Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements

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I. INTRODUCTION

It is no secret that the planet is warming and that humans have had something to do with it.[1] Over the last one hundred and fifty

1. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (Thomas F. Stocker et al. eds., 2014); INT'L ENERGY AGENCY, ENERGY AND CLIMATE CHANGE: WORLD ENERGY OUTLOOK SPECIAL REPORT (2015); *Global Climate Change: Vital Signs of the Planet* , NASA, https://climate.nasa.gov/ [https://perma.cc/JQ56-8688] (last updated Oct. 3, 2017); *Climate Change at the National Academies: Summaries & Booklets*, NAT'L ACADS. OF SCIS., ENGINEERING & MED., http://nas-sites.org/americasclimatechoices/more-resources-on-climate-change/ [https://perma.cc/ZA4G-YMBQ] (last visited Mar. 1, 2017); UNITED NATIONS, http://www.un.org/sustainabledevelopment/climatechange/ [https://perma.cc/Z55G-TMZH] (last visited Mar. 1, 2017).

years, the global average concentration of carbon dioxide in the Earth's atmosphere has increased to unprecedented levels and continues to rise.[2] As the climate becomes warmer, the world will face ocean acidification, sea level rise, decreasing biodiversity, and more extreme weather events.[3]

At the end of the twentieth century, many nations recognized that climate change is a global phenomenon requiring cooperative action, and began to seek international solutions to prevent disastrous warming and to mitigate unavoidable impacts. Sustainable development is central to this international response to climate change.[4] International agreements like the United Nations Framework on Climate Change and the Paris Agreement are indispensable to furthering sustainable development worldwide. However, the complexity of such large multilateral agreements presents a barrier to effective negotiations. The Paris Agreement boasts one hundred and ninety-seven parties.[5] Because the needs and interests of nation-states are so varied, achieving consensus among many participants leads to either less binding or less ambitious agreements. For example, the emissions reduction

2. *A Blanket Around the Earth*, NASA, https://climate.nasa.gov/causes/ [https://perma.cc/3LFH-6SZS] (last update Oct. 3, 2017); *see also* Corinne Le Quéré et al., *Global Carbon Budget 2016*, 8 EARTH SYS. SCI. DATA 605 (2016).

3. *Climate Change and Biodiversity Loss*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, http://www.chgeharvard.org/topic/climate-change-and-biodiversity-loss [https://perma.cc/2ABN-GQN5] (last visited Feb. 27, 2017); *Climate Change: How Do We Know?*, NASA, https://climate.nasa.gov/evidence/ [https://perma.cc/VVP3-TFQ6] (last updated Oct. 3, 2017); *Climate Change*, UNITED NATIONS: SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM, https://sustainabledevelopment.un.org/topics/climatechange [https://perma.cc/3C77-PZBR] (last visited Mar. 1, 2017).

4. For a brief discussion of the relationship between climate change and sustainable development, *see* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE 121 (Bert Metz et. al eds., 2007); *see also* U.N. Conference on Environment and Development, *Rio Deceleration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992); Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377, 383 (2012) (calling the Rio Declaration the "structuring reference for sustainable development"); Henning Grosse Ruse-Khan, *A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond*, 13 J. INT'L ECON. L. 139, 145–46 (2010); Rachel Kyte, *Climate Change Is a Challenge For Sustainable Development*, THE WORLD BANK (Jan. 15, 2014), http://www.worldbank.org/en/news/speech/2014/01/15/climate-change-is-challenge-for-sustainable-development [https://perma.cc/VH73-RCXA].

5. *Paris Agreement—Status of Ratification*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php [https://perma.cc/4DZQ-BLSF] (last visited July 30, 2017).

commitments ("nationally determined contributions") made by the Paris signatories are technically binding, but toothless, because the Agreement does not provide any enforcement mechanisms.[6] Yet, even if every nation fulfills its commitment, we will fail to reach the Agreement's goal of limiting warming to two degrees Celsius.[7]

One way to strengthen consensus among many nations is to build on smaller coalitions and partnerships.[8] For example, the forty-four states and observers that make up the Alliance of Small Island States leveraged their joined voices to obtain the inclusion of an additional 1.5 degrees Celsius goal in the Paris Agreement.[9]

Similarly, bilateral free trade agreements ("FTAs") provide important opportunities for aligning international objectives on climate change and sustainable development.[10] FTAs can promote sustainable development by granting states a robust right to regulate in the public interest. This right determines what regulatory actions governments may take that impact investments without violating investors' rights; it is central to the successful implementation of an agreement's sustainable development objectives.

The European Union ("EU") in particular has embraced FTAs as a vehicle for sustainability.[11] In recent years, the EU has negotiated

6. EUROPEAN PARLIAMENT, THE PARIS AGREEMENT: A NEW FRAMEWORK FOR GLOBAL CLIMATE ACTION 4 (2016).

7. Fiona Harvey, *World's Climate Pledges Not Yet Enough to Avoid Dangerous Warming*, GUARDIAN (Oct. 30, 2015, 5:22 PM), https://www.theguardian.com/environment/2015/oct/30/worlds-climate-pledges-likely-to-lead-to-less-than-3c-of-warming-un [https://perma.cc/N9FP-UWWM]; *Paris Agreement*, EUR. COMMISSION, https://ec.europa.eu/clima/policies/international/negotiations/paris_en [https://perma.cc/KM2H-LDLE] (last visited Nov. 15, 2017); *Road to Paris*, EUR. COMMISSION, https://ec.europa.eu/clima/policies/international/negotiations/progress_en [https://perma.cc/7W93-5K8R] (last updated May 10, 2017); *The Intended Nationally Determined Contributions (INDCs)*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/focus/indc_portal/items/8766.php [https://perma.cc/2ZX7-87FT] (last visited July 30, 2017).

8. CHARLES F. SABEL & DAVID G. VICTOR, THE STANLEY FOUNDATION, MAKING THE PARIS PROCESS MORE EFFECTIVE: A NEW APPROACH TO POLICY COORDINATION ON GLOBAL CLIMATE CHANGE 2 (2016).

9. *Small Islands Propose "Below 1.5°C" Global Goal for Paris Agreement,* ALLIANCE OF SMALL ISLAND STATES (Jun. 8, 2015), http://aosis.org/small-islands-propose-below-1-5%CB%9Ac-global-goal-for-paris-agreement/ [https://perma.cc/4M9U-DUPP]; *see also About AOSIS*, ALLIANCE OF SMALL ISLAND STATES, http://aosis.org/about/ [https://perma.cc/82AD-3R8M] (last visited Mar. 1, 2017).

10. For a discussion of the advantages of including sustainable development objectives in FTAs, rather than in independent environmental agreements, *see infra* Part IV.B.1.

11. Belen Olmos Giupponi, *Squaring the Circle Balancing Sustainable Development and Investment Protection in the EU Investment Policy*, 25 EUR. ENERGY & ENVTL. L. REV. 44, 44, 51

a wave of new FTAs that strive to bring sustainable development to the forefront of bilateral trade.[12] These so-called New Generation FTAs seek to deepen cooperation between nations not only on non-tariff barriers to trade, as traditional FTAs do, but also in areas of social and environmental import.[13] This goal is primarily accomplished by shielding the parties' right to regulate, and by expanding and heightening the specificity of provisions on labor, environmental protection, and sustainable development. Although these provisions do not mention climate change specifically, their ability to facilitate the development of innovative sustainable development policies will necessarily impact the transition to a low-emission world.

In October 2016, as part of this New Generation, the EU and Canada (collectively, "the Parties" or individually, "Party") signed the Comprehensive Economic and Trade Agreement ("CETA").[14] CETA was designed to strengthen the Parties' economic relationship by reducing barriers to trade and investment.[15] The agreement is now provisionally in force pending ratification.[16]

(2016); Ruse-Khan, *supra* note 4, at 143; *see also* Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Trade for All – Towards a More Responsible Trade and Investment Policy, ¶ 5.3.1, COM (2015) 497 final (Apr. 28, 2016).

12. *See* EUROPEAN EXTERNAL ACTION SERVICE, INFORMATION PAPER: CARIFORUM-EU ECONOMIC PARTNERSHIP AGREEMENT: AN OVERVIEW (July 2008).

13. Peter Muchlinski, *Negotiating New Generation International Investment Agreements*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 41, 41 (Steffen Hindelang & Markus Krajewski, eds., 2016).

14. Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Can.-E.U., Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [https://perma.cc/UD3R-EFBE][hereinafter CETA]; Sean Farrell, *EU and Canada Sign CETA Free Trade Deal*, GUARDIAN (Oct. 30, 2016, 12:50 PM), https://www.theguardian.com/business/2016/oct/30/eu-canada-sign-ceta-free-trade-deal-trudeau-juncker [https://perma.cc/BU3S-YRFF].

15. CETA, *supra* note 14, recitals 1–2.

16. The European Parliament ratified CETA on February 15th, 2017, while Canada did likewise on May 17, 2017. However, ratification is still pending from most EU Member States. *Canadian Senate Approves CETA Implementation Bill*, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV. (May 18, 2017), http://www.ictsd.org/bridges-news/bridges/news/canadian-senate-approves-ceta-implementation-bill [https://perma.cc/4394-AJQ9]; *CETA - A Trade Deal That Sets a New Standard for Global Trade*, EUR. COMMISSION (Feb. 15, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1623 [https://perma.cc/YD7F-TTSD]; James Kanter, *E.U. Parliament Votes to Ratify Canada Trade Deal and Send Trump a Message*, N.Y. TIMES (Feb. 15, 2017), https://www.nytimes.com/2017/02/15/business/canada-eu-trade-ceta.html?_r=0 [https://perma.cc/7CSV-TVPM]; Janyce McGregor, *Latvia Becomes 1st*

CETA introduces a new Investor Court System ("ICS") featuring a permanent judicial body (the "ICS Tribunal"), includes an expansive chapter on trade and sustainable development, and insistently asserts the Parties' right to regulate in the public interest.[17]

This Note investigates what protection the right to regulate might provide to the Parties when defending their regulatory measures against investor claims brought under CETA. It asks whether CETA will successfully avoid the chilling effect that investor-state arbitral awards have typically had on the exercise of state police powers. It argues that the protection that the right to regulate explicitly provides to state environmental regulation implicitly extends to state action taken in furtherance of sustainable development, because sustainable development encompasses environmental protection. It concludes that while CETA's provisions on sustainable development have the potential to provide broad protection to state regulations, future agreements must build on this foundation to secure their continued implementation.

Part II explains the concepts of sustainable development and of the state's right to regulate. It introduces the reader to New Generation FTAs and demonstrates how CETA fits into that mold. It concludes with a look at each Party's objectives for CETA. Part III presents the legal framework that the ICS Tribunal will apply when it interprets CETA. It explains Article 31 of the Vienna Convention on the Law of Treaties ("Vienna"), and gives an overview of the most important international cases applying that Convention to the right to regulate and to sustainable development. It applies the resulting interpretive principles to CETA. By reproducing the analysis that the ICS Tribunal may employ to evaluate an investor claim under CETA, this Note identifies arguments that the Parties could raise to defend their right to regulate. Part IV recommends how the Parties can

EU Country to Sign on to Canada's Trade Deal, CBC (Feb. 23, 2017), http://www.cbc.ca/news/politics/latvia-ceta-trade-ratification-1.3995766 [https://perma.cc/3R25-M5UR]; Per Verstergaard Pedersen et al., *Denmark Is the Second EU Member—State to Ratify CETA*, LEXOLOGY (June 9, 2017), http://www.lexology.com/library/detail.aspx?g=14bdccf6-b773-46e1-8fdb-40aa223a464a [https://perma.cc/YZL5-N94K].

17. CETA, *supra* note 14, art. 8.27 (establishing the Tribunal); *id.* ch. 22 (discussing trade and sustainable development); *id.* rectial 6, 8, arts. 8.9.1, 24.3, 24.4.4., 28.3.1, 28.3.2 (asserting the right to regulate).

broaden and strengthen the content of their regulatory right, as well as how future FTAs can build on CETA's achievements. Part V concludes that CETA constitutes an important first step towards advancing sustainable development through the exercise of the right to regulate.

II. BACKGROUND

This section introduces the reader to the principle of sustainable development, the right to regulate, and New Generation FTAs. It concludes with an overview of CETA and its connection to these concepts.

A. Sustainable Development in International Trade Law

Sustainable development entered the modern world stage in 1987 with the famous Brundtland Report of the World Commission on Environment and Development.[18] The Brundtland Report coined one of the most widely-used definitions of sustainable development: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[19] It also introduced three elements that would

18. Rep. of the World Commission on Environment and Development, *Our Common Future*, at ch. 2, ¶ 1, U.N. Doc. A/42/427, annex 1 (1987).

19. *Id.* ch. 2, ¶ 1; Ruse-Khan, *supra* note 4, at 144; *see also* Giorgio Sacerdoti, *Investment Protection and Sustainable Development: Key Issues*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED, *supra* note 13, at 19; André Martinuzzi & Wolfgang Meyer, *Evaluating Sustainable Development in a Global Society*, *in* THE FUTURE OF EVALUATION: GLOBAL TRENDS, NEW CHALLENGES, SHARED PERSPECTIVES 81, 81 (Reinhard Stockmann et al. eds., 2016); Barral, *supra* note 4, at 378. The connection between this foundational definition of sustainable development and climate change is readily apparent. Future generations stand to lose the most from the consequences of climate change, having contributed the least. Several lawsuits have been brought on these grounds in the United States, with some initial success. *See, e.g.*, Juliana v. United States, 217 F.Supp.3d 1224 (D. Or., 2016); Foster v. Washington Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362 (Wash. Super., Dec. 19, 2016) (denying motion for order of contempt and granting *sua sponte* leave to file amended pleading); *see also* James Conca, *Kids Win Again in Lawsuit Blaming Gov't For Not Fighting Global Warming*, FORBES (May 1, 2016, 6:00 AM), https://www.forbes.com/sites/jamesconca/2016/05/01/climate-change-litigation-the-children-win-in-court/#6735797461ff [https://perma.cc/V8KS-7EUW]; Sebastien Malo, *Youth Activists Name Trump in Landmark Suit Against U.S. Over Climate Change*, THOMSON REUTERS FOUNDATION NEWS (Feb. 10, 2017, 7:06 PM), http://news.trust.org/item/20170210191220-pil9k/ [https://perma.cc/7GNY-DPLZ]; Jason Mark, *Federal Judge Greenlights Landmark Climate Change Lawsuit*, SIERRA CLUB (Nov. 10, 2016), http://www.sierraclub.org/sierra/green-life/federal-judge-greenlights-landmark-climate-change-lawsuit [https://perma.cc/3R7G-6ERR].

later come to be known as the "interdependent and mutually reinforcing pillars of sustainable development": the economic, the environmental, and the social (the "pillars").[20] This Note will focus on the economic and environmental pillars.

Since 1987, the concept of sustainable development[21] has been widely deployed in international agreements. For example, the United Nations Framework Convention on Climate Change ("UNFCCC") (the framework convention underpinning the Kyoto Protocol and the Paris Agreement) enshrines sustainable development in its objectives.[22] Similarly, in 1994, the participating countries of the General Agreement on Tariffs and Trade ("GATT") negotiated the Marrakesh Agreement Establishing the

20. World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, annex, ¶ 5, U.N. Doc. A/Conf.199/20 (Sept. 4, 2002); Ruse-Khan, *supra* note 4, at 145. Some have pressed for the inclusion of a fourth or fifth pillar, representing culture or policy. Martinuzzi & Meyer, *supra* note 19, at 84. Martinuzzi and Meyer propose abandoning the pillar framework in favor of a target framework whereby sustainable development would strive to "integrate all kinds of targets from different actors and/or systems in the best possible way." *Id.*

21. One of the contemporary debates surrounding sustainable development is whether it has achieved status as a norm of customary international law. Ruse-Khan, *supra* note 4, at 158. Lowe argued in the 1990s that sustainable development was inherently incapable of attaining the status of a rule of law. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, *in* International Law and Sustainable Development: Past Achievements and Future Challenges 19 (Alan Boyle & David Freestone, eds., 1999); *see also* Ruse-Khan, *supra* note 4, at 159; Giupponi, *supra* note 11, at 44–45; Barral, *supra* note 4. Whether Lowe is right remains to be seen, but it seems likely that sustainable development could attain this status eventually through its increasing use in bilateral and multilateral agreements and treaties. Barral, *supra* note 4, at 386; Lowe, *supra* note 21, at 30–31; Ruse-Khan, *supra* note 4, at 158–60; Sacerdoti, *supra* note 19, at 25–28. There is no need to resolve this debate here, because sustainable development has been explicitly integrated into CETA. *See, e.g.*, CETA, *supra* note 14, recital 9 ("REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions."); *id.* ch. 22; *id.* art. 26.2.1(g) (establishing the Committee on Trade and Sustainable Development).

22. United Nations Framework Convention on Climate Change recital 22, art. 2, 3 ¶¶ 4–5, June 4, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107; Ruse-Khan, *supra* note 4, at 146. The concept has also been deployed in Agenda 21, the Rio Declaration on Environment and Development, the 2002 World Summit on Sustainable Development, the Johannesburg Declaration on Sustainable Development, the Johannesburg Plan of Implementation, and the International Law Association's Declaration of Principles of International Law Related to Sustainable Development. *See* Steffen Hindelang & Markus Krajewski, *Towards a More Comprehensive Approach in International Investment Law*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED, *supra* note 13, at 1, 6–7; Martinuzzi & Meyer, *supra* note 19, at 81 (emphasizing that Rio offered "a globally agreed program for sustainable development" for the first time); Ruse-Khan, *supra* note 4, at 145–48.

