that the dispute resolution process under the TSD Chapter should “follow the model of the USMCA”, that created a mechanism “of quick monitoring and enforcement of provisions”.⁶⁷

3.3.1. Conclusion

list of individuals who are not nationals of either party, each containing at least five individuals (Article 17.3). Such individuals must have specialized knowledge of, or expertise in issues related to labor, environmental or trade law, or in the resolution of disputes arising from international agreements (Article 17.4). The panel of experts will be composed of three members, unless the parties agree otherwise, and shall always be composed of at least a non-national of either party, who will act as chairperson (Article 17.5). Parties shall consult in order to agree on the composition of the arbitration panel for the resolution of their matter (paragraph 1 of Article 8, Chapter III, Title VIII of the EU-Mercosur Agreement - Dispute Settlement).

⁶² Articles 17.1 and 17.9 of the TSD Chapter of the EU-Mercosur FTA.

⁶³ Articles 17.10 and 17.11 of the TSD Chapter of the EU-Mercosur FTA.

⁶⁴ Article 17.11 of the TSD Chapter of the EU-Mercosur FTA.

⁶⁵ Article 15.5 of the TSD Chapter of the EU-Mercosur FTA.

⁶⁶ Information obtained at publication “The European Union-Mercosur Agreement is Not a Threat to EU Environmental Policy” available in the Trade Experettes’ blog, at <<https://www.tradeexperettes.org/blog/articles/the-european-union-mercotur-agreement-is-not-a-threat-to-eu-environmental-policy>>.

⁶⁷ Information obtained at publication “Is the EU-MERCOSUR trade agreement deforestation-proof?” available on IMAZON’s website, at https://imazon.org.br/wp-content/uploads/2020/11/mercotur_en_imazon.pdf.

Considering the differences as to how the dispute settlement mechanisms are structured in each of the FTAs at issue, the possible suggestions of this Report on how such a mechanism could be designed if trade agreement between Brazil and US are discussed refer more to general principles than to the mechanism's structure and rules of proceeding. In this respect, a soft recommendation is that the structure of the dispute settlement mechanism be transparent, that its decisions be effective, and that there are mechanisms available for the participation of civil society in monitoring the parties' compliance with resolutions reached by means of such mechanism.

3.4. Implementation

The commitments on the implementation of Chapter 24 of the USMCA and the TSD Chapter of the EU-Mercosur FTA are similar. Domestic regulation is the basic means for the implementation of environmental obligations. According to both FTAs at issue, implementation shall ensure high and effective levels of protection.⁶⁸ Accordingly, under Chapter 24 of the USMCA, each party must ensure that there are competent authorities investigating the violations, and provide access to administrative, quasi-judicial or judicial proceedings for the enforcement of environmental obligations.⁶⁹ Chapter 24 also highlights that these proceedings should not be unnecessarily complicated or entail unreasonable fees or time limits.⁷⁰

Both FTAs at issue also aim to foster transparency in the implementation of environmental obligations,⁷¹ and encourage public participation in this process.⁷²

In this respect, the USMCA provides that the hearings to be conducted in administrative, quasi-judicial, or judicial proceedings for the enforcement of its parties' environmental laws shall be open to the public, except when the

⁶⁸ Article 24.3.2 of Chapter 24 of the USMCA and article 2.2 of the TSD Chapter of the EU-Mercosur FTA.

⁶⁹ Article 24.6.3 of Chapter 24 of the USMCA.

⁷⁰ Article 24.6.3 of Chapter 24 of the USMCA.

⁷¹ For instance, articles 24.5.1, 24.6.3 and 24.11.3 of Chapter 24 of the USMCA and article 3 of the TSD Chapter of the EU-Mercosur FTA.

⁷² Article 3 of the TSD Chapter of the EU-Mercosur FTA.

administration of justice otherwise requires.⁷³ The USMCA also requires that the parties promote and maintain due procedures for assessing the environmental impacts of proposed projects that are subject to an action by the party's central level of government, and which may cause significant effects on the environment, with a view to minimizing or avoiding adverse impacts.⁷⁴ Such procedures shall also allow for public participation.⁷⁵

3.4.1. Conclusion

Both the EU-Mercosur FTA and the USMCA provide for soft tools to achieve the implementation of environmental commitments and an effective protection of the environment at the domestic level. Overall, both FTAs at issue rely on transparency and public participation. Fostering transparency and public participation may be explored in the design of provisions related to the implementation of environmental commitments in future bilateral discussions between Brazil and the US.

3.5. Specific environmental commitments

Whilst Chapter 24 of the USMCA agreement provides for commitments on diverse issues in the body of the text, the TSD Chapter of the EU-Mercosur mostly emphasizes the necessity of each party to implement or promote the use of MEAs that are references regarding the relevant topics, as will be demonstrated in the following sections.

Environmental commitments under each FTA are divided into topics. This Report focuses on the following topics:

Topics	Articles of Chapter 24 of the USMCA	Articles of the TSD Chapter of the EU-Mercosur FTA
Climate Change	9	6
Air quality	11	N/A
Biodiversity and sustainable management	10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23	7, 8, 9
Corporate responsibility	13, 14, 24	11, 12, 13

⁷³ Article 24.6.4 of Chapter 24 of the USMCA.