World Trade Organization ("WTO").[23] The Marrakesh Agreement added sustainable development to the GATT's objectives, and provided for "optimal" instead of "full" use of the world's resources.[24]

The key to sustainable development is integrating and balancing the three pillars.[25] In particular, sustainable development provides a legal framework for balancing the right to environmental protection and the right to development, as enshrined in international law.[26] Henning Grosse Ruse-Khan, Research Fellow at the Max Planck Institute for Intellectual Property, Competition and Tax Law, sees this balancing process as central to sustainable development's influence and force: "[the] real normative force [of sustainable development] . . . lies in its ability to modify, to 'colour' the understanding of intersecting or conflicting norms and to bring about a balance between them."[27] Decision-makers must start by considering the current balance between these interests. For example, nations have historically emphasized economic development to the detriment of environmental protection.[28] The pillars therefore start from a point of imbalance and any efforts towards sustainability must compensate for that. Therefore, a renewed commitment to environmental protection will improve sustainability overall.[29] The inverse is also true: a genuine

23. *See The GATT Years: From Havana to Marrakesh,* WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [https://perma.cc/92AW-Q8NW] (last visited July 30, 2017).

24. Marrakesh Agreement Establishing the World Trade Organization, recital 1, Apr. 15, 1994, 1867 U.N.T.S. 154; *see also* General Agreement on Tariffs and Trade, recital 1, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 152–53, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter Shrimp-Turtle] ("his language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development."); *Sustainable Development*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm (last visited Mar. 16, 2017).

25. Ruse-Khan, *supra* note 4, at 150–51.

26. *Id.* at 151.

27. *Id.* at 160*; see also* Shrimp-Turtle, *supra* note 24.

28. *See, e.g.*, Muchlinski, *supra* note 13, at 41 ("First generation agreements, with their emphasis on investor rights and host State obligations, are said to be past their best and should give way to new agreements that seek to balance investor rights and duties, preserve the State's right to regulate in the public interest and to acknowledge the importance of *not only economic* but also social and environmental goals in their design.") (emphasis added).

29. *See* CETA, *supra* note 14, art. 24.2 ("The Parties stress that enhanced cooperation to protect and conserve the environment brings benefits that will: (a) promote sustainable development.").

commitment to sustainable development should lead decision-makers to improve environmental outcomes.

Sustainable development bears on the decision-making process by requiring actors to evaluate the impacts of their project on sustainability; it does not mandate particular substantive outcomes.[30] One reason for this is its ambiguity. Though calling for "sustainability," the concept fails to provide clear criteria for evaluating whether that vague and lofty goal has been achieved.[31] This may be unavoidable because evaluating sustainability is a context and fact specific analysis. Strategies for achieving sustainable outcomes vary depending on various factors such as location, resources, and culture. A bright-line rule would not provide the flexibility that policy and decision-makers require. Ambiguity allows regulators a greater margin of discretion in implementing sustainable development, and provides them with diverse bases for justifying regulation.[32]

The principle's evolutionary nature also makes it difficult to apply. Sustainability is fluid, dependent on "the time, the area, or the subjects concerned."[33] As nations struggle to adapt to a changing climate, this inherent fluidity could allow a tribunal to re-evaluate the purpose of a disputed New Generation FTA to bring the State's regulatory actions within the right to regulate.[34] From this perspective, fluidity is an asset, strengthening the presence of sustainable development in treaties over time as an increasing number of FTAs incorporate more precise obligations, and as the

30. Ruse-Khan, *supra* note 4, at 158*; see also* Barral, *supra* note 4, at 391; Sacerdoti, *supra* note 19.

31. Hindelang & Krajewski, *supra* note 22, at 7; Martinuzzi & Meyer, *supra* note 19, at 83; Sacerdoti, *supra* note 19, at 25.

32. Ruse-Khan, *supra* note 4, at 139 ("[The] specific value [of a sustainable development treaty objective] lies in its substantive ambiguity which translates into domestic policy space in the implementation of international treaty obligations."). Barral argues this fluidity is in fact a strength, but it may take time for the courts to develop factors or a balancing test for determining when sustainable development, as a principle or legal norm, has been rightly applied. In the meantime, it is unlikely to have strong legal force. At the very least, the softness of the concept increases the discretion provided to parties implementing it. Barral, *supra* note 4, at 383–85.

33. Barral, *supra* note 4, at 382, 395.

34. Hervé Ascensio, *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, 31 ICSID REV. 366, 371 (2016) ("[T]he shift from 'development' to 'sustainable development' may draw consequences on the interpretation of investment treaty provisions, notably when a State's measure is justified by adaptation to new environmental constraints or legal commitments.").

practices of the signatories evolve, ideally towards a low-carbon or carbon-neutral world.[35] However, the discretion that fluidity accords to tribunals and states is also a weakness; it makes sustainable development dependent on the initiative of domestic institutions and the deference of judicial bodies.[36]

In sum, sustainable development requires a balancing of economic and environmental interests. It changes decision-making practices but does not force specific substantive outcomes. It depends on effective implementation by governments and tribunals. The context of the sustainable development provisions in an agreement will shed light upon the duties of the parties to the agreement in any given case and influence their enforceability.

B. The Government's Right to Regulate in the Public Interest

The right to regulate reinforces "the idea that host states can, under certain conditions, exercise police powers to adopt legitimate regulatory measures affecting foreign investors."[37] This right is juxtaposed against the right of foreign investors to certain protective measures for their investments. Investor rights accorded under FTAs and international investment agreements ("IIAs") typically include an assurance of non-discriminatory, and fair and equitable treatment, as well as rules governing the lawful expropriation of investments.[38] Lawful expropriation will not constitute a violation of an investor's rights as long as the State pays just compensation for the loss.[39] State regulatory powers are controversial in the context of investment agreements, because their exercise could amount to the indirect expropriation of

35. *See supra* note 21.

36. Ruse-Khan, *supra* note 4, at 140, 161*; see also* Martinuzzi & Meyer, *supra* note 19, at 85–86.

37. Giupponi, *supra* note 11, at 46.

38. Simon Klopschinski, *Eli Lilly v. Canada—The First Final Award Ever on Patents and International Investment Law*, WOLTERS KLUWER: KLUWER PATENT BLOG (Apr. 4, 2017), http://kluwerpatentblog.com/2017/04/04/eli-lilly-v-canada-the-first-final-award-ever-on-patents-and-international-invest-ment-law/?print=pd [https://perma.cc/5XTA-YLHK] ("Under IIAs, the contracting states are obliged to accord certain standards of treatment to investors and investments of the other contracting state, e.g., the fair and equitable treatment standard or the expropriation standard."). *See, e.g.*, CETA, *supra* note 14, art. 8.6, 8.10, 8.12.

39. Org. Econ. Co-Operation and Dev., *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 3–5 (Org. Econ. Co-Operation and Dev., Working Papers on International Investment No. 2004/04), http://dx.doi.org/10.1787/780155872321 [https://perma.cc/AHJ2-WJY2] [hereinafter OECD 2004].

investments in some circumstances.[40] With regards to the valid exercise of the right to regulate, the issue is to what extent the State may regulate for a legitimate public purpose, without being obliged to pay compensation to an investor for indirectly expropriating their investment.[41]

Previously, trade and investment agreements provided little scope for the right to regulate. They did not typically include provisions on the state's right to regulate "as a counterbalance to foreign investor rights and protections."[42] Critics opined that arbitrators interpreted state regulatory powers too narrowly.[43] CETA responds to this concern by strengthening the State's right to regulate, providing a legal framework in which arbitrators can balance investor rights against the State's need for "regulatory space."[44] Specifically, CETA emphasizes that "non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as . . . the environment, do not constitute indirect expropriations."[45]

Giving states a robust right to regulate in certain areas critical to public welfare allows them to serve their citizens without fear of retaliation from investors whose economic interests may be negatively impacted by such regulation. It signals to investors that investment protection provisions are not "a commitment from governments that legal frameworks will remain unchanged" and

40. Giupponi, *supra* note 11, at 46. Expropriation occurs when an investment is nationalized, or property is transferred to or seized by the state. OECD 2004, *supra* note 39, at 3. The scope of indirect expropriation is widely debated, but it can occur through interference by the State with the enjoyment of a property right to an extent equivalent to direct expropriation. *Id.* at 3–5; *see also* CETA, *supra* note 14, annex 8-A.

41. OECD 2004, *supra* note 39, at 2.

42. Gus Van Harten, *The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA*, 1 U. BOLOGNA L. REV. 138, 161 (2016). Under CETA, an "investor" is simply "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party." CETA, *supra* note 14, art. 8.1.

43. Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT'L ECON. L. 223, 224 (2012) ("[C]oncerns continue to be raised about arbitral tribunals' stringent review of host state measures.") [hereinafter Henckels 2012]; OECD 2004, *supra* note 39, at 2. Regulatory chill theory holds that "investment arbitration would represent a threat or a restriction to governments and their ability to adopt measures to achieve public goals, such as environmental protection." Giupponi, *supra* note 11, at 46.

44. Van Harten, *supra* note 42, at 161–62.

45. CETA, *supra* note 14, annex 8-A.3.

ensures that important public policy objectives will not be held subordinate to investment protection.[46]

Investor claims for compensation and damages have abounded in recent decades, especially in response to environmental regulation.[47] For example, in 2011, Quebec placed a moratorium on fracking for natural gas in the St. Lawrence River.[48] Lone Pine Resources, Inc., launched a suit under the expropriation provision of the North American Free Trade Agreement ("NAFTA") seeking $118.9 million in damages for financial losses related to the revocation of its permit.[49] In response to the suit, Canada asserted, among other things, that the moratorium was intended to protect the St. Lawrence River and constituted a valid exercise of its police powers.[50] The ongoing case has led to a spate of criticism directed at trade agreements and their strong protection of investor rights.[51]

46. *CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement*, EUR. COMMISSION (Feb. 29, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468 [https://perma.cc/2UAS-EA3L].

47. *See* Anthony Depalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html [https://perma.cc/8JU3-RAGT]; Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals*, HUFFPOST (Jan. 14, 2015, 12:27 PM), http://www.huffingtonpost.ca/2015/01/14/canada-sued-investor-state-dispute-ccpa_n_6471460.html [https://perma.cc/YLL5-RJWM] ("About 63 per cent of the claims against Canada involved challenges to environmental protection or resource management programs that allegedly interfere with the profits of foreign investors.").

48. Jeff Gray, *Quebec's St. Lawrence Fracking Ban Challenged Under NAFTA*, GLOBE AND MAIL (Nov. 22, 2012, 6:37 PM), https://www.theglobeandmail.com/globe-investor/quebecs-st-lawrence-fracking-ban-challenged-under-nafta/article5577331/ [https://perma.cc/7UNM-4D7D].

49. North American Free Trade Agreement art. 1110, Dec. 17, 1992, 32 I.L.M. 289; Julian Beltrame, *Quebec Fracking Ban Lawsuit Shows Perils of Free Trade Deals: Critics*, HUFFPOST (Oct. 3, 2013, 1:25 AM), http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit_n_4038173.html [https://perma.cc/D659-2T5C]; *Cases Filed Against the Government of Canada*, GOV'T CANADA (last modified Mar. 13, 2017), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng [https://perma.cc/8KYW-X8AZ]; Jeff Gray, *U.S. Firm to Launch NAFTA Challenge to Quebec Fracking Ban*, GLOBE AND MAIL (Nov. 15, 2012, 2:17 PM), https://www.theglobeandmail.com/globe-investor/us-firm-to-launch-nafta-challenge-to-quebec-fracking-ban/article5337929/ [https://perma.cc/ZSW6-V7T8].

50. Lone Pine Res. Inc., v. Government of Canada, NAFTA Case No. UNCT/15/2, Réponse à l'avis d'arbitrage, ¶¶ 68, 182 (Feb. 27, 2015), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4406/DC5875_Fr.pdf [https://perma.cc/RF9M-WH67] (author's translation).

51. Ilana Solomon, *4 Ridiculous Reasons Lone Pine Resources Is Suing Canada Over Fracking Moratorium*, SIERRA CLUB: COMPASS (Oct. 2, 2013), http://blogs.sierraclub.org/compass/2013/10/4-ridiculous-reasons-lone-pine-resources-is-suing-canada-over-frackingmoratorium.

CETA would potentially correct situations like these by giving the Parties and the relevant arbitral tribunal a legal framework for defending claims of indirect expropriation. However, the scope of the right to regulate under FTAs is ultimately at the arbitrator's discretion.[52] Therefore, the language and context of CETA's right to regulate are crucial to ascertaining the breadth of that right under CETA. Since no tribunal has yet tested CETA's formulation of the right to regulate, this Note derives interpretive principles from arbitral awards decided under GATT's Article XX and applies them to CETA.[53] The following sections introduce the reader to New Generation FTAs and to CETA as a manifestation of this new approach to international trade.

C. New Generation FTAs and the Comprehensive Economic and Trade Agreement

This section examines the characteristics of New Generation FTAs and how CETA fits into that framework. First, the term "free trade agreement" is misleading in this context. New Generation FTAs combine the traditional FTA with IIAs and sustainable development objectives to create an all-inclusive instrument.[54] In

html [https://perma.cc/6MZ7-HJ28]; Ilana Solomon, *No Fracking Way: How Companies Sue Canada to Get More Resources*, HUFFPOST (Oct. 3, 2013, 12:39 PM), http://www.huffingtonpost.ca/ilana-solomon/lone-pine-sues-canada-over-fracking_b_4032696.html [https://perma.cc/ND75-KKG3]; *see also Fracking is Not a Right: Tell Lone Pine to Drop its NAFTA Lawsuit Against Quebec's Moratorium on Fracking!*, COUNCIL CANADIANS, https://canadians.org/action/petition/index.php [https://perma.cc/4TFN-K6US] (last visited July 30, 2017).

52. Kirsten Mikadze, *Uninvited Guests: NGOs, Amicus Curiae Briefs, and the Environment in Investor-State Dispute Settlement*, 12 J. INT'L L & INT'L REL. 35, 59 (2016) (Can.).

53. *See infra* Part III.A.2.

54. IIAs "establish binding rules on investment protections." MARTIN A. WEISS ET AL., CONG. RESEARCH SERV., R44015, INTERNATIONAL INVESTMENT AGREEMENTS (IIAS): FREQUENTLY ASKED QUESTIONS 4 (2015). FTAs focus more broadly on "trade and trade-related issues involving goods, services, agriculture, and investment." *Id.* The New Generation agreement combines these provisions in a single instrument. New Generation FTAs combine the attributes of foreign investment promotion and protection agreements, free trade agreements, and mutual recognition agreements/arrangements, as those agreements are defined by the Canadian government, with the addition of sustainable development provisions. *See Agreement Types*, GOV'T CANADA (last modified Feb. 24, 2017), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/agreements_type-type_accords.aspx?lang=eng [https://perma.cc/44EL-3BMV]*; see also Reforming the IIA Regime—a Stocktaking*, UNITED NATIONS CONF. ON TRADE AND DEV. (Mar. 1, 2016), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1208&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#607;#International Investment Agreements [https://perma.cc/P9QY-8ZAF]; *Reshaping the Investment Regime in the Era of Sustainable*

particular, New Generation agreements seek to recalibrate the power balance between investors and states. First generation investment agreements emphasized investor *rights* and state *obligations*.[55] However, as first generation investor claims began to generate dispute resolution proceedings, concerns arose that the resulting awards unjustifiably restricted state sovereignty in favor of investment protection.[56] Partly in response to these concerns, the EU began deploying a new model trade agreement in its negotiations with third states—the New Generation.[57] This Note refers to CETA, and to the New Generation generally, as FTAs, in keeping with the most common usage, with the understanding that the term "FTA" in this context encompasses trade, investment, and sustainability.

New Generation FTAs stress the state's sovereign right to regulate in the public interest and seek to enhance the role of social and environmental objectives.[58] By strengthening the right to regulate, New Generation agreements seek to prevent investors from using

Development, UNITED NATIONS CONF. ON TRADE AND DEV (Nov. 20, 2015), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1131&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#6;#InvestmentandEnterprise;#607;#International Investment Agreements [https://perma.cc/VSD3-NBFT]. CETA clearly reflects this contemporary blending of trade and investment. For example, although Chapter 24 is called "Trade and Environment," Articles 24.5, 24.8, 24.9, and 24.12 address both trade and investment. *See* CETA, *supra* note 14, art. 24, 24.5, 24.8, 24.9, 24.12. In addition, the term "investment," as defined in Article 8.1 clearly constitutes an "economic" activity or development under that pillar of sustainable development. *See* CETA *supra* note 14, art. 8.1, 22.1. Consequently, the sustainable development chapter can reasonably be supposed to encompass investment measures, although it does not mention the term "investment." This Note treats sustainable development as an objective applicable to all measures covered by CETA, and not just those related to trade.

55. Muchlinski, *supra* note 13, at 41.

56. *See* Roland Kläger, *Revising Treatment Standards—Fair and Equitable Treatment in Light of Sustainable Development*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED, *supra* note 13, at 67; Kyra Bell-Pasht, *Treaty-Based Investor-State Arbitration and Canadian Environmental Governance*, 27 J. ENVTL. L. & PRAC. 141, 142 (2015); Giupponi, *supra* note 11, at 44–45 (2016); Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT'L ECON. L. 27, 32 (2016) [hereinafter Henckels 2016]; Mavluda Sattorova, *Investor Rights under EU Law and International Investment Law*, 17 J. WORLD INV. & TRADE 895, 902 (2016); Mikadze, *supra* note 52, at 36–37; Sacerdoti, *supra* note 19, at 32.

57. Frank Hoffmeister, *The Contribution of EU Trade Agreements to the Development of International Investment Law*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED, *supra* note 13, at 357, 357–58.