⁷⁴ Article 24.7.1 of Chapter 24 of the USMCA.

⁷⁵ Article 24.7.2 of Chapter 24 of the USMCA.

3.5.1. Climate change

Articles 24.9 and 24.11 of Chapter 24 of the USMCA and article 6 of the TSD Chapter of the EU-Mercosur FTA cover climate change. Both chapters refer to a number of climate change-related MEAs, with different environmental focus including emissions reduction (as the United Nations Framework Convention on Climate Change and the Paris Agreement in the EU-Mercosur FTA) and the ozone layer protection (as the Montreal Protocol in the USMCA). Both FTAs also contain provisions regarding the prevention and monitoring of air pollution.

3.5.1.1. The United Nations Framework Convention on Climate Change and the Paris Agreement

The objective of the United Nations Framework Convention on Climate Change (“UNFCCC”) (1994) is to stabilize greenhouse gas emissions. The Paris Agreement complements the UNFCCC by establishing the goal of limiting global warming to well below 2 degrees Celsius.⁷⁶ This shall be achieved by cooperation between the parties to reach a global peaking of greenhouse gas emissions.

The EU-Mercosur provisions refer to the UNFCCC and the Paris Agreement and request that the parties “effectively implement” these two MEAs. The USMCA does not refer to either of these MEAs. However, the US is currently part of the UNFCCC and of the Paris Agreement.

3.5.1.2. Protection of the ozone layer

In addition to being bound to reduce emissions under the Paris Agreement, the US also recognizes the need to reduce the levels of harmful compounds such as hydrochlorofluorocarbons (“HCFCs”) under the Montreal Protocol. Under the Montreal Protocol, parties must send annual reports of the

⁷⁶ Article 2.1.(a) of the Paris Agreement. Full text available at <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>.

data, the control of ozone depleting substances (“ODS”) trade and listing the respective responsibilities to phase out the ODS.

The USMCA refers to the Montreal Protocol in Article 24.9. Through cooperation, the USMCA parties must exchange information on: (i) environmentally friendly alternatives; (ii) management practices, policies and programs; (iii) methodologies for stratospheric ozone measurements; and (iv) combatting illegal trade in substances.

The EU-Mercosur agreement recognizes the importance of the Montreal Protocol in article 13 of the TSD Chapter, which provides that the parties will work together on trade-related aspects of the Montreal Protocol. Also, parties recognize the necessity to work together to promote environmentally friendly alternatives to the emission of HCFCs and ODS, and to address illegal trade of substances regulated by the Protocol. In addition, Brazil participates individually in the Montreal Protocol, which reinforces the existence of a common goal between the US and Brazil regarding the protection of the ozone layer.

3.5.1.3. Conclusion

The commitments in the USMCA and the EU-Mercosur FTA on climate change illustrate a significant level of convergence: even though the text of the FTAs and the MEAs referred to in each FTA are different, there is similarity of substantive content.

The provisions on climate change in Chapter 24 and in the TSD Chapter rely heavily on cooperation. No matter how specific each agreement is, the actions described always mention the necessity to establish a system of cooperation, especially scientific and informational. Moreover,, even though the Paris Agreement is not mentioned under the USMCA, the US recently returned to the agreement. The same can be said about the Montreal Protocol, since Brazil and the US have, respectively, acceded to it and ratified it.

As environmental matters have become a top priority on the American government’s current agenda and as the US now participates individually in the UNFCCC and in the Paris Agreement, these MEAs could provide a starting point for environmental discussions related to trade in a future bilateral

understanding.⁷⁷ The Paris Agreement, which enacts requirements to pursue national commitments,⁷⁸ would appear to be particularly important for the discussions.

3.5.2. Air quality

There is no specific mention of MEAs related to air quality in either the EU-Mercosur FTA or the USMCA. In fact, the EU-Mercosur FTA does not address air quality specifically. By contrast, Article 11 of Chapter 24 of the USMCA emphasizes the need to maintain and monitor air quality. The FTA highlights that cooperation between parties to the USMCA is important to reduce the effects of air pollution, since there are several transboundary and domestic effects. Subject to public participation and transparency, cooperation may include exchanging information and experiences in areas related to (i) ambient air quality planning; (ii) modeling and monitoring, including spatial distribution of main sources and their emissions; (iii) measurement and inventory methodologies for air quality and emissions' measurement; and (iv) reduction, control, and prevention technologies and practices.

3.5.2.1. Conclusion

Although the EU-Mercosur FTA has no specific provision on the matter of air quality, this could be at least partly explained by the distance between Mercosur and the European Union. To the extent that this is correct, the same reasoning would apply for the relationship between the US and Brazil. From this perspective, air quality would not appear to be a central topic in bilateral discussions between Brazil and the US.