58. Muchlinski, *supra* note 13, at 41; Hindelang & Krajewski, *supra* note 22, at 5.

expropriation claims to prevent the State from effectively wielding its sovereign power to protect the interests of its citizens.

Sustainable development is the framework and the "presiding principle" upon which New Generation FTAs are built.[59] CETA represents the culmination of the EU's FTAs in the area of sustainable development.[60] Its aims are broader than simple investment protection or tariff elimination. It adopts a holistic approach to deeper collaboration by eliminating and minimizing non-tariff barriers and aligning the Parties' social objectives, while enhancing investment and trade.

D. CETA's Promise: A Stronger Right to Regulate

This section examines what the parties intended CETA to achieve, particularly in terms of advancing sustainable development. These intentions will prove crucial to future arbitral proceedings interpreting CETA's provisions, as explained below. Although the Parties shared many objectives, they nonetheless had disparate interests arising from their unique roles on the world stage. Canada is a small trading partner with an economic dependence on domestic oil production, while the EU is a large energy importer with a market of 500 million consumers. These differing interests shaped CETA.

1. Joint Objectives

Canada and the EU launched CETA with ambitious economic and environmental goals. Both Parties aimed to maintain low

59. EUROPEAN EXTERNAL ACTION SERVICE, *supra* note 12, at 3.

60. Lina Lorenzoni Escobar, *Sustainable Development and International Investment: A Legal Analysis of the EU's Policy from FTAs to CETA*, 136 TRANSNATIONALEN WIRTSCHAFTSRECHT 1, 27 (2015) (Ger.). Escobar also provides an overview of past bilateral EU FTAs and their treatment of sustainable development. *Id.* at 28–44. *But see* Axel Berger et al., *Environmental Provisions in Preferential Trade Agreements: Comparing the European and Emerging Markets' Approach* 15 (Jan. 15, 2016) (unpublished manuscript) (available at http://www.oefse.at /fileadmin/content/Downloads/tradeconference/BergerBrandiBruhn_Green_PTAs_Jan_16.pdf [https://perma.cc/YJ2V-QDKV]) ("[I]n terms of novel content, CETA is not particularly ground-breaking in its approach; instead it draws on a mix of existing commitments and the standard approaches taken by the EU and Canada to create a sort of hybrid model."). Notably, Berger and his colleagues wrote before the publication of the final version of CETA.

prices on goods while offering greater choice to consumers,[61] and to increase support for the development of small and medium enterprises.[62] CETA was expected "to increase bilateral trade in goods and services by 23%, while eliminating more than 98% of all tariffs."[63] A 2008 study commissioned by the Parties estimated the annual real income gain at approximately 11.6 billion EUR for the EU and 8.2 billion EUR for Canada by 2023.[64] European exports to Canada "[should] increase by 24.3% or €17 billion, while Canadian exports to the EU [should] increase by 20.6% or €8.6 billion."[65]

The Parties also share similar social objectives for the agreement, but with different emphasis. During negotiations, the EU stressed that CETA will maintain the EU's high standards of safety, and its protection of public health and the environment.[66] This denotes an affirmative stance towards protecting human health and the environment. Canada, on the other hand, emphasized the right to regulate on the assumption that both Parties already have high standards. Canada's approach shows less concern that CETA could

61. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1205 (Nov. 21, 2016) (statement of Hon. Freeland); *Fact Sheet: CETA—A Trade Deal That Sets a New Standard for Global Trade*, EUR. COMMISSION (Oct. 29, 2016), http://europa.eu/rapid/press-release_MEMO-16-3580_en.htm [https://perma.cc/8T8D-5M2M]. CETA defines "goods" as "domestic products as these are understood in the GATT 1994 or such goods as the Parties may decide, and includes originating goods of that Party." CETA, *supra* note 14, art. 1.1. Under GATT 1994, "goods" is defined as "products as understood in commercial practice." GATT, *supra* note 24, annex I, art. XVII, ¶ 2.

62. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1205; EUROPEAN COMM'N, THE BENEFITS OF CETA 2 (2016) [hereinafter EC BENEFITS OF CETA];

63. Marie-Anne Coninsx & Jesse Shuster-Leibner, *Canada and the European Union: Toward a New Level of Treaty-Based Partnership*, 10 J. PARLIAMENTARY & POL. L. 505, 509 (2016).

64. GOV'T OF CAN. & EUROPEAN COMM'N, ASSESSING THE COSTS AND BENEFITS OF A CLOSER EU-CANADA PARTNERSHIP: A JOINT STUDY BY THE EUROPEAN COMMISSION AND THE GOVERNMENT OF CANADA 28 (2008).

65. EUROPEAN PARLIAMENT, BRIEFING: EU—CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT 2 (2017). *But see* Érick Duchesne & Jean-Frédéric Morin, *Revisiting Structural Variables of Trade Negotiations: The Case of the Canada-EU Agreement*, 18 INT'L NEGOT. 5, 13 (2013) ("[G]ains in absolute terms remain unreliable and assessments of CETA's impacts vary significantly from one study to the next.").

66. *Fact Sheet: CETA—A Trade Deal That Sets a New Standard for Global Trade*, *supra* note 61 ("[F]ree trade does not mean lowering or changing EU standards that protect people's health and safety, social rights, their rights as consumers and the environment. These standards will remain untouched."); *see also CETA—A Trade Deal That Sets a New Standard for Global Trade*, *supra* note 16; *CETA Explained: Creating New Opportunities for Your Business*, EUR. COMMISSION, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm [https://perma.cc/X3KA-MRH5] (last updated Sept. 21, 2017).

possibly result in any lowering of its health, safety, or environmental standards.[67]

2. Canada's Objectives

Canada's position on the global market shaped its motivations for CETA. As a small nation of about 35 million people[68] that is dependent on trade, Canada seeks to move up in the world by modernizing its trade policy. To achieve this, Canada must lessen its dependence on the United States[69] and gain access to larger

67. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1200 (CETA "cements the paramount right of democratically elected governments to regulate in the interest of our citizens, to regulate the environment, labour standards, and in defence of the public sector."); *Agreement Overview*, GOV'T CANADA (last modified June 6, 2017), http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cetaaecg/overview-apercu.aspx?lang=eng [https://perma.cc/54ZF-NJFT] ("CETA includes clear commitments to uphold Canada's high standards [on sustainable development, labour, and the environment] and not to undermine them for commercial gain. Clear language confirms the right to regulate for all levels of governments."); *Canada-EU Comprehensive Economic and Trade Agreement (CETA)—Frequently Asked Questions*, GOV'T CANADA (last modified Oct. 6, 2016), http://www.canadainternational.gc.ca/euue/policiespolitiques/ceta_faq_aecg.aspx?lang=eng [https://perma.cc/9NDM-VSMC] ("Both Canada and the EU maintain high standards for food safety . . . Nothing in CETA will require Canada or the EU to lower their food standards, or to change their existing regulatory frameworks for genetically modified organisms.").

68. Éric Grenier, *Census 2016: Canada's Population Surpasses 35 million*, CBC News (Feb. 8, 2017, 8:47 AM), http://www.cbc.ca/news/politics/grenier-2016-census-population-1.3970314 [https://perma.cc/PE33-KT8C].

69. *See* Duchesne & Morin, *supra* note 65, at 14*; see also* George Anderson, *Canadian Federalism and Foreign Policy*, 27 CAN.—U.S. L. J. 45, 47 (2001); David Crane, *Canada—US Economic Relations*, HISTORICA CAN. (MAR. 3, 2009), http://www.thecanadianencyclopedia.ca/en/article/economic-canadian-american-relations/ [https://perma.cc/2AMH-L4HZ] ("A key lesson of the 1960s, culminating in the 1971 New Economic Policy, was the vulnerability of Canada to unilateral US actions. A 1972 government report, *Canada–US Relations: Options for the Future*, said Canada should reduce its vulnerability to US policies and pressures through trade diversification."); Andrew H. Malcolm, *Canadian Gateway to the Pacific Rim*, N.Y. TIMES (Jan. 19, 1981), http://www.nytimes.com/1981/01/19/business/canadian-gateway-to-the-pacific-rim.html [https://perma.cc/3K8H-GSS2]; Hugh McKenna, *Canadian Economy Growing Less Reliant on U.S.: TD*, GLOBE AND MAIL (Feb. 1, 2012, 2:16 PM), http://www.theglobeandmail.com/report-on-business/economy/growth/canadian-economy-growing-less-reliant-on-us-td/article544053/ [https://perma.cc/LQH2-CKXS]; *Reliance on U.S. as Trading Partner Continues Decline*, STATISTICS CANADA (last modified Oct. 7, 2016), http://www.statcan.gc.ca/pub/11-402-x/2012000/chap/international/international01-eng.htm [https://perma.cc/XXB4-7YY9]. Pierre Trudeau, Prime Minister of Canada from 1968–1979 and 1980–1984, famously described America as a "sleeping elephant" whose every move jostled the mouse to the north. *The Elephant and the Mouse*, DICTIONARY OF CANADIAN POL., http://www.parli.ca/the-elephant-and-the-mouse/ [https://perma.cc/HX59-H8TQ] (last visited Feb. 22, 2017) ("Living next to you is in some ways like sleeping with an elephant. No matter how friendly and even-tempered is the beast, if I can call it that, one is

markets.[70] CETA offers Canada an opportunity to make strides towards independence by opening the European market to Canadian products and services.[71] CETA will increase the percentage of Canadian merchandise exports covered by FTAs from 80% to 87.2%[72] and usher Canada into the EU's enormous market, the annual imports of which are worth more than Canada's entire GDP.[73] By joining the select group of "countries [holding] [] FTAs with both the EU and the US" Canada would increase its global financial clout and its value to investors.[74] Canada simply has more economic need of the EU than vice versa. Canada is only "the EU's 11th most important goods trading partner" and "fourth most important investment partner."[75] By contrast, the EU is Canada's second most important trading partner for goods, services, and investments.[76]

Canada achieved its main objectives for CETA by merely signing the agreement. The next section shows that the EU had bigger ideas in mind.

affected by every twitch and grunt."); *see also Canada—US Economic Relations*, *supra* note 69. Despite this long effort at cutting the apron strings, Canada still depends on the United States to buy the majority of its exports. In 2016, the United States captured 75% of Canada's total exports. Christian Deblock & Michèle Rioux, *From Economic Dialogue to CETA: Canada's Trade Relations with the European Union*, 66 INT'L J. 39, 43 (2010-11) ("The United States continues to capture the bulk of Canadian exports . . . ."); Duchesne & Morin, *supra* note 65, at 15; *Canada Exports*, TRADING ECON., http://www.tradingeconomics.com/canada/exports [https://perma.cc/BG8V-EGTV] (last visited Feb. 22, 2017) ("The United States is by far the largest destination for Canadian products (75 percent of total exports); followed by the European Union (8 percent), of which the United Kingdom (3 percent); China (4 percent); Japan and Mexico (2 percent each).").

70. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1210.

71. The strength of this position could embolden Canada on the global stage. The Hon. Gerry Ritz, Member of Parliament, went so far as to suggest that Canada proceed with the Trans-Pacific Partnership ("TPP") despite the withdrawal of the United States. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1240–45 (statement of Hon. Ritz).

72. The Canadian Trade Comm'r Serv., *CETA: An Important Addition to Canada's Free Trade Agreements*, GOV'T CANADA, http://tradecommissioner.gc.ca/canadexport/0000875.aspx?lang=eng [https://perma.cc/J7VW-WZX2] (last modified Dec. 6, 2016).

73. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1550 (statement by Mr. Lametti).

74. Duchesne & Morin, *supra* note 65, at 17.

75. *Assessing the Costs and Benefits of a Closer EU—Canada Economic Partnership*, GOV'T CANADA Part 1.1, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/study-etude.aspx?lang=eng [https://perma.cc/ZEJ7-Y5WG] (last modified Jan. 8, 2013).

76. *Id.*

3. The EU's Objectives

As an economic superpower and a global leader in liberal ideals, the EU strives to export its values, to "shape globalisation according to [European] values and [European] standards."[77] To do so, it needs to expand the depth and scope of its FTAs with other countries. Although it often partners with developing countries, the EU has also sought to deepen its relationships with developed countries like Canada and the United States. The EU began CETA negotiations aiming to establish "a balanced, ambitious, high-quality agreement that goes well beyond tariff reductions."[78] It is true that Canada also affirmed that globalization should be based on the Parties' shared values, calling this CETA's *raison d'être*.[79]

77. Cecilia Malmström, *Signing Our Trade Agreement with Canada*, EUR. COMMISSION (Oct. 30, 2016), http://ec.europa.eu/commission/2014-2019/malmstrom/blog/signing-our-trade-agreement-canada_en [https://perma.cc/Z89Q-QJXL]. Indeed, the EU has enjoyed considerable success in this regard. *See* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2013); *see also* EUROPEAN COMM'N, *CETA—Summary of the Final Negotiating Results* 17 (2016) [hereinafter EC 2016]; Berger et al., *supra* note 60, at 4; Tamara Perišin, *Transatlantic Trade Disputes on Health, Environmental and Animal Welfare Standards: Background to Regulatory Divergence and Possible Solutions*, 10 CROATIAN Y.B. EUR. L. & POL'Y 249, 265 (2014). The Parties recognized the EU's global influence in a joint statement issued in 2007, as negotiations were just beginning. *Assessing the Costs and Benefits of a Closer EU—Canada Economic Partnership , supra* note 75, at part 3.2 ("The EU plays an important role in setting the direction of energy policy, particularly in the competition, environment and security areas."). Canada in particular has been identified as one partner with which "the EU has proved capable of providing stability and projecting its energy policy." Caroline Kuzemko & Amelia Hadfield, *Defining and Projecting EU Energy Policy*, *in* EU LEADERSHIP IN ENERGY AND ENVIRONMENTAL GOVERNANCE: GLOBAL AND LOCAL CHALLENGES AND RESPONSES 21, 33 (Jakub M. Godzimirski, ed., 2016). However, recent developments in energy security may have lessened the EU's ability to export its energy policy, especially to Canada. *Id.* at 37. In response to this weakening of Europe's position, the Canadian Chamber Commerce is pursuing a more influential role for Canada. Perrin Beatty, *Canada Can Be the Key to European Energy Security*, CANADIAN CHAMBER OF COM. (June 27, 2014), http://www.chamber.ca/media/op-eds/140627-canada-can-be-the-key-to-european-energy-security/ [https://perma.cc/AH2B-FKNV].

78. European Parliament Resolution of 8 June 2011 on EU-Canada Trade Relations, ¶ 2, 2012 O.J. (C 380E) 20, 22.

79. House of Commons Debate, 42nd Parl., 1st Sess, No. 111, at 1210 (Nov. 21, 2016) (statement of Hon. Freeland); *see also* Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States ¶¶ 7, 9, Jan. 14, 2017, 2017 O.J. (L 11) 3 [hereinafter JII]; Cecilia Malmström, *supra* note 77; *Assessing the Costs and Benefits of a Closer EU—Canada Economic Partnership*, *supra* note 75, at part 3.2–3 ("EU and Canadian Leaders recognised these interests at their Berlin Summit in June 2007, acknowledging that tackling climate change and ensuring clean, secure and affordable supplies of energy were central, interlinked global challenges . . . Both the EU and Canada share the view that a sustainable environment and a sustainable economy are key to the well-being of their respective societies.").

However, while the two partners have collaborated for years on environmental initiatives, Canada's record on environmental protection, and especially on climate, fails to match that of the EU.[80] Canada's environmental record demonstrates that the EU had reason to export its values of sustainable development to Canada.

i. The EU's Exportation of Sustainable Development

Sustainable development is one of the core values the EU seeks to export, and protecting the right to regulate is one of the EU's strategies for promoting it.[81] Sustainable development first gained status as an overarching EU objective with its addition to the Treaty of Amsterdam in 1997.[82] It became a fundamental objective with the Treaty of Lisbon, through its explicit inclusion in the Treaty on the European Union[83] and its incorporation by reference into the

80. *See* DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY (2003). Many assume that Canada is the EU's equal partner in this regard. *See, e.g.*, Escobar, *supra* note 60, at 49–50. For a fascinating analysis of trade disputes as an expression of environmental values, *see* Perišin, *supra* note 77, at 249 ("The European Union (EU), the United States (US) and Canada belong to the same cultural circle and subscribe to similar values. . . . However, particular trade disputes show different levels of commitment to a particular value and different levels of risk aversion. . . . [S]ince the establishment of the WTO the US and Canada have significantly more frequently challenged EU measures with high standards of protection than vice versa."). *But see* Anderson, *supra* note 69, at 52 ("Canada has had an effective environmental foreign policy. It has lead on certain multilateral agreements on such issues as biosafety, species at risk, and ozone, and has played a full part on climate change.").

81. Ruse-Khan, *supra* note 4, at 143; Giupponi, *supra* note 11, at 44, 51; *see also Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Trade for All—Towards a More Responsible Trade and Investment Policy,* ¶ 5.3.1, COM (2015) 497 final (Apr. 28, 2016); Martinuzzi & Meyer, *supra* note 19, at 87.

82. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts recital 7, art. 1.b, art. 2, art. 3(c), Oct. 2, 1977, 1977 O.J. (C 340) 1; Martinuzzi & Meyer, *supra* note 19, at 87.

83. Consolidated Version of the Treaty on European Union art. 3.3, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU] ("The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."); *id.* art. 3.5 ("In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and

Treaty on the Functioning of the European Union.[84] It is also addressed in numerous secondary laws and policies, like the Europe 2020 Strategy.[85] The EU incorporated this demonstrated commitment to sustainable development into its New Generation FTAs, like CETA. The Commission boasted that CETA has "the most ambitious sustainable development chapter ever negotiated."[86]

ii. Canada's Environmental Protection Record

Canada's history of noncommittal environmental policies helps explain the EU's concerns about CETA's environmental impact. It also sheds light on CETA's importance; if successful, it could have a powerful positive impact on Canada's environmental practices.

the development of international law, including respect for the principles of the United Nations Charter.").

84. Consolidated Version of the Treaty on the Functioning of the European Union art. 207.1, Oct. 26, 2012, 212 O.J. (C 326) 47 [hereinafter TFEU] ("The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."). The TFEU explains that "[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union." *Id.* art. 205. Chapter 1 of Title V in turn provides that "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world . . ." and "[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: . . . (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty . . . . [and] (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development." TEU, *supra* note 83, art. 21.1–2. *See also* Hoffmeister, *supra* note 57, at 360 (Steffen Hindelang & Markus Krajewski, eds., 2016); Giupponi, *supra* note 11, at 49.

85. *Europe 2020 Strategy*, EUR. COMMISSION, https://ec.europa.eu/info/strategy/europe an-semester/framework/europe-2020-strategy_en [https://perma.cc/G9PC-LQ9U] (last visited Feb. 22, 2017) ("The Europe 2020 strategy is the EU's agenda for growth and jobs for the current decade. It emphasises smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe's economy, improve its competitiveness and productivity and underpin a sustainable social market economy."); *see also* Escobar, *supra* note 60, at 46.

86. Malmström , *supra* note 77; *see also EU—Canada Free Trade Agreement Signed*, EUROPEAN UNION EXTERNAL ACTION (Oct. 31, 2016, 1:58 AM), https://eeas.europa.eu/headquarters/ headquarters-homepage/13587/eu-canada-free-trade-agreement-signed_ro [https://per ma.cc/ER6H-MZX3].

Many discrepancies exist between Canadian and European climate policy.[87] For example, Canada is the only country in the world to have withdrawn from the Kyoto Protocol.[88] The Intended Nationally Determined Contribution it submitted for the Paris Agreement received a rating of "[i]nsufficient" from Climate Action Tracker,[89] compared to the EU's "medium" rating.[90]

87. *See* Miranda A. Schreurs, *Federalism and the Climate: Canada and the European Union*, 66 INT'L J. 91 (2010–11); *see also infra* note 134. However, given the Trump administration's hostility to the Paris Agreement and environmental regulation, the EU will have to rely on Canada to become a world leader on climate policy, and has expressed confidence in its ability to fill the gap. *See* Catharine Tunney, *EU, Canada Need to Work Together to Enforce Paris Agreement: Commissioner*, CBC NEWS (Mar. 4, 2017, 5:00 AM), http://www.cbc.ca/news/politics/eu-canada-caniete-trump-paris-1.4008406 [https://perma.cc/7F9J-G2UT].

88. *Canada Pulls Out of Kyoto Protocol*, GUARDIAN (Dec. 12, 2011, 9:04 PM), https://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol [https://perma.cc/AT49-42X9]. The Kyoto Protocol (now succeeded by the Paris Agreement) was the first international agreement to set binding greenhouse gas emissions reduction targets. Canada's withdrawal from the agreement speaks volumes about the state of its climate policy in 2011. The EU expressed its disapproval of this action. European Parliament Resolution of 10 December 2013 Containing the European Parliament's Recommendation to the Council, the Commission and the European External Action Service on the Negotiations for an EU—Canada Strategic Partnership Agreement, recital I, 2016 (C 468) 2, 3. Canada is also the only country to have withdrawn from the Convention to Combat Desertification. Roland Paris, *Are Canadians Still Liberal Internationalists? Foreign Policy and Public Opinion in the Harper Era*, 69 INT'L J. 274, 279 (2014).

89. *Canada*, CLIMATE ACTION TRACKER, http://climateactiontracker.org/countries/canada.html [https://perma.cc/9JW8-U665] (last updated Sept. 18, 2017). Climate Action Tracker is "an independent scientific analysis produced by three research organisations," Climate Analytics, Ecofys, and the NewClimate Institute, in collaboration with the Potsdam Institute for Climate Impact Research. It is supported by the German Ministry for Environment, Nature Conservation, Buildings and Nuclear Safety. *What is CAT?*, CLIMATE ACTION TRACKER, http://climateactiontracker.org/about.html [https://perma.cc/EE9G-2W8P] (last visited Sep. 9, 2017). Its work has been cited by sources such as the BBC, the Washington Post, and POLITICO Magazine. *See* Elizabeth Economy, *Why China is No Climate Leader*, POLITICO MAGAZINE (June 12, 2017), http://www.politico.com/magazine/story/2017/06/12/why-china-is-no-climate-leader-215249 [https://perma.cc/B8V5-BB8S]; Matt McGrath, *COP21: Coal Plans Would Derail 2 Degree Warming Target*, BBC NEWS (Dec. 1, 2015), http://www.bbc.com/news/science-environment-34977265 [https://perma.cc/R7TK-W6KW]; Chris Mooney, *Whatever Trump Decides on Paris, He's Already Taken the U.S. out of the Climate Game*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/30/whether-or-not-trump-withdraws-from-paris-hes-already-put-the-brakes-on-climate-action/?utm_term=.3b0f61b4d90e [https://perma.cc/7EFG-YAFM].

90. *EU*, CLIMATE ACTION TRACKER, http://climateactiontracker.org/countries/eu/2016.html [https://perma.cc/J9QQ-PVLX] (last updated Nov. 2, 2017). Interestingly, the EU's rating has since fallen and it now has the same "insufficient" rating as Canada. *Id.* ("The European Union has established a well-deserved reputation as a global leader on climate policy. However, in the wake of the Paris Agreement's entry into force, the EU's climate policy effort appears to be slowing and it has not effectively responded to the 1.5°C limit in the Paris Agreement, which goes beyond the former 2°C goal.").

Canada has only committed to a 60–70% reduction in greenhouse gas emissions by 2050 compared to a 2006 baseline, while the EU maintains that developed countries must collectively reduce their emissions by a similar margin (60% to 80% in 2050), but compared to 1990 (a more exacting baseline, as emissions were lower in 1990 than in 2006).[91] Perhaps most revealingly, according to a study that examined emissions from 1990-2015, Canada's per capita emissions have dropped less than 1 ton since 1990, from 16.23 to 15.45 tons of CO^2.[92] The EU's emissions, meanwhile, dropped 2.33 tons, from 9.20 to 6.87 tons per capita.[93]

In addition, the EU has expressed concern over many of Canada's public health and environmental policies and practices, including mining and export of asbestos (a substance banned in the EU);[94] management of Alberta's oil sands;[95] regulation of GMOs;[96] and use of hormones in beef and pork.[97] The EU maintained throughout the CETA negotiations that Canada would have to satisfy European product rules and regulations, and that regulatory cooperation under CETA would not dilute the EU's

91. *2007 EU—Canada Summit Statement*, GOV'T CANADA, http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2007_06_04_statementdeclaration.aspx?lang=eng [https://perma.cc/U2R6-EDHP] (last modified June 24, 2009).

92. Emissions Database for Global Atmospheric Research, *CO2 Time Series 1990-2015 Per Capita for World Countries*, EUR. COMMISSION, http://edgar.jrc.ec.europa.eu/overview.php?v=CO2ts_pc1990-2015 [https://perma.cc/LVW6-888P] (last updated Jun. 28, 2016). Canada's high per capita emissions rates are attributable to energy production, not to consumption. *See infra* page 120. Only 42% of Canadian energy consumption comes from oil and coal, while 25% comes from hydroelectricity, 24% from natural gas, 7% from nuclear power and 1% from renewables. The EU, by contrast, derives 55% of its energy from oil and gas, 24% from natural gas, 14% from nuclear power, 5% from biomass, 1% from hydroelectricity, and 1% from renewables. Schreurs, *supra* note 87, at 93–94.

93. Emissions Database for Global Atmospheric Research, *supra* note 92.

94. European Parliament Resolution of 8 June 2011, *supra* note 78, ¶ 6, 2012 O.J. (C 380E), at 22; Community Research and Development Information Service, *Commission Extends Ban on Asbestos Products In EU*, EUR. COMMISSION, http://cordis.europa.eu/news/rcn/13445_en.html [https://perma.cc/6PEH-2M88] (last updated Aug. 9, 1999); Perišin, *supra* note 77, at 255–256.

95. European Parliament Resolution of 8 June 2011, *supra* note 78, ¶ 13, 2012 O.J. (C 380E), at 23.

96. *Id.* ¶15, at 24; Statements to Be Entered in the Council Minutes, Jan. 14, 2017, ¶ 30, 2017 O.J. (L 11) 9, 18.

97. Statements to Be Entered in the Council Minutes, *supra* note 96, ¶ 26, 2017 O.J. (L 11), at 17; COLIN KIRKPATRICK ET AL., A TRADE SIA RELATING TO THE NEGOTIATION OF A COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) BETWEEN THE EU AND CANADA 434 (2011); *Fact Sheet: CETA—A Trade Deal That Sets a New Standard for Global Trade*, *supra* note 61.

more stringent standards.[98] Furthermore, Canada's Environmental Assessment[99] of CETA's impacts has been criticized for lacking rigor. Indeed, compared to the EU's Impact Assessment, Canada's report is conclusory and unilluminating.[100]

Canada's role as an energy producer may be the primary reason for its half-hearted commitment to environmental objectives. Canada has the second-largest known oil reserves in the world and is economically invested in their exploitation.[101] Canadian energy production increased 87% from 1980 to 2006, and it is pursuing new energy export agreements with nations in Asia.[102] The EU is "a net energy importer"; energy efficiency, renewables, and climate regulation provide a welcome opportunity for it to reduce its economic dependence on foreign energy production.[103] Canada, by contrast, is securing its economic future through global exports of non-renewable energy.[104]

Provincial disputes about how to address climate change also contribute to Canada's inaction.[105] Under the Canadian Constitution, the provinces wield considerable influence over

98. *See Fact Sheet: CETA—A Trade Deal That Sets a New Standard for Global Trade*, *supra* note 61.

99. Under Canadian law, federal agencies must obtain an environmental assessment of proposed projects if it meets a certain threshold of probable environmental impact. The responsible agency will use the assessment to decide whether the project may go forward, and whether the project proponents will have to comply with certain mitigative or adaptive actions to ease the anticipated adverse environmental impacts. *Canadian Environmental Assessment Act, 2012*, GOV'T CAN., https://www.canada.ca/en/environmental-assessment-agency/corporate/acts-regulations/legislation-regulations/canadian-environmental-assessment-act-2012.html [https://perma.cc/Z7ST-B5NP], (last modified July 6, 2016). Such assessments are common all over the world. In Europe, such analyses are called Impact Assessments, and are regulated by the EIA Directive, which has since been amended. *See* European Parliament and Council Directive 2011/92, 2012 O.J. (L 26) 1 (EU).

100. *See Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations: Initial Strategic Environmental Assessment*, section I (Feb. 2012), [hereinafter Canada SEA] ("[T]he Initial Environmental Assessment analysis indicates that a CETA with the EU is unlikely to lead to significant environmental impacts."); KIRKPATRICK ET AL., *supra* 97; Bell-Pasht, *supra* note 56, at 188–89.

101. *See* Schreurs, *supra* note 87, at 94; Peter J. Stoett, *Looking for Leadership: Canada and Climate Change Policy*, *in* NORTH AMERICAN POLITICS: INSTITUTIONS, POLICYMAKING, AND MULTILEVEL GOVERNANCE 47, 48 (Henrik Selin & Stacy D. VanDeveer eds., 2009).

102. Schreurs, *supra* note 87, at 94.

103. *Id.* at 94–95.

104. *Id.*

105. Stoett, *supra* note 101, at 48–50.

environmental law and policy.[106] Their differing energy interests and political contexts lead to divergent priorities that can prove difficult to unify, though Canada has successfully done so in the past, such as when it ratified the Kyoto Protocol.[107]

Historically, Canada's environmental record can be explained in part by the country's "two waves" of environmental regulation. In the 1960s and 1980s, the public expressed deep concern about environmental issues. Politicians responded with two waves of regulatory action, peaking in 1970 and 1990.[108] Since then, Canada's action on environment and climate has largely stagnated,[109] especially during the recent term of former Prime Minister Stephen Harper from 2006 to 2015.[110] For example, in 2013, Canada ranked last among 27 wealthy nations in the area of

106. Anderson, *supra* note 69, at 51; Charles Caccia, *Defining Canada's Environmental Priorities*, 14 J. ENV. L. & PRAC. 7, 8 (2004).

107. Anderson, *supra* note 69, at 51–52. In the EU, the environment is a shared competence. TFEU, supra note 84, art. 4.2. This means that the Member States may exercise their competence to regulate the environment "to the extent that the Union has not exercised its competence." *Id.* art. 2. This gives the Union regulatory priority in this area. In any case, there is large consensus among the European Member States about the Paris Agreement and climate regulation. *Ministers Approve EU Ratification of Paris Agreement*, EUORPEAN COMMISSION (Sept. 30, 2016), https://ec.europa.eu/clima/news/articles/news_2016093001_en [https://perma.cc/37LT-VUXG].

108. Caccia, *supra* note 106, at 10–11.

109. *See, e.g.*, BOYD, *supra* note 80, at 5–10. This is surprising, because Canadians consistently express a commitment to environmental protection on an individual level. *Id.* at 10. This leads one to conclude that either: (1) the democratic process is not effectively expressing the people's priorities; (2) despite their concern for the environment, people are more concerned about other issues; or (3) an increase in governmental action on the environment and climate change may be expected soon.

110. The Harper government has been extensively criticized for its environmental record. *See* Anne Dance, Kimberly Bittermann & Teresa Devor, Practice Note, *Canada After COP21*, 10 J. PARLIAMENTARY & POL. L. 629, 631–32 (2016); *Canada Blasted as 'Climate Laggard' in International Report*, CBC NEWS (Jun. 5, 2015, 5:34 PM), http://www.cbc.ca/news/politics/canada-blasted-as-climate-laggard-in-international-report-1.3102808 [https://perma.cc/TY6W-SDTJ]; *Canada Wins 'Lifetime Unachievement' Fossil Award at Warsaw Climate Talks*, CLIMATE ACTION NETWORK (Nov. 22, 2013), http://climateactionnetwork.ca/2013/11/22/canada-wins-lifetime-unachievement-fossil-award-at-warsaw-climate-talks/ [https://perma.cc/Y7ZX-AHCW]; Bruce Livesey, *Is Harper the Worst Prime Minister in History?*, NAT'L OBSERVER (May 18, 2015), http://www.nationalobserver.com/2015/05/18/news/harper-worst-prime-minister-history [https://perma.cc/HG9C-XDHA]; Daniel Tencer, *Canada Climate Change Policy Ranks Worst In Wealthy World: Climate Action Network*, HUFFPOST (May 12, 2012, 3:27 AM), http://www.huffingtonpost.ca/2012/12/05/canada-worst-climate-policy_n_2246238.html [https://perma.cc/9SK3-GL4M].

environmental protection.[111] The Center for Global Development ranked countries on a variety of factors. Canada's poor performance was attributed to its high per capita greenhouse gas emissions, the fact that it is not a party to the Kyoto Protocol, and its low gas taxes.[112] Notably, Canada's environmental ranking improved, from 27th (last) place to 23rd place after its ratification of the Paris Agreement in 2016.[113] Since Justin Trudeau's Liberal Government took office in 2015, Canada has been sending mixed signals with respect to the environment.[114] For example, it concluded a Pan-Canadian Agreement on Climate Change,[115] but approved several pipelines[116]—infrastructure which many consider

111. Paul Waldie, *Canada Dead Last in Ranking for Environmental Protection*, GLOBE AND MAIL (Nov. 18, 2013), http://www.theglobeandmail.com/news/world/canada-dead-last-in-oecd-ranking-for-environmental-protection/article15484134/ [https://perma.cc/35Z8-4WMB] ("The major reasons for Canada's poor showing . . . were pulling out of the Kyoto Protocol and having one of the highest levels of greenhouse gas production per capita. Canada also has low gasoline taxes, which don't encourage conservation, and high subsidies for fishing, which impacts fish stocks."); *see also Canada's Poor Environment Record Could Hit Energy Exports, Watchdog Warns*, FIN. POST (Nov. 5, 2013, 12:54 PM), http://business.financialpost.com/news/energy/canadas-poor-environment-record-could-hit-energy-exports-watchdog-warns [https://perma.cc/6HXD-KX3F] ("The Conservatives, whose political heartland is in Alberta, the centre of the energy industry, have worked hard to make it easier for companies to extract and export oil and gas.").

112. *Commitment to Development Index 2013*, CTR. FOR GLOBAL DEV., https://www.cgdev.org/sites/default/files/CDI2013/cdi-brief-2013.html [https://perma.cc/FX2A-A8DV] (last visited July 30, 2017); *see also Canada*, CTR. FOR GLOBAL DEV., https://www.cgdev.org/sites/default/files/archive/doc/CDI_2013/Country_13_Canada_EN.pdf [https://perma.cc/Z8N7-FFXF] (last visited July 30, 2017).

113. *Canada – Commitment to Development Index*, CTR. FOR GLOBAL DEV., https://www.cgdev.org/cdi-2017/country/CAN [https://perma.cc/7FVX-EYGN] (last visited Nov. 3, 2017).