⁷⁷ Joe Bidens' administration stated as a priority the importance to achieve the goals established in the Paris Agreement. Information obtained at publication "World welcomes U.S. return to Paris climate accord, readies wish-list for Biden" available on Reuters website, at <<https://www.reuters.com/world/china/world-welcomes-us-return-paris-climate-accord-readies-wish-list-biden-2021-01-21/>>.

⁷⁸ DI LEVA, Charles E.; SHI, Xiaoxin (2017) The Paris Agreement and the International Trade Regime: Considerations for Harmonization. *Sustainable Development Law & Policy*: Vol. 17: issue 1, Article 4. Available at <<http://digitalcommons.wcl.american.edu/sdlp/vol17/iss1/4>>.

3.5.3. Biodiversity and sustainable management of resources

The analysis of biodiversity and sustainable management of resources provisions in Chapter 24 of the USMCA and TSD Chapter of the EU-Mercosur FTA can be divided in four categories of provisions: protection of biodiversity in general, sustainable management of forests, protection of marine life, and provisions regarding invasive alien species.

3.5.3.1. Protection of biodiversity

Article 15 of Chapter 24 of the USMCA recognize the importance of conservation and of respecting, preserving and maintaining the knowledge and practices of indigenous peoples and local communities for the discussion on biological diversity.

The TSD Chapter of the EU-Mercosur FTA also provides for commitments regarding indigenous and tribal peoples. However, this recognition takes place in provisions regarding the sustainable management of forests, further discussed below.

In Article 22 of Chapter 24, the USMCA parties commit to combating the illegal taking of, and illegal trade in, wild fauna and flora. Article 15 of Chapter 24 requires parties to cooperate by exchanging information and experiences on: (i) conservation and sustainable use of biological diversity; (ii) protection and maintenance of ecosystems and ecosystems services; and (iii) access to genetic resources and the sharing of benefits arising from their use. Lastly, Chapter 24 incorporates the notion of public participation and consultation on matters related to protection of biodiversity.

As for the EU-Mercosur FTA, article 7 of the TSD Chapter acknowledges the importance of conservation and sustainable use of biological biodiversity, as per the provisions of the Convention on Biological Diversity, the CITES, and the International Treaty on Plant Genetic Resources for Food and Agriculture. The parties to the EU-Mercosur FTA commit to promoting the use of CITES for the conservation and sustainable use of biodiversity, to implementing effective measures to reduce illegal trade in wildlife, to encouraging trade in products obtained through the sustainable use of

resources or which contribute to conservation of biodiversity, and to promoting the sharing of benefits from the use of genetic resources. In addition, the parties shall exchange information, initiatives and good practices on trade in natural resource-based products with the scope of conserving diversity and cooperate as appropriate in the matter.

3.5.3.2. Sustainable management of forests

The USMCA refers to the relationship between the sustainable management of forests and trade in Article 23 of Chapter 24, where the parties acknowledge their roles as major consumers, producers and traders of forest products, as well as the importance of healthy forests for the ecosystem and for providing livelihood, job opportunities and benefits for present and future generations. In that context, the parties to the USMCA commit to maintain or strengthen the capacity of government and institutional frameworks to promote sustainable forest management, and to promote trade in legally harvested forest products. These actions should rely on the exchange of information and on cooperative initiatives to promote sustainable forest management, including those designed to combat illegal logging and associated trade.

The TSD Chapter of the EU-Mercosur FTA sets out commitments related to the sustainable management of forests in Article 8. The parties recognize the role of trade in pursuing sustainable forest management, and commit to (i) encouraging trade in products from sustainably managed forests, (ii) promoting, as appropriate and with prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as means to enhance their livelihoods and promote the conservation and sustainable use of forests, and (iii) implementing measures to fight illegal logging and related trade. Article 8 of the TSD Chapter also states that countries shall cooperate on issues regarding trade and the conservation of forest cover as well as sustainable forest management consistently with the 2030 Agenda for Sustainable Development.

Hence, with respect to the sustainable management of forests, both Chapter 24 and the TSD Chapter basically converge on the scope of cooperation: to reduce deforestation, combat illegal trade and provide for

healthy forests, relying heavily on promotion and information-exchange activities.

3.5.3.3. Protection of marine life

In the USMCA, the protection of marine life and environment is a major issue to which Chapter 24 dedicates several Articles – namely, Articles 10, 12, and 17 to 21. Chapter 24 expressly provides that its provisions regarding marine wild capture fisheries, sustainable fisheries management, conservation of marine species, fisheries subsidies and illegal, unreported and unregulated fishing do not apply to aquaculture.

Articles 10 and 12 of Chapter 24 focus on the protection of the marine environment from ship pollution and from littering, respectively. In this respect, the parties to the USMCA recognize the importance of protecting and preserving the marine environment from ship pollution and commit to take measures to prevent the pollution of the marine environment from ships, in accordance with the obligations undertaken by the parties in the International Convention for the Prevention of Pollution from Ships and its Protocols. As to marine littering, the parties commit to take action to prevent and reduce marine litter in order to preserve human health and prevent the loss of biodiversity.

Articles 17 to 21 of Chapter 24 focus on the protection of fisheries from capture, illegal, unreported, and unregulated fishing as well as on the importance of their sustainable management and conservation. The parties acknowledge their roles as major consumers, producers, and traders of fisheries, and recognize the importance of measures for the conservation and sustainable management of fisheries. To that end, the parties deem important the promotion and facilitation of trade in sustainably managed and legally harvested fish and fish products – while ensuring that trade in such products is not subject to unjustifiable barriers to trade.

Article 17 provides that trade restrictive measures on fish or fish products to protect fish or other marine species should be (i) based on the best scientific evidence available; (ii) tailored to the conservation objective; and (iii) implemented after the importing party has endeavored to resolve the matter cooperatively with the exporting party.

Article 18 provides that sustainable fisheries management systems should (i) prevent overfishing and overcapacity through appropriate measures, (ii) reduce bycatch of non-target species, and (iii) the promote the recovery of overfished stock.

Article 19 requires effective enforcement of measures for the long-term conservation of marine species. These measures shall include: (i) studies and assessments of the impact of fisheries operations, (ii) measures to avoid, mitigate or reduce bycatch of non-target species in fisheries, and (iii) cooperation on national and regional bycatch reduction measures.

Article 20 provides that parties to the USMCA shall not grant or maintain subsidies for fishing that contribute to overfishing and overcapacity.

Finally, Article 21 calls on the parties to improve cooperation to fight illegal, unreported and unregulated fishing.

As to the EU-Mercosur FTA, Article 9 of the TSD Chapter contains provisions related to trade and sustainable management of fisheries and aquaculture. The parties recognize the role of trade in pursuing the conservation and sustainable management of marine resources and ecosystems and in promoting sustainable aquaculture. In this respect, they agree to implement long-term conservation and management measures and sustainable exploitation of marine resources in accordance with the UN Convention on the Law of the Sea and with the Food and Agriculture Organization of the UN (“FAO”) instruments, especially the Code of Conduct for Responsible Fisheries. To that end, parties to the EU-Mercosur FTA shall also implement transparent measures to combat illegal, unreported and unregulated fishing, and exclude from international trade products derived from such activities. Last, parties shall promote the development of sustainable and responsible aquaculture.

Overall, the USMCA contains more specific obligations concerning the protection of marine life and environment than the EU-Mercosur FTA, with the caveat that none of these provisions apply to aquaculture. At the same time, both the USMCA and the EU-Mercosur FTA converge in terms of main obligations and goals regarding the protection of marine life and environment, and seek to promote the sustainable management of marine resources.

3.5.3.4. Provisions regarding invasive alien species

Article 16 of Chapter 24 of the USMCA states that the parties aim to prevent, detect, control and eradicate “terrestrial and aquatic invasive alien species” that cause adverse environmental impacts.

There is no similar provision in the TSD Chapter of the EU-Mercosur FTA. This could be at least partly explained by the absence of borders and by the long distance between the parties to the EU-Mercosur FTA. To the extent that this is an explanation for the lack of treatment of this matter in the EU-Mercosur FTA, a similar explanation may apply to the relationship between the US and Brazil.

3.5.3.5. Conclusion

A significant part of the obligations under Chapter 24 and the TSD Chapter converges with respect to biodiversity and sustainable management matters and by focusing broadly on cooperation. Cooperation is highlighted in different areas and could also be emphasized in future engagements between Brazil and the US (especially on information about policy actions and on scientific data). Given the state of the bilateral trade agenda and the examples of the FTAs under analysis, focusing on cooperation rather than seeking to provide for specific and well-defined obligations would seem more plausible. The protection of biodiversity, sustainable management of forests and protection of marine life would seem to provide fruitful grounds for discussion.

3.5.4. Corporate responsibility

Both Chapter 24 of the USMCA and the TSD Chapter of the EU-Mercosur FTA mention the adoption of corporate social responsibility (“CSR”) practices, a trending concept that could be further promoted by Brazil and the US in their bilateral environmental agenda.

Article 13 of Chapter 24 acknowledges the importance of promoting CSR and responsible business conduct. It provides that each country shall “encourage enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement voluntary best practices of corporate social

responsibility that are related to the environment”. The inclusion of CSR provisions in the USMCA is consistent with the trend of multinational corporations assimilating CSR principles and third-party standards into corporate risk management.⁷⁹

In addition, Articles 14 and 24 of Chapter 24 set out provisions that promote responsible business conduct:

- (i) Article 14 provides that parties should encourage private sector entities to develop voluntary mechanisms for the promotion of products based on their environmental qualities,
- (ii) Article 24 provides that parties shall strive to facilitate and promote trade and investment in environmental goods and services, including clean technologies, as means to improve environmental and economic performance and contribute to green growth and jobs.

The EU-Mercosur FTA, in Article 11 of the TSD Chapter, expresses the parties commitment to promote the voluntary uptake by companies of CSR or responsible business practices, consistent with guidelines and principles from the International Labor Organization (“ILO”), the UN and the Organization for Economic Co-operation and Development.⁸⁰ Article 12 provides that countries shall encourage trade and investment in goods and services that contribute to enhanced social and environmental conditions, including those of relevance for climate change mitigation and adaptation. Moreover, the parties should jointly work to achieve the objective of the TSD Chapter concerning the trade-related aspects of CSR, responsible business conduct, and responsible management of supply chains and accountability, including with respect to implementation, follow-up, and dissemination of relevant international instruments.