114. *See* David Akin, *Climate Scientists Evaporating Under Trudeau, Not Harper*, TORONTO SUN (Aug. 8, 2016, 6:19 PM), http://www.torontosun.com/2016/08/08/climate-scientists-evaporating-under-trudeau-not-harper [https://perma.cc/R3G5-LYR5]; Lorrie Goldstein, *Trudeau Adopts Harper's Climate Targets*, TORONTO SUN (Sept. 18, 2016, 1:42 PM), http://www.torontosun.com/2016/09/18/trudeau-adopts-harpers-climate-targets [https://perma.cc/KNY7-S67T]; Ed Struzik, *Canada's Trudeau is Under Fire For His Record on Green Issues*, YALE ENV'T 360 (Jan. 19, 2017), http://e360.yale.edu/features/canada_justin_trudeau_environmental_policy_pipelines [https://perma.cc/M2FT-WC57]; David Suzuki & Maude Barlow, *Trudeau Much Like Harper on Environmental Protection*, COUNCIL CANADIANS (Apr. 11, 2017, 9:24 AM), https://canadians.org/blog/trudeau-much-harper-environmental-protection [https://perma.cc/42ZG-3FGH].

115. John Paul Tasker, *Trudeau Announces 'Pan-Canadian Framework' on Climate—But Sask., Manitoba Hold Off*, CBC (Dec. 9, 2016, 7:15 AM), http://www.cbc.ca/news/politics/trudeau-premiers-climate-deal-1.3888244 [https://perma.cc/82FV-R938]; *see also* GOV'T CAN, PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE (2017).

116. Ian Austen, *Justin Trudeau Approves Oil Pipeline Expansion in Canada*, N.Y. TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/world/canada/canada-trudeau-

incompatible with GHG emissions targets.[117] Governmental support for new pipelines demonstrates Canada's unwillingness to curtail its exploitation of the tar sands to reach its climate goals.[118] Its importance as an energy exporter[119] and its reliance on that trade are in tension with its professed commitment to sustainable development and environmental protection.

Due to its economic dependence on oil production, political tussles among the provinces, and the federal government's failure to promulgate adequate climate regulations, Canada cannot be regarded as the EU's equal on environmental policy. In this context, the EU's objectives for sustainable development are crucial to the depth and scope of that principle in CETA.

In sum, although the Parties share many objectives, Canada is not the EU's equal partner in the field of environmental protection. Its ambitious rhetoric in past agreements with the EU[120] has not yet been translated into effective policies for advancing sustainable development. Whether the EU has achieved its goal of exporting this value will depend on the content and binding force that the sustainable development provisions are accorded by the ICS Tribunal.[121] The next section explores sustainable development in CETA.

kinder-morgan-pipeline.html [https://perma.cc/QA2H-YFB3]; Daniel Tencer, *Trudeau's Pipeline Approvals Get Praise from Big Oil, But Opponents Vow Fight Not Over*, HUFFPOST (Nov. 29, 2016, 7:48 AM), http://www.huffingtonpost.ca/2016/11/29/trudeau-pipeline-approvals-reaction_n_13311080.html [https://perma.cc/6W8R-TY74].

117. *See generally* David Biello, *Keystone Pipeline Will Impact Climate Change, State Department Reports*, SCI. AM. (Jan. 31, 2014), https://blogs.scientificamerican.com/observations/keystone-pipeline-will-impact-climate-change-state-department-reports/ [https://perma.cc/5VGX-SL9X]; Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, NAT'L GEOGRAPHIC (Jan. 25, 2017), http://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/ [https://perma.cc/EER2-GMJ2].

118. *See* Bruce Cheadle, *Canada Earns D Grade on Environmental Record*, GLOBE AND MAIL (Apr. 21, 2016, 8:09 AM), http://www.theglobeandmail.com/news/national/canada-earns-d-grade-on-environmental-record/article29705154/ [https://perma.cc/3SNM-J8R3].

119. Schreurs, *supra* note 87, at 94; *see also supra* note 80.

120. *See Canada-European Union Joint Report: Towards a Comprehensive Economic Agreement*, GOV'T CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-can-ue-rapport.aspx?lang=eng [https://perma.cc/TY6W-SDTJ] (last modified Apr. 13, 2012).

121. *See infra* Part III.B.

III. THE RIGHT TO REGULATE AND SUSTAINABLE DEVELOPMENT UNDER CETA

CETA incorporated the EU's "new approach on investment" by introducing two major reforms to protect the state's right to regulate.[122] First, the final version of CETA[123] established a new dispute resolution system featuring a permanent tribunal and appellate court (the Investor Court System, or "ICS"). The ICS replaced the heavily-criticized, traditional Investor-State Dispute System ("ISDS").[124] The ICS Tribunal hears claims brought by investors for violation of their rights under CETA's Chapter Eight.[125] Chapter Eight provides for the investor's right to non-

122. *CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement*, *supra* note 46.

123. For a comparison of the 2014 and 2016 texts, *see* Annex I.

124. *See* James Crawford, *The Kyoto Protocol in Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 681, 681 (Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Paul Newcombe, eds., 2011) ("One of the most significant challenges facing international investment law today is the need to balance the interests of investors in the protection of their investment with the regulatory interests of host States. . . . [I]t now seems difficult for States to regain what would—less than two decades ago—have been considered unquestioned regulatory prerogatives."); Bell-Pasht, *supra* note 56, at 189–90 ("[Investor-state arbitration] claims are not only being brought against developing countries or in relation to measures clearly designed to expropriate or devalue foreign investments, but also against public interest regulations of developed countries, and particularly environmental measures. Furthermore, this trend has been on the rise in recent years, which is increasing the effectiveness of mere threats of ISA claims as government lobbying tools."); Cecilia Malmström, *Proposing an Investor Court System*, EUR. COMMISSION (Sept. 16, 2015), http://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en [https://perma.cc/ADV4-6KHG] ("[T]here is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model."); Henckels 2012, *supra* 43, at 224 ("[C]oncerns continue to be raised about arbitral tribunals' stringent review of host state measures."); OECD 2004, *supra* note 39, at 2 ("Largely prompted by the first cases brought under NAFTA, there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society."). *But see* Ian A. Laird, TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court, 9th Annual Canada—United States Distinguished Lecture at Western University Faculty of Law (Nov. 16, 2015), *in* 40 CAN.—U.S. L. J. 106, 117 ("Judge Schwebel has described the current position of the ISDS's critics as 'more colourful than . . . cogent.'").

125. CETA, *supra* note 14, art. 8.2.4 ("Claims may be submitted by an investor under this Chapter only in accordance with Article 8.18. . . ."); *id.* art. 8.18.1 ("Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under: (a) Section C [Non-discriminatory Treatment] . . . or (b) Section D [Investment Protection]").

discriminatory treatment[126] and to fair and equitable treatment,[127] and lays out the rules governing expropriation.[128]

In creating the ICS, the Parties hoped to shield sustainable development from investor claims. The EU doubted that the old ISDS "would create a . . . sustainability benefit for the EU and/or Canada," citing in particular the fact that the ISDS frequently resulted in limitations on the ability of governments to implement public policies.[129] In establishing the ICS, the Parties aimed to create a dispute resolution system that more closely resembled domestic or international courts.[130] They hoped, thereby, to gain more control over the interpretation of CETA.[131]

126. *Id.* art. 8.6.1 ("Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."); *id.* art. 8.7.1 ("Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.").

127. *Id.* art. 8.10.1 ("Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security . . . .").

128. *Id.* art. 8.12.1 ("A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ('expropriation'), except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) on payment of prompt, adequate and effective compensation.").

129. KIRKPATRICK ET AL., *supra* note 97, at 431. Canada more cursorily concluded that "[t]o the extent that such provisions strengthen environment stewardship they could have positive indirect effects." Canada SEA, *supra* note 100, at section VI, part 1. The authors of the EU SIA, by contrast, recommended the Parties replace ISDS with a state-state enforcement mechanism, emphasize domestic dispute settlement and create a dispute settlement monitoring body. KIRKPATRICK ET AL., *supra* note 97, at 437.

130. JII, *supra* note 79, ¶ 6.f; Eur. Commission Press Release MEMO/16/4350, A Future Multilateral Investment Court (Dec. 13, 2016) (listing as core principles permanency, availability of appeals, and random allocation of cases); EC 2016, supra note 77, at 11 (CETA "removes ambiguities that made the old system open to abuses or excessive interpretations and creates an independent investment court system, consisting of a permanent tribunal and an appeal tribunal that will conduct dispute settlement proceedings in a transparent and impartial manner."); *Malmström*, *supra* note 124 (naming as desirable attributes accountability, transparency, public judicial appointments, elimination of conflicts of interest, and judicial respect for the right to regulate).

131. EC 2016, *supra* note 77, at 12; *see also* Henckels 2016, *supra* note 56, at 28. Eventually, the parties intend to establish a permanent, multilateral investment court. CETA, *supra* note 14, art. 8.29 ("The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the

Second, CETA strengthened the right to regulate by introducing more specific provisions protecting and defining that right. The chilling of state regulatory power has been attributed to vague treaty provisions.[132] In response, CETA places more precise limitations on investor rights.[133] The entirely new article on the right to regulate in the final version of Chapter Eight and the Joint Interpretative Instrument ("JII") are examples of this effort.[134]

resolution of investment disputes."); Eur. Commission Press Release MEMO/16/4350 *supra* note 120; *CETA: EU and Canada Agree on New on Investment in Trade* Agreement, EUR. COMMISSION (Feb. 29, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468 [https://perma.cc/QTX3-NLFB]. The EU-Vietnam FTA also includes such a reference, and the EU has taken to including them in all its negotiations. EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016, European Union-Viet., chp. 8, sec. 3, art. 15, European Union-Viet., Dec. 2, 2015, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 [https://perma.cc/Q97Z-YL4N].

132. Henckels 2016, *supra* note 56, at 32; *see also* Escobar, *supra* note 60, at 47.

133. CETA, *supra* note 14, art 8.9, 8.10, 8.12; Giupponi, supra note 11, at 53; Henckels 2016, *supra* note 56, at 32.

134. CETA, *supra* note 14, art. 8.9.1; JII, *supra* note 79, ¶ 2. The European Parliament had called for protection of the right to regulate in this chapter as early as 2011. European Parliament Resolution of 8 June 2011 on EU-Canada Trade Relations, *supra* note 78, ¶ 12, 2012 O.J. (C 380E), at 23. Such a provision had thus far been absent in treaties with ISDS. *See* Van Harten, *supra* note 42, at 161. The EU-Vietnam Agreement, concluded on February 1, 2016, affirms the right to regulate in the investment chapter, but that chapter is separate from the dispute resolution chapter, which does not reaffirm this right. *See* EU-Vietnam Free Trade Agreement Agreed Text as of January 2016, *supra* note 131, ch. 8, sec. 2, art. 13bis & ch. 15, art. 2. The EU-South Korea FTA, signed in 2010, contains the right to regulate in its chapters on trade in services, establishment and electronic commerce, and trade and sustainable development. Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, European Union-S. Kor., art. 7.1.4, 13.3, Oct. 15, 2009, 2011 O.J. (L 127) 6. The EU-Peru and Colombia FTA, signed in 2012, affirms this right in the objective and scope of application provision, and the trade and sustainable development chapter. Trade Agreement Between the European Union and its Member States, of the One Part, and Colombia and Peru, of the Other Part, Colom.-Peru-European Union, art. 107.5, 268, June 26, 2012, 2012 O.J. (L 354) 3. By comparison, Canada's FTA with Korea, concluded in January 2015, affirms the right to regulate only in the chapter on the environment, and has no chapter on sustainable development. Free Trade Agreement Between Canada and The Republic of Korea, Can.-Kor., art. 17.2, Sep. 22, 2014, available at http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng [https://perma.cc/33CU-N6YL]. Canada's FTA with the Ukraine, concluded in July 2016, does not recognize the right to regulate in so many words, although the environmental chapter recognizes that "each Party has sovereign rights to conserve and protect its environment and sustainably manage its natural resources." Canada–Ukraine Free Trade Agreement, Can.-Ukr., art. 12.2, July 11, 2016, available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng [https://perma.cc/6JV2-Z2PT]. The Canada-Ukraine FTA also has no chapter on trade and sustainable development. *Id.* In fact, CETA is the first time Canada has included a chapter on sustainable development and a chapter with substantive

Although the right to regulate appears many times in CETA,[135] its inclusion in Chapter Eight is particularly crucial, because context serves an important role in treaty interpretation.[136]

This section asks what protection the right to regulate provides to the Parties when faced with an investor claim under Chapter Eight—will CETA successfully correct the chilling effect that historically characterized ISDS decisions? To answer this question, this section examines what legal and political force the right to regulate, as provided in Article 8.9.1, may have. Part A lays out the legal background that will frame the Tribunal's analysis. Part B applies that framework to Article 8.9.1 and to CETA's provisions on the right to regulate, sustainable development, and environmental protection more broadly.

A. Interpreting CETA: The Vienna Convention on the Law of Treaties

This Part lays out the legal framework underpinning the right to regulate and sustainable development in CETA. It presents the relevant provisions of Vienna and discusses the way in which some of the seminal international cases have interpreted these rules, the right to regulate, and the principle of sustainable development.

1. The Vienna Convention on the Law of Treaties

The ICS Tribunal applies the interpretive rules mandated by Vienna to construe CETA's terms.[137] The scholarship on Article 31

environmental provisions in an FTA. GOV'T CANADA, TECHNICAL SUMMARY OF FINAL NEGOTIATED OUTCOMES: CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT 25 (2013).

135. *See* CETA, *supra* note 14, recital 6, 8, 5.4, 6.1.5, 8.9, 21.2.1–2, 22.1, 23.2, 24.3, 24.4–5, 28.3, annex 8-A; *see also infra* Annex II.

136. The Commission viewed this provision as giving "a clear instruction to the tribunal as regards the interpretation of the investment protection rules." EC 2016, *supra* note 77, at 11.

137. CETA explicitly invokes the Vienna Convention. CETA, *supra* note 14, art. 8.31.1. ("When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, and other rules and principles of international law applicable between the Parties.") (emphasis added). In addition, the ECJ applies Art. 31 of the Vienna Convention to treaties to which the EU is a party (even though Vienna technically only applies to states) because it has become part of customary international law. *See* Case T-396/09, Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v. Comm'n, ECLI:EU:T:2012:301, ¶ 61; Case C-386/08, Brita GmbH, v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289, ¶¶ 41–43; Opinion 1/91, 1991 E.C.R. I-06079, ¶ 14; *see also* Iron Rhine Railway (Belg. v. Neth.), 26

of Vienna[138] is extensive and does not bear repeating here. This Part simply outlines the generally accepted meaning and application of these provisions. Part III.B applies them to CETA.[139]

When employing Vienna to interpret treaties and agreements, the judge or arbiter aims to identify the meaning of the contested terms that most nearly "giv[es] effect to the parties' intention."[140] In New Generation FTAs, this will require weighing investment protection against the other social and policy objectives of the treaty, in this case, sustainable development. Katharina Berner, Research Fellow at Humboldt University Berlin, argues that Vienna has "great potential" as a tool for reconciling these rival aims, "because IIAs typically contain substantive clauses that do not have

R.I.A.A. 35, 62 (Perm. Ct. Arb. 2005); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 65 (April 20). This may not guarantee that the Tribunal will be obligated to, or will, apply the Vienna Convention. *See* Katharina Berner, *Reconciling Investment Protection and Sustainable Development*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED, *supra* note 13, at 177, 180 ("Empty phrases such as 'arbitral tribunals must apply the Vienna rules since these rules govern the interpretation of treaties', albeit popular, do not help to resolve this issue. Instead, one eventually needs to determine the applicable law for each individual dispute."). However, Berner admits that "[i]n most instances, this complex interaction will eventually result in authorizing arbitral tribunals to apply the Vienna rules." *Id.* at 181.

138. Vienna Convention on the Law of Treaties, art. 31.1–3, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna] ("GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.").

139. This analysis focuses on Articles 31,1 and 31.2. Article 31.3(a)–(b) is not currently relevant, as there has not yet been any subsequent agreements or practices implementing CETA. Article 31.3(c) of Vienna also provides that "[a]ny relevant rules of international law applicable in the relations between the parties" shall be taken into account, but there is no room for an exploration of that here. The relevant rules include the principles of effectiveness and reasonableness. *Id.* art. 31.3(c); *see also* Ascensio, *supra* note 34, at 373–74. On effectiveness, *see* Shrimp-Turtle, *supra* note 24, ¶ 131, n. 116; *Iron Rhine Railway*, 27 R.I.A.A. at 64. On principles of environmental international law, *see Iron Rhine Railway*, 27 R.I.A.A. at 66. On environmental necessity, *see* SAVERIO DI BENEDETTO, INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT 172–76 (2013).

140. Berner, *supra* note 137, at 184.

a single ordinary (or special) meaning."[141] In the face of such ambiguity, tribunals exercise their discretion to interpret the text using Vienna's balancing framework.[142]

Article 31.1 of Vienna states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*."[143] Arguably, this article effectively ensures that the treaty's overall objectives receive as much weight as the contested provision's plain meaning and immediate context.[144] Thus, the ICS Tribunal should not read "protection of the environment," as it appears in CETA's right to regulate provision, in isolation. Instead, other provisions indicate that "protection of the environment" encompasses sustainable development. For example, the Parties committed to developing trade "in such a way as to contribute to sustainable development in its . . . environmental dimension[];"[145] they recognized "that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development;"[146] and they "underlin[ed] the benefit[s] of considering . . . environmental issues as part of a global approach to trade and sustainable

141. *Id.* at 185; *see also* Crawford, *supra* note 124, at 681; Hoffmeister, *supra* note 57, at 361–62.