3.5.4.1. Conclusion

The EU-Mercosur FTA and the USMCA similarly acknowledge the importance of responsible business practices and encourage practices to achieve the goals of both chapters (the highest level of protection of the

⁷⁹ See “The USMCA, Trade, and the Environment”, available on the Hunton Andrews Kurth website, at <https://www.huntonnickelreportblog.com/2020/07/the-usmca-trade-and-the-environment/>.

⁸⁰ Namely, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

environment). Based on this commonality, there is room for cooperation between the US and Brazil in furthering the promotion of CSR practices.

4. Conclusion

The analysis carried out in Parts I and II of this Report points to existing convergence between international environmental commitments undertaken by Brazil and the US under MEAs and under their most recently negotiated FTAs with third parties.

In 2020, Brazil and the US updated their Agreement on Trade and Economic Cooperation (“Agreement”) with the New Protocol on Trade Rules and Transparency.⁸¹ The Agreement does not contain specific environmental commitments, such as the USMCA provides for, but the general provisions provide that Brazil and the US recognize the importance of the implementation of governmental practices to promote good regulatory quality, enhanced transparency, objective analysis and accountability to achieve environmental objectives.⁸²

This understanding, the fact that Brazil is the 14th largest goods trading partner of the US⁸³ and the historical importance of bilateral relations provide a basis for both countries to pursue additional cooperation, and specifically regarding the protection of the environment. Future cooperation may benefit from the analysis carried out herein of FTAs recently negotiated by the countries (i.e. EU-Mercosur FTA and USMCA).

The environmental commitments so far undertaken by Brazil and the US provide fertile ground for a future cooperation related to environmental matters between these countries. The MEAs to which Brazil and the US are committed and the environmental commitments assumed under the EU-Mercosur FTA and the USMCA evidence that the two countries are active in the

⁸¹ Full text of the Protocol To The Agreement On Trade And Economic Cooperation Between The Government Of The United States Of America And The Government Of The Federative Republic Of Brazil Relating To Trade Rules And Transparency is available on the US' government website, at <<https://ustr.gov/sites/default/files/files/Press/Releases/ATECProtocolUSBREnglish.pdf>>.

⁸² Article 2 and 9.11 of the Agreement on Trade and Economic Cooperation.

⁸³ Information available on the official website of the Office of the United States Trade Representative at: < <https://ustr.gov/countries-regions/americas/brazil>>.







international protection of the environment, and broadly acknowledge that trade must not be encouraged or facilitated at the expense of environmental protection. At the same time, there is also common recognition that environmental regulations should be imposed as unjustified, disguised restrictions to trade.

As highlighted in the foregoing analysis, there are elements where convergence is clear, such as in the acceptance of institutions to guarantee transparency and effectiveness of the results of a negotiation and in the emphasis on cooperation to achieve common goals. This cooperation may take place through exchange of information related to initiatives adopted by the countries, or of scientific knowledge.

Another potential topic for future bilateral cooperation is tackling climate change, with the US' rejoining the Paris Agreement and the express references to the Paris Agreement in the EU-Mercosur FTA.

By way of conclusion, Figure 1 highlights topics that could be further explored by Brazil and the US to further discussions on future cooperation on environmental matters and their relations to trade, based on the main findings in Part II.

Figure 1: Main findings⁸⁴

Cooperation	Institutions	Implementation
 <ul style="list-style-type: none"> • Shared initiatives related to environmental protection in the scientific and technological fields. • Joint measures for the promotion of sustainable development. • Exchange of scientific and technological knowledge.; and • Exchange of information on environmental policies and best practices for harmonization of trade and sustainable development measures. 	 <p>Providing for a mechanism to monitor and advise on the implementation of environmental commitments, as well as to review environmental commitments from time to time.</p>	 <p>Providing for implementation tools through domestic regulations that ensure transparency and public participation in decision processes and monitoring of environmental commitments.</p>
Dispute settlement mechanism	Environmental commitments	Corporate social responsibility
 <p>Consider establishing a transparent dispute settlement mechanism, the decisions should be effective. Provide for mechanisms for the participation of civil society in monitoring the parties' compliance with resolutions.</p>	 <p>Cooperating for agreeing on commitments in converging areas of environmental protection such as in the fight against climate change, in the protection and conservation of biodiversity, and in the sustainable management of resources, notably by the establishment of cooperation measures.</p>	 <p>Cooperating on commitments related to the promotion of corporate social responsibility practices by the countries.</p>

⁸⁴ Images obtained from The Noun Project website (<https://thenounproject.com>).

ANNEXES

Annex 1: Overview of significant selected MEAs

Treaty	Subject	Year	Parties	Entered into force
International Plant Protection Convention	Aims to protect cultivated and wild plants by preventing the introduction and spread of pests. It contains reference to trade in the Preamble and provisions in article VII. 2 (requirements in relation to imports).	1971	171	December 21, 1975
Convention on International Trade in Endangered Species of Wild Fauna and Flora	Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species. Thus, trade is the main subject of this MEA.	1973	183	July 1, 1975
United Nations Convention on the Law of the Sea*	It establishes rules regarding all uses of the oceans and their resources and established the International Tribunal for the Law of the Sea. It contains reference to trade in articles 150 (policies relating to activities in the Area), 151.8 (production policies), and 13.7 of Annex III on the conditions of prospecting, exploration and exploitation (trade of processed metals).	1982	168	November 16, 1994
Vienna Convention for the protection of Ozone Layer	Aims to promote cooperation among nations by exchanging information on the effects of human activities on the ozone layer. In doing so, the creators of the Convention hoped policymakers would adopt measures to combat those activities responsible for ozone depletion. It contains reference to trade in article 4 (co-operation in the Legal, Scientific and Technical Fields).	1985	198	September 22, 1985
Montreal Protocol	Aims the reduction of levels of harmful compounds such as hydrochlorofluorocarbons (HCFCs), used by the refrigeration and foaming sectors. It contains reference to trade in articles 4 and 4A (control of trade with non-Parties and with Parties).	1987	197	January 1, 1989
Basel Convention	The provisions of the Convention center around the following principal aims the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal; It does not contain explicit reference to trade in its text. However, according to the Basel Convention Mandate, Decision BC-VI/30, the Convention relates to trade since its implementation requires the consideration of "all trade related aspects	1989	199	May 5, 1992

Treaty	Subject	Year	Parties	Entered into force
	of the transboundary movement of hazardous wastes, including the monitoring of international trade and prevention of illegal trade of hazardous wastes, as well as the export and import licensing systems for hazardous wastes”.			
Convention on Biological Diversity	Focus on the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. It contains reference to trade in article 14.7 (commercial use of genetic resources). Also, according to Manuel Ruiz Muller, the Convention on Biological Diversity relates to trade in its application of intellectual property and biotechnological inventions derived from biodiversity components, within the framework of the Convention on Biological Diversity and the review of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). ⁸⁵	1992	196	December 29, 1993
United Nations Framework Convention on Climate Change	Its ultimate objective is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system. It contains reference to trade in article 3.5 (principle to promote a supportive and open international economic system that would lead to sustainable economic growth and development).	1992	197	March 21, 1994
Kyoto Protocol	Operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. It contains reference to trade in article 2.3 (minimize effects on international trade, and social, environmental and economic impacts on the parties).	1997	192	February 16, 2005

⁸⁵ MULLER, Manuel Ruiz. International trade and biodiversity: complementarity or conflict?. Edited by Konrad-Adenauer-Stiftung e.V. Regional Programme Energy Security and Climate Change in Latin America. 2018. Available at: <<https://www.voices4biojustice.org/wp-content/uploads/2018/12/Ruiz-Muller-International-trade-and-biodiversity-complementarity-or-conflict.pdf>>.

Treaty	Subject	Year	Parties	Entered into force
Rotterdam Convention	Aims to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm. Also, attempts to contribute to the environmentally sound use of those hazardous chemicals, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties. Thus, trade is the main subject in this MEA.	1998	164	February 24, 2004
Cartagena Protocol	It aims to ensure the safe handling, transport and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on biological diversity, taking also into account risks to human health. It contains reference to trade in the Preamble.	2000	173	September 11, 2003
Stockholm Convention	Aims to achieve the protection of the human health and the environment from chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of humans and wildlife, and have harmful impacts on human health or on the environment. It contains reference to trade in the Preamble, relating it to Principle 16 of the Rio Declaration (national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments).	2001	184	May 17, 2004
International Tropical Timber Agreement	Aims to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests. Thus, trade is the main subject in this MEA.	2006	74	December 07, 2011
Agreement on Port State Measures to Prevent, Deter and Eliminate illegal, unreported and unregulated	Aims to prevent, deter and eliminate illegal, unreported and unregulated fishing through the adoption and implementation of effective port State measures as a means of ensuring the long-term conservation and sustainable use of living marine resources. It does not contain reference to trade but relates directly since the port is the entrance for trade, if there's regulation on	2009	73	June 05, 2016

Treaty	Subject	Year	Parties	Entered into force
fishing	ports, is possible to prevent illegal trade, according to the US department of commerce. ⁸⁶			
Nagoya Protocol	Regulates the Access and Benefit Sharing, by establishing guidelines for commercial relations between the provider country of the genetic resources and the user country, covering aspects such as royalty payments, establishment of joint ventures, the right to technology transfer and training. It contains reference to trade in articles 5 (fair and equitable benefit-sharing relating to commercialization), 17 (monitoring the utilization of genetic resources) and in the Annex (monetary and non-monetary benefits).	2010	128	October 12, 2014
Nagoya – Kuala Lumpur Supplementary Protocol	It provides international rules and procedures in the field of liability and redress relating to living modified organisms. It does not contain explicit reference to trade, but is directly related since article 6 provides the possibility that non-State Parties engaged in trade could pressure on Parties to make exemptions in their domestic law. ⁸⁷	2010	49	March 5, 2018
Paris Agreement	It is a legally binding international treaty on climate change. Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels. To achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century. It does not contain explicit reference to trade, but is directly related once enact requirements to pursue national commitments and the need for fairness, transparency and proactive engagement that may affect trade. ⁸⁸	2016	191	November 4, 2016