142. Tribunals have proven reluctant to apply Vienna as a balancing tool, frequently giving greater weight to investment protection instead. *See* Berner, *supra* note 137, at 202. Berner, while noting that increasing the precision of these provisions could help ensure that tribunals properly balance these concerns, expresses doubts about whether the loss of flexibility and policy space would be worth it, and whether tribunals can be relied upon to implement even revised texts. She proposes instead that states maintain the current ambiguity while insisting (for example through procedural mechanisms) "that arbitral tribunals faithfully and openly apply the Vienna rules as they ought to apply any other element of the applicable law." *Id.* at 203. However, this suggestion does not overcome her original concern about the willingness of tribunals to comply. Increasing the precision of the text, as CETA has done, seems like the best concrete step towards promoting effective balancing of investor rights and state sovereignty. Whether the new procedural and ethical provisions governing the ICS will assist in overcoming the historical reluctance of arbitral tribunals remains to be seen.

143. Vienna, *supra* note 138, art. 31.1 (emphasis added).

144. Ruse-Khan, *supra* note 4, at 164 ("Emphasis on the exact words of a treaty does nothing more than taking those words as the necessary *starting point* for an interpretative exercise that also includes teleological dimensions . . . .") (emphasis in original). It does not, however, authorize "'an investigation *ab initio* into the intentions of the parties." Ascensio, *supra* note 34, at 371–72.

145. CETA, *supra* note 14, recital 9.

146. *Id.* art. 22.1.1.

development."[147] Reading CETA's right to regulate in light of the agreement's object and purpose strengthens and broadens the right's scope to include sustainable development.

Paragraph 2 of Article 31 explains that "context" includes the treaty's preamble and annexes, as well as agreements and instruments made "in connexion with the conclusion of the treaty."[148] Thus, such concluding agreements receive the same weight as the treaty text when used to determine a provision's meaning. The ICS Tribunal would therefore view the JII as an interpretive tool that is as important as the provisions of CETA itself. With respect to sustainable development, this is important because the Parties took pains to emphasize their intent to implement further sustainability in the JII.[149]

Article 31.3 embodies the principle of "evolutionary interpretation," acknowledging that the meaning of treaty provisions may develop over time.[150] This injects flexibility and realism into the act of treaty interpretation, which may prove crucial to the achievement of sustainable development objectives. This is important because what constitutes "sustainable" development changes over time, especially in the context of a changing climate. The ICS Tribunal should consider that achieving sustainable development may require different regulatory measures at different times. The mere fact of variation does not necessarily indicate regulatory arbitrariness; in fact, it indicates that the government is rationally exercising its regulatory discretion to adapt to changing circumstances.

147. *Id.* art. 22.1.2.

148. Vienna, *supra* note 138, art. 31.2; Ascensio, *supra* note 34, at 371.

149. *See, e.g.*, JII, *supra* note 79, ¶1.f ("This interpretative instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions . . . and provides an agreed interpretation thereof. This includes, in particular, the impact of CETA on the ability of governments to regulate in the public interest, as well as the provisions on . . . sustainable development . . . and environmental protection.").

150. Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 784 (2002); *see also* Shrimp-Turtle, *supra* note 24, ¶ 130. This principle has also been observed by the European Court of Justice, *see* Case C-283/81, CILFIT Srl v. Ministro della Sanita, 1982 E.C.R. 03415, ¶ 20, and the European Court of Human Rights, *see* Tyrer v. United Kingdom, App. No. 5856/72, Eur. Ct. H.R. ¶ 31 (1978), https://hudoc.echr.coe.int/eng#{"fulltext":["\"CASE OF TYRER v. THE UNITED KINGDOM\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57587"]} [https://perma.cc/2QJE-3EVW].

In summary, under Vienna, the ICS Tribunal will interpret CETA by analyzing its context, and object and purpose. The scope of this analysis includes the disputed provision, the broader treaty text, and any instruments connected with its conclusion. Furthermore, the meaning of a passage may change over time.

2. Court Precedents on Vienna, the Right to Regulate, and Sustainable Development

The right to regulate and sustainable development are closely interwoven concepts that must be jointly interpreted. Sovereign nations regulate to protect the environmental and social pillars of sustainable development, while investors sue to protect their rights under the economic pillar. A court's role is to balance these competing interests. The practical outcome of a given case under Chapter Eight of CETA will depend not only on the relevant facts and CETA's text, but also on the jurisprudence adopted by the ICS Tribunal.[151] As a new court, it remains to be seen what precedents the ICS Tribunal will rely on. Accordingly, this section examines a few examples of how sustainable development and the right to regulate have been interpreted and applied in major cases before the International Court of Justice ("ICJ"), the WTO Appellate Body ("Appellate Body"), and arbitral tribunals.

In determining whether the right to regulate has been validly exercised, arbitral tribunals have employed a three-prong test. A tribunal will determine, first, whether the state acted to further a public interest; second, whether the measure is non-discriminatory; and third, whether the state observed due process of law.[152] Provided these requirements are met, the tribunal will find that the measure in question is not expropriatory.[153] For the purpose of

151. *See* Ruse-Khan, *supra* note 4, at 165.

152. Giupponi, *supra* note 11, at 46 n. 25.

153. *Id. See, e.g.*, In the Matter of an International Arbitration Under Chapter 11 of the North American Free Trade Agreement and the Uncitral Arbitration Rules, Methanex Corp. v. United States, Final Award, part 4, chp. D, at 4 (Aug. 3, 2005), available at https://www.state.gov/documents/organization/51052.pdf [https://perma.cc/C246-L64L] (a " non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."). Strictly interpreted, right to regulate provisions should prevent investors from interfering with state sovereignty. Giupponi, *supra*

evaluating the scope of the right to regulate under CETA, the contentious issue is whether an action was taken in furtherance of a public interest. Courts have not always found that environmental measures pass this test.[154] Given the centrality of environmental protection to sustainable development, one indicator of CETA's effectiveness in achieving its sustainable development objectives will be how the ICS Tribunal treats environmental objectives under the right to regulate.

The case law on the right to regulate centers on Article XX of GATT.[155] Article XX aptly illustrates how courts interpret the right to regulate because it implicates an equivalent balancing test, and it plays an important role in the advancement of environmental policy among Parties to the WTO.[156] It provides that, as long as measures are not discriminatory or "disguised restrictions" on trade, the contracting parties shall be permitted to adopt and enforce measures "(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; . . . [or] (g) relating to the conservation of exhaustible natural resources. . . ."[157] CETA similarly protects measures addressing "the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[158] In addition, CETA incorporates

note 11, at 46. In the past, however, arbitrators have rarely done this balancing. Van Harten, *supra* note 42, at 163.

154. Giupponi, *supra* note 11, at 47.

155. The GATT is contained in Annex 1A of the World Trade Organization Agreement and is crucial to disputes brought under the WTO. *See GATT and the Goods Council*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm [https://perma.cc/KU8C-WLTV] (last visited Feb. 22, 2017).

156. BENEDETTO, *supra* note 139, at 182–83.

157. GATT, *supra* note 24, art. XX.

158. CETA, *supra* note 14, art. 8.9.1. ("[T]he Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."); *see also id.* art. 23.2 (covering the right of the Parties to adopt labor laws); *id.* art. 24.3 (covering environmental policy and law and explicitly providing for high and improving levels of environmental protection). While GATT covers measures "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources," environmental protection is arguably broader than these two provisions, encompassing threats to life and health, and aiming at the conservation of natural resources while also intending to mitigate and adapt to climate change, threats that may be distant in the future and difficult to predict. GATT, *supra* note 24, art. XX(b), (g); *see also* Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 EUR. J. INT'L

Article XX of GATT in Article 28.3,[159] and arguably incorporates the relevant case law of the WTO tribunals as well, as can be seen for example in Article 28.3.1 of CETA, which explicitly cites to the holding of the *Shrimp-Turtle* case.[160]

Shrimp-Turtle is perhaps the most cited international case on sustainable development and the application of Vienna.[161] Decided by the WTO Appellate Body in 1998, it clearly demonstrates how to balance the right to regulate and sustainable development against economic rights. India, Malaysia, Thailand, and Pakistan sued the United States under GATT for prohibitions issued by the latter on the importation of shrimp.[162] The United States justified its measures as necessary to protect sea turtles against harmful fishing techniques.[163] It claimed legal authority for its actions under Article XX, asserting that sea turtles constituted "exhaustible natural resources" under subparagraph (g).[164] The Appellate Body relied on the Treaty's objective of sustainable development to hold that the term "'exhaustible natural resources'" did indeed include *living* species.[165]

In applying Vienna to the facts, the *Shrimp-Turtle* court noted that the object and purpose of a treaty must initially be sought in the text and context of the disputed provision.[166] However, when the

L. 639, 643 (2015). UNCTAD has found right to regulate provisions more effective than GATT Art. XX for achieving sustainable development goals. Muchlinski, *supra* note 13, at 56.

159. *See infra* Annex II.

160. "The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources." CETA, *supra* note 14, art. 28.3.1; Shrimp-Turtle, *supra* note 24, ¶ 131.

161. Shrimp-Turtle, *supra* note 24. For analyses of this appellate body report, *see* Barral, *supra* note 4, at 386, 395; Marceau, *supra* note 150, at 784; Ruse-Khan, *supra* note 4, at 161, 166.

162. Shrimp-Turtle, *supra* note 24, ¶ 1.

163. *Id.* ¶ 11.

164. GATT, *supra* note 24, art. XX(g). For some reason, the United States only wanted to rely on subparagraph (b)—which allows regulation for animal health and seems like a more intuitive choice—in the alternative. *See* Shrimp-Turtle, *supra* note 24, ¶ 125.

165. Ruse-Khan, *supra* note 4, at 166 (emphasis added); Shrimp-Turtle, *supra* note 24, ¶ 131 ("Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.").

166. Shrimp-Turtle, *supra* note 24, ¶ 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states

text is inconclusive, or the tribunal wants to confirm its initial interpretation, "light from the object and purpose of the treaty as a whole may usefully be sought."[167] The court's reference to the treaty's broader objective of sustainable development is particularly interesting in the *Shrimp-Turtle* case because the term "natural resource" does not, on its face, seem to include living organisms. The Oxford English Dictionary defines "natural resources" as "those materials or substances of a place which can be used to sustain life or for economic exploitation."[168] Nevertheless, the court used its discretion to examine this overarching goal of the Treaty and applied it to develop a creative and unexpected interpretation of the disputed text.

Although the United States lost the case because its actions were discriminatory, and therefore, unjustifiable under Article XX's chapeau,[169] the decision offers some insight into what might have constituted acceptable regulation. First, the Appellate Body did not prohibit all unilateral state action, or even action conditioning market access on compliance with specific policies implemented by the importing country.[170] However, though not prohibited, unilateral measures are more vulnerable to invalidation by the arbitration panel as discriminatory.[171] Second, the decision explicitly encouraged states to "act together" to protect the environment.[172] Bilateral or multilateral projects are more likely to be met with approval from an arbitration tribunal. Finally, the Appellate Body suggested that greater flexibility in the law's

parties to the treaty must first be sought."). The *Iron Rhine* court also took this as its starting point. Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 63 (Perm. Ct. Arb. 2005).

167. Shrimp-Turtle, *supra* note 24, ¶ 114; Ruse-Khan, *supra* note 4, at 166. Both the immediate and broader context are important to properly interpreting a treaty. The Appellate Body in *Shrimp-Turtle* criticized the panel below for *only* considering the purpose of the whole agreement (maintaining the multilateral trading system), ignoring the immediate context and purpose of Article XX's chapeau. Shrimp-Turtle, *supra* note 24, ¶ 116. These analyses highlight the importance of Article 8.9.1's placement in Chapter Eight of CETA.

168. *Natural*, OXFORD ENGLISH DICTIONARY (3d ed. 2003).

169. Shrimp-Turtle, *supra* note 24, ¶ 186.

170. *Id.* ¶ 121 ("[C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. . . . It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . prescribed by the importing country, renders a measure a priori incapable of justification under Article XX.").

171. *Id.* ¶ 172.

172. *Id.* ¶ 185.

implementation might have prevented a ruling of unjustified discrimination. The American import restriction effectively required exporting countries to adopt exactly the same protective measures as the United States. The court would not allow the United States to impose this mandate on other countries.[173]

The Appellate Body again emphasized the connection between GATT Article XX and the right to regulate in the *Seal Products* case.[174] Canada and Norway claimed that the EU's regulation of seal products constituted an unnecessary obstacle to trade under Recital 5 of the Agreement on Technical Barriers to Trade ("TBT").[175] However, Recital 6 of the TBT recognized the Parties' right to regulate.[176] The court observed that in principle, reconciling these two considerations was no different from the balancing required under GATT Article XX.[177] The Appellate Body engaged in similar balancing in the *Clove Cigarettes* case, where it explained that the TBT juxtaposes the *right* to regulate against the *desire* to avoid unnecessary obstacles to trade.[178] A right has more force than a mere desire and should be balanced accordingly. Though not unlimited or unqualified, the right to regulate is an effective shield against claims that state regulation poses "unnecessary obstacles" to trade. Thus, under the TBT, the right to regulate meant that "[m]embers have a right to use technical regulations in pursuit of their legitimate objectives,

173. *Id.* ¶¶ 161–165, 177 ("[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.").

174. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 1.1, 1.5, WT/DS400/AB/R (adopted May 22, 2014) [hereinafter Seal Products].

175. *Id.* ¶¶ 1.1, 1.5.

176. Agreement on Technical Barriers to Trade recital 6, Apr. 12, 1979, 1868 U.N.T.S. 120 ("Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, 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 this Agreement.").

177. Seal Products, supra note 174, ¶ 5.127.

178. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 96, WT/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter Clove Cigarettes].

provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*."[179]

Like the right to regulate and GATT Article XX, sustainable development involves balancing different interests, as explained by the ICJ in *Gabčíkovo-Nagymaros*.[180] A dispute arose between Hungary and the Czech and Slovak Federal Republic concerning the construction and operation of a system of locks on the Danube. Although the ICJ acknowledged that the essential aims of the project were the production of hydroelectricity, the improvement of navigation, and flood protection, the treaty also committed the parties to maintaining the water quality of the Danube.[181] The court noted that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[182] Practically speaking, this meant that the Parties had to work together to develop a solution to achieve the *integrated* objectives of the Treaty, in particular, by organizing the release of water into the old bed of the Danube. The court declined to identify a particular solution; instead it required the Parties to craft one together based on the principle of sustainable development.[183] Sustainable development bound the Parties to act even though it was not even mentioned in the agreement, and even though environmental protection was not one of the agreement's "essential" objectives.

The integration of competing objectives referred to in *Gabčíkovo-Nagymaros* was also developed in *Iron Rhine*.[184] *Iron Rhine* concerned a dispute between Belgium and the Netherlands over the reactivation of a railway. The tribunal held that international law required the integration of environmental measures into the "design and implementation of economic development activities," which included a duty to prevent and mitigate environmental harm

179. *Id.* ¶ 95. The court emphasized the fact that the Agreement explicitly authorized the right to regulate through *technical* regulations. *Id.* ¶ 108 (emphasis added). The context of the right to regulate informs its content and scope.

180. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25); *see also* Barral, *supra* note 4, at 386–87.

181. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. ¶ 15.

182. *Id.* ¶ 140.

183. *Id.* ¶¶ 140–41.

184. Barral, *supra* note 4, at 387.

caused by those activities.[185] The tribunal cited *Gabčíkovo-Nagymaros*, affirming that integrating competing objectives is an expression of sustainable development.[186] It is clear that balancing the economic and environmental pillars is not a zero-sum game; they must be woven together.[187]

Balancing and integration do not occur based solely on the original intentions of the Parties. Rather, sustainable development is an evolutionary concept allowing for flexibility as practices and knowledge develop. Economic projects must consider emerging norms and standards based on scientific developments. In *Shrimp-Turtle*, the Appellate Body noted that the GATT preamble had been modified in 1994 to incorporate the new objective of sustainable development. This amendment was crucial to the court's understanding of "exhaustible natural resources."[188] The court was not concerned with the Parties' objectives at the time Article XX was written, but at the time of the dispute. When it applied sustainable development to Article XX, "the term 'natural resources' . . . [was] *not 'static' . . . but . . . 'evolutionary.*'"[189] In expanding the definition of "exhaustible natural resources," the Appellate Body cited modern science[190] and the "contemporary concerns of the community of nations about the protection and conservation of the environment."[191] It also cited recent international events that "elucidate[d] the objectives of WTO Members with respect to the relationship between trade and the environment."[192] The ICJ recognized this evolutionary character of

185. Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 66–67 (Perm. Ct. Arb. 2005). From this survey of the case law, Barral concludes that sustainable development is indeed a principle of customary law, albeit one requiring case by case analysis. Barral, *supra* note 4, at 388*; see also supra* note 21.

186. Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 59, 80 (Perm. Ct. Arb. 2005); *see also* Barral, *supra* note 4, at 387, 392; Ruse-Khan, *supra* note 4, at 148.

187. Barral, *supra* note 4, at 395; Ruse-Khan, *supra* note 4, at 148, 161.

188. Shrimp-Turtle, *supra* note 24, ¶ 129 ("While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement*—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of *sustainable development*.'"); *see also id.* ¶¶ 152–53.

189. *Id.* ¶ 130 (emphasis added).

190. *Id.* ¶ 128.

191. *Id.* ¶ 129.