⁸⁶ Information obtained from publication “Frequent Questions: Implementing the Port State Measures Agreement”, available on the US Department of Commerce’s website, at <<https://www.fisheries.noaa.gov/enforcement/frequent-questions-implementing-port-state-measures-agreement>>.

⁸⁷ TELESETSKY, Anastasia. The 2010 Nagoya-Kuala Lumpur Supplementary Protocol: A New Treaty Assigning Transboundary Liability and Redress for Biodiversity Damage Caused by Genetically Modified Organisms. *American Society of International Law*, volume 15, issue 1, 2011. Available at: <<https://www.asil.org/insights/volume/15/issue/1/2010-nagoya-kuala-lumpur-supplementary-protocol-new-treaty-assigning>>.

⁸⁸ DI LEVA, Charles E.; SHI, Xiaoxin (2017) The Paris Agreement and the International Trade Regime: Considerations for Harmonization. *Sustainable Development Law & Policy*: Vol. 17: issue 1, Article 4. Available at <<http://digitalcommons.wcl.american.edu/sdlp/vol17/iss1/4>>.

Treaty	Subject	Year	Parties	Entered into force
Minamata Convention on Mercury	Protection of human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. It contains reference to trade in the Preamble and in articles 3 (mercury supply sources and trade), 17 (information exchange), and 19 (research, development and monitoring).	2017	131	August 16, 2017

Annex 2: List of MEAs referred to in the USMCA and in the EU-Mercosur FTA

MEAs	USMCA	EU-MERCOSUR	US	BRAZIL
the Convention on International Trade in Endangered Species of Wild Fauna and Flora	✓	✓	✓	✓
the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal	✓	✓	✓	✓
the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships	✓	?	✓	✓
the Convention on Wetlands of International Importance Especially as Waterfowl Habitat	✓	?	✓	✓
the Convention on the Conservation of Antarctic Marine Living Resources	✓	?	✓	✓
the International Convention for the Regulation of Whaling	✓	?	✓	✓
the Convention for the Establishment of an	✓	?	✓	?

MEAs	USMCA	EU-MERCOSUR	US	BRAZIL
Inter-American Tropical Tuna Commission				
The United Nations Framework Convention on Climate Change (UNFCCC)	?	✓	✓	✓
The Paris Agreement	?	✓	✓	✓
The Convention on Biological Diversity	?	✓	?	✓
The International Treaty on Plant Genetic Resources for Food and Agriculture	?	✓	✓	✓
UN Convention on the Law of the Sea of 1982	?	✓	?	✓

BIBLIOGRAPHY

ACCIOLY; NASCIMENTO E SILVA; CASELLA. *Manual de Direito Internacional Público*. São Paulo: Saraiva, 24 ed., 2019.

ALMOND, Roncevert Ganan. *U.S. Ratification of the Law of the Sea Convention – Measuring the raison d’État in the Trump era*. 2017. Available at: <<https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>>.

BRANDI, Clara; BLÜMER, Dominique; MORIN, Jean-Frédéric. When Do International Treaties Matter for Domestic Environmental Legislation?. *Global Environmental Politics*. 2019. Issue 19, Volume 4, pages: 14–44. Available at: <https://doi.org/10.1162/glep_a_00524>

BRAZIL. *Resumo Acordo Mercosul EU*. Available at: <https://www.gov.br/mre/pt-br/arquivos/documentos/politica-externa-comercial-e-economica/2019_10_24__Resumo_Acordo_Mercosul_UE_CGNCE.pdf>.

CHARNOVITZ, Steve. NAFTA: An Analysis of Its Environmental Provisions. *The Environmental Law Reporter*. 23 ELR, 10067. 1993. Available at: <<https://elr.info/sites/default/files/articles/23.10067.htm>>.

DI LEVA, Charles E.; SHI, Xiaoxin (2017) The Paris Agreement and the International Trade Regime: Considerations for Harmonization. *Sustainable Development Law & Policy*. Volume 17: issue 1, Article 4. Available at <<http://digitalcommons.wcl.american.edu/sdlp/vol17/iss1/4>>.

DO AMARAL JUNIOR, Alberto, MARTES, Marina. (2021) The Mercosur-EU FTA and the Obligation to Implement the Paris Agreement: An Analysis from the Brazilian Perspective. In: *European Yearbook of International Economic Law*. Springer, Berlin, Heidelberg, available at <https://doi.org/10.1007/8165_2021_68>.

Freund, Eleanor. Freedom of Navigation in the South China Sea: A Practical Guide. *Belfer Center for Science and International Affairs, Harvard Kennedy School*, June 2017. Available at <<https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>>.

GANTZ, David. The US-Mexico-Canada Agreement: Labor Rights and Environmental Protection. *Baker Institute Report*, 6. 2019. Available at: <<https://www.bakerinstitute.org/media/files/research-document/62174e56/bi-report-061319-mex-usmca-4.pdf>>

GEHRING, Markus W.; SEGGER, Marie-Claire Cordonier; CORREA, Fabiano de Andrade; REYNAUD, Patrick; HARRINGTON, Alexandra; MELLA, Rodrigo. *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*. Available at

<<https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf>>.

GRACIA, Maria Belén. *The European Union-Mercosur Agreement is Not a Threat to EU Environmental Policy*. Available at <<https://www.tradeexperettes.org/blog/articles/the-european-union-mercotur-agreement-is-not-a-threat-to-eu-environmental-policy>>.

HART, Nina. *USMCA: Legal Enforcement of the Labor and Environment Provisions*. 2021. Available at: <<https://crsreports.congress.gov/product/pdf/R/R46793>>.

HENKIN, Louis. *How Nations Behave*, New York, Columbia University Press in PICKERING, Heath (2014), *Why Do States Mostly Obey International Law?* 1979. Available at <<https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/>>.

IMAZON. *Is the EU-MERCOSUR trade agreement deforestation-proof?*. 2020. Available on IMAZON's website, at <https://amazon.org.br/wp-content/uploads/2020/11/mercotur_en_amazon.pdf>.

IPEA. *Meio Ambiente na Agenda Internacional: Implementação no Brasil das Convenções do Rio sobre Biodiversidade, Clima e Desertificação*. Available at <https://www.ipea.gov.br/portal/images/stories/PDFs/TDs/12122016td_2259.pdf>.

KNOX, John. The United States, Environmental Agreements, and the Political Question Doctrine. *North Carolina Journal of International Law and Commercial Regulation*, Vol. 40, 2015, Wake Forest Univ. Legal Studies Paper No. 2613681, Available at SSRN: <<https://ssrn.com/abstract=2613681>>.

KURTH, Hunton Andrews. *The USMCA, Trade, and the Environment*. Available at <https://www.huntonnickelreportblog.com/2020/07/the-usmca-trade-and-the-environment/>.

MULLER, Manuel Ruiz. *International trade and biodiversity: complementarity or conflict?*. Edited by Konrad-Adenauer-Stiftung e.V. Regional Programme Energy Security and Climate Change in Latin America. 2018. Available at: <<https://www.voices4biojustice.org/wp-content/uploads/2018/12/Ruiz-Muller-International-trade-and-biodiversity-complementarity-or-conflict.pdf>>.

REUTERS. *Biden's climate summit zeroes in on technology to help fight global warming*. Available at <<https://www.reuters.com/business/environment/bidens-climate-summit-zeroes-technology-help-fight-global-warming-2021-04-23/>>.

REUTERS. *World welcomes U.S. return to Paris climate accord, readies wish-list for Biden*. Available at <<https://www.reuters.com/world/china/world-welcomes-us-return-paris-climate-accord-readies-wish-list-biden-2021-01-21/>>.

SCHREPFERMAN, Will. *Hypocrisea: The United States' Failure to Join the UN Convention on the Law of the Sea*. Available at <<https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/>>.

STEVENS, Candice. 1993. Harmonization, trade and the environment. *International Environmental Affairs*. Issue 5, Volume 1, pages: 42-49. Available in at <<http://www.ciesin.org/docs/008-062/008-062.html>>.

TELESETSKY, Anastasia. The 2010 Nagoya-Kuala Lumpur Supplementary Protocol: A New Treaty Assigning Transboundary Liability and Redress for Biodiversity Damage Caused by Genetically Modified Organisms. *American Society of International Law*, volume 15, issue 1, 2011. Available at: <<https://www.asil.org/insights/volume/15/issue/1/2010-nagoya-kuala-lumpur-supplementary-protocol-new-treaty-assigning>>.

UN. *Johannesburg Declaration and Plan of Implementation*. Available at: <<https://digitallibrary.un.org/record/499757>>.

UN. *Rio Declaration*. 1992. Available at: <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf>.

UNEP. *Environment and Trade: a handbook*. Second edition. 2005. Available at https://www.iisd.org/system/files/publications/envirotrade_handbook_2005.pdf.

UNEP. *Glossary of Terms for Negotiators of Multilateral Environmental Agreements*. 2007. Available on UNEP's website, at <<https://wedocs.unep.org/bitstream/handle/20.500.11822/7569/-Glossary%20of%20Terms%20for%20Negotiators%20of%20Multilateral%20Environmental%20Agreements-2007762.pdf?sequence=3&isAllowed=>>>.

US. Agreement On Trade And Economic Cooperation Between The Government Of The United States Of America And The Government Of The Federative Republic Of Brazil Relating To Trade Rules And Transparency. Available at <<https://ustr.gov/sites/default/files/files/Press/Releases/ATECProtocolUSBREnglish.pdf>>.