192. *Id.* ¶ 154*; see also* Marceau, *supra* note 150, at 784.

sustainable development in *Gabčíkovo-Nagymaros*, citing "new scientific insights and . . . a growing awareness of the risks for mankind," particularly because the obligation imposed on the Parties was continuing and thus "necessarily evolving."[193]

Finally, in *Pulp Mills*, the ICJ interpreted the Treaty in such a way as to make sustainable development a binding objective. In that case, Argentina sued Uruguay under the Treaty of the River for its construction of two pulp mills on the river.[194] The Treaty's object was the "optimum and rational utilization of the River Uruguay."[195] The court held that the terms "optimum and rational" required consideration of sustainable development.[196] It defined the term "utilization" to encompass both "the continued conservation of the river environment and the rights of economic development of the riparian States."[197] From this perspective, sustainable development was not simply a concept or balancing tool, but an objective (albeit a broad and vague one) with which state action had to comply.[198] As the court said, "this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection . . . is the essence of sustainable development."[199]

In summary, while judicial inquiry begins with the context of the disputed provision, a tribunal may have recourse to the broader context of the treaty itself to shed light on ambiguous provisions, or simply to confirm its interpretation of the disputed text. Like Article XX of GATT, interpreting the right to regulate is a balancing process. The leading cases define sustainable development as a concept or principle that evolves over time, providing a measure of flexibility to the interpretive process. In addition, it requires balancing and integrating economic and environmental interests so that trade and investment support environmental protection. Although courts have refrained from mandating specific actions, sustainable development is a binding

193. Gabčíkovo-Nagumaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25).

194. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 1 (Apr. 20).

195. *Pulp Mills*, 2010 I.C.J. ¶¶ 75, 174.

196. *Id.* ¶ 177.

197. *Id.* (internal quotations ommited).

198. Barral, *supra* note 4, at 387.

199. *Pulp Mills*, 2010 I.C.J. ¶ 177.

objective and the Parties must collaborate to effectively realize their obligations under its competing pillars.

B. Applying the Law to CETA

Assuming that the ICS Tribunal will look to these leading cases to inform its analysis, the question becomes what content and force the right to regulate will have under CETA within the context of investor-state dispute resolution.[200] This section applies both the case law and Vienna to Article 8.9.1 of CETA in an effort to answer this question. Implementing Vienna, the Tribunal will seek to give effect to the Parties' intentions, as expressed in various textual sources.[201] This section proceeds through the concentric circles of sources examined in Vienna: (1) the immediate context, and object and purpose of the disputed provision; (2) the broader object and purpose of the treaty; and (3) the documents connected with the conclusion of the agreement.

1. Article 31.1: The Immediate Context

The Vienna inquiry begins with the text and context of the relevant provisions. Article 8.9.1 reiterates the right to regulate for the purposes of the investment protection chapter, which also contains the provisions on the ICS.[202] Its placement in this chapter signals to the ICS Tribunal that the Parties intended for the right to regulate to be central to its analysis of any investor claim,[203] and for the ICS Tribunal to balance investor rights against the State's right to regulate in its treatment of investor claims.[204]

Article 8.9.1 is phrased somewhat differently from the right to regulate as asserted in Recital 6. Recital 6 frames "environment" as a simple policy objective.[205] Article 8.9.1 explicitly mentions the

200. While the tribunal will have many other rules and principles to apply, this Note focuses on the criteria provided in Vienna Article 31. *See* Martins Paparinskis, *International Investment Law and the European Union: A Reply to Catharine Titi*, 26 EUR. J. INT'L L. 663, 665 (2015).

201. Berner, *supra* note 137, at 184; Ascensio, *supra* note 34, at 371–72.

202. CETA, *supra* note 14, art. 8.9.1 ("For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.").

203. *See* Van Harten, *supra* note 42, at 161; *see also* Giupponi, *supra* note 11, at 55.

204. In the cynical words of Van Harten, "if so inclined." *See* Van Harten, *supra* note 42, at 161–62.

205. CETA, *supra* note 14, recital 6.

protection of the environment and of public health as legitimate policy objectives protected by this right, clarifying the intended scope of the right.[206] Thus, in any dispute concerning regulatory measures seeking to protect the environment, the Tribunal should note that the right to regulate explicitly encompasses environmental protection. Determining whether the right to regulate insulates such measures from investor challenges will therefore require balancing and integrating environmental protection against investor rights.[207]

While this immediate context shows that protecting the right to regulate constitutes an important object and purpose of the investment protection chapter, the broader object and purpose of the treaty further defines what that right includes.

2. Article 31.2: The Broader Context

Defining the content of the right to regulate requires identifying the Parties' intent as to the scope of regulatory measures included in that right. The relevant question is therefore what CETA includes within the meaning of "the protection of the environment."[208] Vienna provides that "[t]he context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes."[209] This section analyzes the Preamble, and Chapters Eight (Investment), Twenty-Two (Trade and Sustainable Development), and Twenty-Four (Trade and Environment).

206. *Id.* art. 8.9.1 (emphasis added).

207. *See* Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 66–67 (Perm. Ct. Arb. 2005); Gabčíkovo-Nagumaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25); Clove Cigarettes, *supra* note 178, ¶ 95; Seal Products, *supra* note 174, ¶ 5.127.

208. CETA, *supra* note 14, art 8.9.1 ("For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of . . . the environment . . . ."); *id.* art. 24.3 ("The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.").

209. Vienna, *supra* note 138, art. 31.2.

i. Sustainable Development and Environmental Protection: Twin Obligations

This Note argues that the right to regulate implicitly applies to actions taken in furtherance of sustainable development through its explicit shielding of environmental protection measures. As one of the three pillars of sustainable development, environmental protection cannot be divorced from sustainable development.[210] CETA confirms this in several places. Recital 9 states that the parties reaffirm their commitment to promoting the "development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions."[211] This provision reverses the traditional order of priority between investment protection and sustainable development. Under CETA, sustainable development is not subordinate to trade and investment. Rather, the latter must be pursued in such a way as to further the goal of sustainable development. This makes sustainable development the concern not only of the Parties, but of investors.[212]

The sustainable development chapter incorporates the rights and obligations of the chapter on trade and environment.[213] The Parties' environmental obligations are therefore central to any interpretation of their commitments to sustainable development. More precisely, under the trade and environment chapter, "the Parties aim to: (a) promote sustainable development through . . . enhanced coordination and integration of . . . environmental . . .

210. CETA, *supra* note 14, art. 24.2.

211. *Id.* recital 9. CETA affirms the idea that trade must contribute to the objective of sustainable development. *Id.* art. 22.1.1. ("The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such as way as to contribute to the objective of sustainable development, for the welfare of present and future generations.").

212. *Id.* recital 9 ("REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions."); Hoffmeister, *supra* note 57, at 362.

213. CETA, *supra* note 14, art. 22.1.2 ("The Parties underline the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development. Accordingly, the Parties agree that the rights and obligations under Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment) are to be considered in the context of this Agreement.").

policies and measures" and "(b) develop[] their trade and economic relations in a manner that supports their . . . environmental protection measures and standards."[214]

These broad commitments offer ample room for discretion and interpretation, and the Parties should employ various and creative arguments in their defense of the right to regulate. For example, the Parties' aim to develop "trade and economic relations in a manner that supports their . . . environmental protection measures and standards"[215] may be interpreted to encompass Article 24.3.[216] Under that Article, the Parties "shall seek to ensure that [their] laws and policies provide for and encourage high [and continually improving] levels of environmental protection."[217] This obligation to improve protective measures is confirmed by Recital 11, which envisions continuous progress towards greater environmental protection.[218] The agreement does not mandate specific levels of protection, and the phrase "shall strive" likely would not be interpreted so as to force either Party to increase the levels of protection provided. However, in defending actions the Parties choose to take, they could rely on *Gabčíkovo-Nagymaros* to argue that these provisions mean that they had to take *some* coordinated action "to develop trade and economic relations in a manner that supports their . . . environmental protection measures and standards."[219] This means that the right to regulate includes an

214. *Id.* art. 22.1.3.

215. *Id.*

216. *See id.* art. 24.3.

217. *Id.* art. 24.3. This obligation is framed by the caveat "in a manner consistent with the multilateral environmental agreements to which they are a party and with this Agreement," which Berger et al. suggest weakens it considerably. Berger et al., *supra* note 60, at 13–14.

218. CETA, *supra* note 14, recital 11 ("IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters.").

219. *Id.* art. 22.1.3; Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 140–41 (Sept. 25) (holding that sustainable development applied to the circumstances required "the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river." But, "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses."); *see also* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Reports 14, ¶ 75 (April 20) (finding that

obligation to take concrete steps to develop trade and economic relations in support of environmental protection. Under this interpretation, the Parties would argue, and the Tribunal would likely find, that measures taken to establish or strengthen environmental standards are protected by the right to regulate.[220]

Article 22.3.2 offers some details on what such measures might include. It provides that:

> [E]ach Party *shall strive* to promote trade and economic flows and practices that contribute to enhancing decent . . . environmental protection, *including* by: (a) *encouraging* the development and use of voluntary schemes . . . such as eco-labeling and fair trade schemes; . . . (c) *encouraging* the integration of sustainability considerations in private and public consumption decisions; and (d) *promoting* the development, the establishment, the maintenance or the improvement of environmental performance goals and standards.[221]

The Parties can meet these commitments in a myriad of ways, such as legislation and rule-making, subsidies and incentives, or public education and awareness initiatives. For example, Article 22.3.2 would shield a governmental rule mandating the consideration of sustainable development in environmental impact assessments.[222] This could even be extended to a mandate that agencies or developers consider the Social Cost of Carbon.[223]

sustainable development required the "'continued conservation of the river environment. . . .'"); Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 66 (Perm. Ct. Arb. 2005) ("[I]nternational law relating to the protection of the environment . . . . [R]equire[s] the integration of appropriate environmental measures in the design and implementation of economic development activities . . . . [W]here development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.").

220. This is further confirmed by Article 24.5.1–2, which prohibits the Parties from lowering environmental standards to attract investments. CETA, *supra* note 14, art. 24.5.1–2 ("1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law. 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.").

221. *Id.* art. 22.3.2 (emphasis added).

222. *Id.*

223. *See generally* ENV'T AND CLIMATE CHANGE CAN., TECHNICAL UPDATE TO ENVIRONMENT AND CLIMATE CHANGE CANADA'S SOCIAL COST OF GREENHOUSE GAS ESTIMATES (2016) (updating Environmental and Climate Change Canada's recommended Social Cost of Carbon values, for use in the cost-benefit analyses of regulatory proposals required under Canadian law).

In addition, Article 22.3.2 is not exhaustive. Any measures that "promote trade and economic flows and practices that contribute to enhancing . . . environmental protection"[224] would arguably fall under this provision. "Economic flows and practices" is vague, and accordingly, flexible. Moreover, the textual mandate is a strong one: the Parties "shall strive" to promote such actions.[225] Within the provided examples, subparagraph (d) offers the most scope for the imagination. Parties should interpret "performance goals and standards"[226] creatively. While the term would certainly include numerical or narrative pollutant limits, they could also include efficiency standards, renewable energy quotas, housing quality standards, natural resource extraction limits, reporting and monitoring requirements, energy infrastructure modernization, public transit programs; the list goes on. Any of these activities could also be brought within the scope of Article 22.3.2 as "flows and practices"[227] that, while not included in the text, come within its spirit and intent.

Unilateral actions such as those mentioned above are more likely to be favorably construed by the ICS Tribunal if they are flexibly implemented. In the *Shrimp-Turtle* case, the Appellate Body evaluated the flexibility of measures imposed by the United States on other WTO members.[228] The situation under CETA is somewhat different; the same national sovereignty concerns are not at stake in investor-state relations as in state-state relations. However, fostering flexibility towards investor rights demonstrates good faith, and is advisable for maximizing the State's regulatory space.

Shrimp-Turtle examined the flexibility of how the United States measured compliance with its rule,[229] how it evaluated conditions particular to the governed parties,[230] and how it provided access to compliance pathways.[231] Thus, measures applied by a State to investors are more likely to be protected by the right to regulate if they allow multiple pathways to compliance, take conditions

224. CETA, *supra* note 11, art. 22.3.2.
225. *Id.*
226. *Id.*
227. *Id.*
228. Shrimp-Turtle, *supra* note 24.
229. *Id.* ¶¶ 161, 177.
230. *Id.* ¶¶ 164–65.
231. *Id.* ¶ 175.

particular to foreign investors into account in determining those pathways, and ensure that foreign investors do not face unique barriers to compliance.[232] The Appellate Body also expressed concern that the United States was more interested in forcing other countries to adopt its policy than in protecting sea turtles, implying that its environmental objectives lacked sincerity.[233] Parties must pursue sustainable development in good faith and should not harbor or hide ulterior motives. The Appellate Body's stance, however, could be interpreted to provide the Parties with another defense: measures that genuinely pursue sustainable development should be promoted, and the ICS Tribunal should not demand flexibility to the point of compromising that goal. If the Parties can show that a procedural or substantive concession demanded by investors would jeopardize sustainability, the ICS Tribunal would likely allow the State concerned to deny the request.

CETA's emphasis on coordination and integration is reinforced by *Shrimp-Turtle*'s explicit approval of bilateral agreements to further environmental protection,[234] providing the Parties with a strong defense for any measures taken *together* to further sustainable development. It also seems unlikely that the Tribunal would rule against united efforts because collaboration eliminates the risk of discriminatory behavior.

The right to regulate would also shield government enforcement of existing environmental laws. Article 24.5.3 provides that "[a] Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment."[235] This Article not only prevents bad faith leniency, but also reflects a general intention that environmental laws be effectively enforced as a normal practice. Sustainable development cannot be attained if the relevant laws are ineffective in practice. In fact, CETA explicitly incorporates the international legal principle of effectiveness.[236] Therefore, the Parties have the right to take action to implement the Agreement effectively, including through rigorous enforcement.

232. *Id.* ¶¶ 163–65, 175–77, 179–81.
233. *Id.* ¶ 165.
234. *Id.* ¶ 185.
235. CETA, *supra* note 14, art. 24.5.3.
236. *Id.* art 1.8.

In an important concession to the European legal tradition, CETA also incorporates the precautionary principle, while affirming the centrality of science to environmental protection.[237] The precautionary principle holds that, so long as a Party bases its actions on solid scientific evidence, it may act to prevent harm to the environment despite scientific uncertainty.[238] The precautionary principle as applied to environmental protection is also explicitly mandated in *Iron Rhine* and *Gabčíkovo-Nagymaros*.[239] Investors could not, therefore, challenge preventive measures solely on the ground that they are preventive. The Parties have a solid basis for arguing that actions taken to *prevent* harm to the environment are also incorporated within the right to regulate. In addition, preventive action provides more certainty for investors, by preventing harmful projects before they begin, rather than halting them midway when negative impacts occur, wasting financial resources. Precautionary measures therefore constitute an opportunity for state-investor collaboration.

Along with Vienna Article 31.3, the precautionary principle supports an interpretation of sustainable development as evolutionary. The Parties should urge the Tribunal to use modern circumstances to distinguish its interpretation of CETA from

237. *Id.* art. 24.8.2. For an excellent discussion of the precautionary principle in CETA and the difference between how Canada and the EU have treated the principle historically, *see* Angéline Couvreur, *New Generation Regional Trade Agreements and the Precautionary Principle: Focus on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union*, 15 ASPER REV. INT'L BUS. & TRADE L. 265, 275–77 (2015) (noting that Canada does not typically include the precautionary principle in its FTAs and that Article 24.8.2 appears to represent a compromise between the Parties). The EU wanted to include this principle because of its place in the EU's Treaties. Statements to Be Entered in the Council Minutes, *supra* note 96, ¶ 7, 2017 O.J. (L 11), at 12. Canada's reasons for allowing its inclusion are unclear, but one assumes some kind of *quid pro quo* took place. It could even be attributable to pressures outside the CETA negotiations. For example, some have attributed the EU's capitulation on the issue of the Fuel Quality Directive and the technical specifications of tar sands-derived oil to CETA. James Crisp, *Canada Tar Sands Will Not Be Labelled 'Dirty' After All*, EURACTIVE (Dec. 17, 2014), https://www.euractiv.com/section/trade-society/news/canada-tar-sands-will-not-be-labelled-dirty-after-all/ [https://perma.cc/8A2G-SPKP].

238. Couvreur, *supra* note 237, at 267.

239. Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 66–67 (Perm. Ct. Arb. 2005) ("[W]here development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. . . . This duty is a principle of general international law."); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25) ("[I]n the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.").

narrower decisions under previous treaties. This would free the Tribunal to adopt a more expansive interpretation of the right to regulate and of the Parties' sustainable development obligations.

ii. Investment Protection

The investment chapter signals its support of the right to regulate by placing specific limits on investor claims and rights. For example, neither a negative impact on an investment, nor interference with investor expectations will in and of itself constitute a breach of a Party's duty of investment protection.[240] Nor does the decision to discontinue, or not to issue, renew, or maintain a subsidy.[241] Given this explicit shield, the Parties should use subsidies to promote sustainable development. The chapter also includes a novel provision listing those actions that could constitute a violation of the duty of fair and equitable treatment.[242] Reliance on a legitimate expectation does not in and of itself constitute a breach of fair and equitable treatment, though the tribunal may take such facts into account.[243] The expropriation provisions reaffirm the right to regulate,[244] and provide that in determining whether indirect expropriation has occurred, the tribunal will take into consideration the character of the measures in question, including their "object, context and intent."[245] By paralleling an assertion of the right to regulate with limitations on the Parties' obligations towards investors, the Parties indicated their intention for the right to regulate to provide robust protection of legitimate State actions.

In summary, the broader context of Article 8.9.1 indicates that the right to regulate could be interpreted to cover a wide variety of actions taken in furtherance of not only environmental protection, but sustainable development as well. This would include, for example, measures increasing the stringency of environmental

240. CETA, *supra* note 14, art. 8.9.2.

241. *Id.* art. 8.9.3–4.

242. *Id.* art. 8.10.2; EC 2016, *supra* note 77, at 11; Escobar, *supra* note 60, at 47; Giupponi, *supra* note 11, at 51; Henckels 2016, *supra* note 56, at 36; Kläger, *supra* note 56, at 66; Titi, *supra* note 158, at 656. For discussions on the value of this list approach, *see* Kläger, *supra* note 56, at 74; Simon Lester, Symposium, *Reforming the International Investment Law System*, 30 MD. J. INT'L L. 70, 78 (2015); Van Harten, *supra* note 42, at 156.

243. CETA, *supra* note 14, art. 8.10.4; Escobar, *supra* note 60, at 47**;** Titi, *supra* note 158, at 656.

244. *See* CETA, *supra* note 14, annex 8-A.3.

245. *Id.* annex 8-A.2.d.

standards, mandating the consideration of sustainable development in impact assessments applicable to investor projects, enforcing existing laws, and preventing environmental harm, even in face of scientific uncertainty.

3. Article 31.2(a): Instruments "in connexion with the conclusion" of CETA

Aside from the text of the agreement itself, Vienna provides that "the context for the purpose of the interpretation of a treaty shall comprise. . . (a) [a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty."[246]

The Joint Interpretative Instrument was intended to have legal force and to clarify what the Parties agreed upon in CETA.[247] In fact, it explicitly invokes its legal force under Vienna, particularly with respect to the right to regulate, sustainable development, and environmental protection:

> This interpretative instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof. This includes, in particular, the impact of CETA on the ability of governments to regulate in the public interest, as well as the provisions on investment protection and dispute resolution, and on sustainable development, labour rights and environmental protection.[248]

The JII provides important guidance for how the ICS Tribunal should interpret the content of the right to regulate. It asserts that right no less than six times in twelve pages.[249] Furthermore, the JII affirms that CETA's provisions on environmental protection are "comprehensive and binding," intended to deliver tangible outcomes that will maximize environmental benefits.[250] This speaks

246. Vienna, *supra* note 138, art. 31.2.

247. *CETA—A Trade Deal That Sets a New Standard for Global Trade*, *supra* note 16.

248. JII, supra note 79, ¶ 1.e.

249. *See id.* ¶¶ 1.e, 1.c, 1.d, 2, 6.a, 6.b.

250. *Id.* ¶ 7.b ("Accordingly, CETA includes comprehensive and binding commitments for the protection of workers' rights and the environment. The European Union and its Member States and Canada attach the highest priority to ensuring CETA delivers tangible

volumes about the Parties' intention to establish the right to regulate and change the way it has been interpreted and applied by tribunals under other agreements.

The JII explains that CETA is designed to "foster the contribution of trade" to sustainable development.[251] Under CETA, trade serves sustainable development; its *principle purpose* is to create *sustainable* economic growth.[252] While this idea may seem controversial, it is simply logical. Governments serve the public interest. They do not (ideally) enter into trade agreements to get rich or to enrich investors, but to improve the lives and increase the wealth of their citizens. Unsustainable trade and investment, though perhaps profitable in the short-term, will eventually harm the economy and the people's welfare, through resource depletion, and irresponsible exploitation of the environment and of people. Sustainability is therefore absolutely fundamental to the government's duty to its citizens. Its power to shape trade and investment is entirely appropriate and even necessary.

In paragraph 1.d, the JII adds that CETA will not lower the Parties' respective food safety, health, or environmental protections and reaffirms the commitments the Parties have made in international agreements with respect to precaution.[253]

The JII also links the right to regulate to New Generation FTAs, and to the Parties' goals of changing their approach to investment protection.[254] It emphasizes that this right exists even if the

outcomes in these areas, thereby maximising the benefits the agreement will bring for workers and for the environment.").

251. *Id.* ¶ 7.a ("CETA reconfirms the longstanding commitment of Canada and the European Union and its Member States to sustainable development and is designed to foster the contribution of trade to this objective.").

252. *Id.* ¶ 1.c ("In particular, we wish to recall . . . that the principal purpose of trade is to increase the well-being of citizens, by supporting jobs and creating sustainable economic growth; – that Canada and the European Union and its Member States recognise the importance of the right to regulate in the public interest and have reflected it in the Agreement.").

253. *Id.* ¶ 1.d ("The European Union and its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as . . . environment . . . . CETA will also not lower our respective standards and regulations related to food safety . . . health, environment or labour protection . . . . The European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements.").

254. *Id.* ¶ 6.a ("CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing

measures negatively affect investments or investor expectations of profit.[255] The Parties are here reminding the Tribunal of its role: to balance investment protection with the right to regulate in the public interest.

The JII insistently asserts the binding nature of the right to regulate, and draws the Tribunal's attention to its comprehensive content.[256] It sets economic development firmly within the governing framework of sustainable development, emphasizing the latter's power to shape CETA's economic goals and practices.[257] The JII should lead the Tribunal to grant the right to regulate and sustainable development significant weight in balancing them against economic development.

In conclusion, CETA provides a useful framework for expanding the reach of the principle of sustainable development and effectively shields the Parties' right to regulate, without contradicting existing case law.

IV. RECOMMENDATIONS

A. Party Initiatives

This section makes recommendations for how the EU and Canada could urge the ICS Tribunal to interpret Article 8.9.1 in a way that would maximize their ability to further sustainable development objectives under CETA.

for fair and transparent dispute resolution. . . . CETA does not privilege recourse to the investment court system set up by the agreement. Investors may choose instead to pursue available recourse in domestic courts.").

255. *Id.* ¶ 6.b ("CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits.").

256. *See id.* ¶ 2 ("CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.").

257. *Id.* ¶ 1.c ("[T]he principal purpose of trade is to increase the well-being of citizens, by supporting jobs and creating sustainable economic growth . . . economic activity must take place within a framework of clear and transparent regulation defined by public authorities."); *id.* ¶ 2 ("CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of . . . the environment . . . .").

1. The Continuing Evolution of Sustainable Development

The Parties should emphasize the increasing role of sustainable development in international law. As sustainable development becomes more akin to a customary principle of international law,[258] it gains persuasive power. The more the concept is invoked by nations as an overarching policy objective, the stronger it becomes as a defense against investor claims. Ideally, sustainable development would join the list of legitimate policy objectives included in standard right to regulate provisions, alongside public health, safety, and environmental protection.

To this end, the Parties should draw the ICS Tribunal's attention to various elements that evidence the increasing global importance of sustainable development. For example, the Paris Agreement[259] and statements from UN Climate Change Conferences[260] testify that the majority of the world's nations are placing explicit, increasing emphasis on sustainable development as a global practice, and on the reduction of carbon emissions to a sustainable level. They could also cite to recent declarations from the UN,[261] or to scientific research demonstrating the severity and urgency of anthropogenic climate change.[262] European and Canadian law would also serve as indications of the Parties' intentions.[263] Finally,

258. *See supra* note 21.

259. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, PARIS AGREEMENT recital 8 (2015) ("*Emphasizing* the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.") (emphasis in original); *id.* recital 16 ("*Also recognizing* that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change.") (emphasis in original).

260. *See, e.g.*, *Landmark Climate Change Agreement to Enter into Force*, COP22 MARRAKECH (Oct. 6, 2016, 7:36 PM), http://www.cop22-morocco.com/news/landmark-climate-change-agreement-to-enter-into-force-72.html [https://perma.cc/GPB5-EZRH] ("'Above all, entry into force [of the Paris Agreement] bodes well for the urgent, accelerated implementation of climate action that is now needed to realize a better, more secure world and to support also the realization of the Sustainable Development Goals.'").

261. *Climate Change*, *supra* note 3.

262. Env't and Climate Change Can., *Climate Change Science and Research*, GOV'T CANADA, http://www.ec.gc.ca/sc-cs/ [https://perma.cc/5BZU-DUXX] (last modified July 18, 2017); *EU Climate Action*, EUR. COMMISSION, https://ec.europa.eu/clima/citizens/eu_en [https://perma.cc/6ULZ-VBAK] (last updated Dec. 10, 2017).

263. *See, e.g.*, TFEU, *supra* note 84, art. 191.2 ("Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be

they could refer to any of the existing environmental agreements between Canada and the EU.[264] These factors weigh heavily in favor of allowing the Parties to exercise their regulatory right to address these concerns, and should prevent the ICS Tribunal from allowing investor claims to trump a Party's ability to address these global, urgent problems through measures designed to pursue sustainable development.

Admittedly, for the Parties, strength is a double-edged sword. The stronger sustainable development becomes, and the more concrete its content, the more it can be used against them when they fail to achieve it.[265] This could have a chilling effect on the Parties' advocacy in favor of the sustainable development.

2. The Precautionary Principle

The Parties should emphasize the importance of the fact that they included the precautionary principle in CETA, even though

rectified at source and that the polluter should pay."); *id.* art. 11 ("Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."); Charter of Fundamental Rights of the European Union art. 37, 2012 O.J. (C 326) 391, 403 ("A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."). Canada's Charter of Rights and Freedoms makes no mention of the environment. Many are still actively pressuring the government to include such rights in the Charter. *See* Devon Page & Peter Robinson, Opinion, *Canadians Deserve Legal Right to Healthy Environment*, THESTAR (Dec. 17, 2015), https://www.thestar.com/opinion/commentary/2015/12/17/canadians-deserve-legal-right-to-healthy-environment.html; [https://perma.cc/S7AL-6T9R]; Devon Page, *Canada's Right to a Healthy Environment Must Be Part of the Charter*, HUFFPOST: THE BLOG (Oct. 13, 2014, 11:39 AM), http://www.huffingtonpost.ca/ecojustice/canada-environmental-rights_b_5966568.html [https://perma.cc/JT7B-HY79].

264. *See, e.g.*, Strategic Partnership Agreement Between the European Union and its Member States, of the One Part, and Canada, of the Other Part, European Union-Can., art. 12.5, Oct. 30, 2016, 2016 O.J. (L 329) 45; Agreement for Scientific and Technological Cooperation Between Canada and the European Community, European Union-Can., art. 1, 4(a), June 17, 1995, 1996 O.J. (L 74) 26; ENV'T & CLIMATE CHANGE CAN., COMPENDIUM OF CANADA'S ENGAGEMENT IN INTERNATIONAL ENVIRONMENTAL AGREEMENTS: EXCHANGE OF LETTERS BETWEEN CANADA AND THE COMMISSION OF THE EUROPEAN COMMUNITIES (2017); *2007 EU—Canada Summit Statement*, GOV'T OF CAN., http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2007_06_04_statement-declaration.aspx?lang=eng [https://perma.cc/4P98-VMZ7] (last modified June 24, 2009).

265. *See* Barral, *supra* note 4, at 398 (explaining that, currently, sustainable development provisions impose obligations of means, rather than concrete substantive outcomes, but as the concept becomes more akin to a customary principle of international law, that could change).

Canada does not typically employ it.[266] This choice sends a clear signal of intent, one the ICS Tribunal should be reminded of and asked to respect. To underline the intention behind its choice, Canada should ensure that it applies this principle consistently in all its actions taken pursuant to CETA. Likewise, it should begin to apply the precautionary principle in its other international agreements, and in domestic matters. Such action would also help improve Canada's environmental record and its reputation globally.

3. Engaging with Civil Society and Other "Subsequent Practices"[267]

Under Article 31.3 of Vienna, the ICS Tribunal will take its cue from the Parties.[268] If they do not take CETA's sustainable development and environmental protection obligations seriously, the ICS Tribunal may not either. In order to demonstrate their intent to pursue sustainable development under CETA, the Parties should comply with every sustainable development item under CETA, and keep a record of discussions and resolutions taken towards such action. For example, the Parties should make full use of the Civil Society Forum.[269] They could agree to convene the Forum quarterly, instead of annually as required by CETA.[270] The Parties should keep a public record of the comments provided by civil societies and act on their suggestions as often as practicably and politically possible. They should also foster engagement and communication with the general public.[271] Such interactions may be taken into account by the ICS Tribunal as "subsequent practices" under Article 31.3(b) of Vienna.[272]

266. Couvreur, *supra* note 237, at 275; *see also supra* note 237.

267. *See* Mikadze, *supra* note 52, at 36–37; EC BENEFITS OF CETA, *supra* note 62, at 12 ("CETA also gives a strong role to business associations, trade unions, environmental groups and other non-governmental organisations (NGOs) in both the EU and Canada in helping to put these commitments into practice.").

268. Vienna, *supra* note 138, art. 31.3 ("There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.").

269. CETA, *supra* note 14, art. 22.5.

270. *Id.* art. 22.5.2.

271. *Id.* art. 24.7; *see also id.* art. 24.12.3, 24.13.5.

272. Vienna, *supra* note 138, art. 31.3(b).

The Parties should also use the opportunity provided by the "subsequent practices" clause in Vienna to push sustainable development beyond the consensus goals developed in the negotiations leading up to CETA. Instead of "striving," "aiming," and "encouraging," they could simply "do."[273] For example, in conflicts with investors and communities, the Parties should demonstrate their commitment to sustainability in concrete ways. This would include integrating sustainable development into all of their decisions and refusing projects that fail to meet its criteria, thus according the principle of sustainable development substantive, as well as procedural, weight. Commitment looks to the future, to innovation. The Parties should invest in research and development, and invent new technologies and methods to achieve sustainable development in their territories and through their actions abroad.

4. Bilateral Action and Flexible Unilateral Action

As discussed briefly in Part III.B.2.i, the Parties can insulate their regulatory measures from challenge by taking bilateral action as often as possible. This strategy neutralizes the threat of discrimination because the Parties are working together and will protect their own investors in any agreement. In addition, it realizes CETA's many exhortations to coordinate and cooperate,[274] and thus stands firmly rooted in CETA's textual mandates.

When acting unilaterally, the Parties should provide for flexible implementation and enforcement measures, without compromising the goal of sustainable development. This includes providing investors with multiple pathways to compliance, taking into account their particular circumstances, and ensuring that foreign investors do not face uniquely difficult compliance barriers. For example, a measure imposing new and stringent energy efficiency requirements on existing buildings could provide for a reasonable phase-in period, ensure that foreign investors have equal access to the necessary technology, and offer carbon offsets as one pathway to compliance. Administrative flexibility could also prove helpful. Parties could provide new regulations in multiple languages and offer a helpline to answer questions investors may

273. *See, e.g.*, CETA, *supra* note 14, art. 22.1, 22.1, 24.3.
274. *See, e.g.*, *id.* art. 22.1.3.(a)–(b), 22.3, 24.2, 24.4.3, 24.10.2, 24.11.2, 24.12, 24.13.4, 25.

have about how to comply. They could also offer deadline extensions in extraordinary circumstances. As always, any measures taken in this regard should be well-documented and explicitly framed as protective of investor interests and in furtherance of sustainable development objectives. Such signals will guide the ICS Tribunal in its reconstruction of the Party's intentions.

B. Crafting Future Agreements

In order to marshal a New Generation of FTAs that will have a meaningful impact on the furtherance of sustainable development principles, other trade partners should learn from and expand upon CETA's progress in this area. This section outlines some possible objectives for Canada, the EU, and other nations to pursue in their negotiations.

1. Desirability of Targeting Sustainable Development in FTAs

Before offering recommendations on how to further sustainable development through bilateral or multilateral New Generation FTAs, this section addresses why it ought to be pursued through such agreements at all. Proponents assert that dialogue will improve environmental protection, while detractors counter that commercial pressure from trade and investment partners will erode positive environmental practices.[275] Sustainable development belongs in New Generation FTAs for reasons of both efficiency and effectiveness.

First, while including sustainable development provisions in New Generation FTAs increases transaction costs in the short-term, it increases efficiency overall. As international trading and investing continue to increase, the number of related issues increases as well. In their negotiations, trade partners should anticipate as many collateral impacts as possible to avoid future, foreseeable conflicts.[276] Parties can lessen the attendant transaction costs by building on existing international agreements and domestic standards, which provide a minimum level of consensus. Putting sustainable development on the table increases flexibility by

275. CHRISTOPHER STEVENS ET AL., U.K. DEP'T OF INT'L DEV., THE IMPACT OF FREE TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES ON ECONOMIC DEVELOPMENT IN DEVELOPING COUNTRIES 17 (2015).

276. Josh Ederington, Symposium, *Should Trade Agreements Include Environmental Policy?*, 4 REV. ENVTL. ECON. & POL'Y 84, 91 (2010).

multiplying the issues up for negotiation.[277] This will result in more efficient agreements because it facilitates the development of mutually beneficial agreements. Some scholars have suggested that increased complexity could arrest negotiations. However, these authors were concerned with inserting environmental policy into the WTO, a body of one hundred sixty-four members.[278] Including sustainable development in bilateral or regional FTAs implicates fewer participants, and is therefore much easier than including it in the WTO. This becomes especially true as major trade partners like the EU develop expertise in this area, and use their influence to insert sustainable development principles into new agreements. In a costless universe, "an optimal agreement would be comprehensive and cover all trade-relevant policies."[279] While a fully comprehensive agreement is impossible in our inefficient world, major global issues like sustainable development should not be neglected due to fear of transaction costs.

Some warn that sustainable development produces inefficiencies because it is difficult to monitor and enforce.[280] However, sustainable development does not mandate specific, substantive outcomes and need not be enforced in the same way as trade or investment obligations. As long as Parties incorporate sustainable development into all their decisions in good faith, they enjoy a margin of discretion in choosing how to implement that objective.[281] For example, opportunities for public citizen and civil society participation like notice and comment periods can deter noncompliance and lessen the administrative burden on States by putting reputational pressure on investors. Other reputational and economic incentives like naming-and-shaming or fines can also deter noncompliance at low cost.

Second, including sustainable development in New Generation FTAs increases the effectiveness of actions taken to achieve it by marshalling the power of trade and investment policy to achieve

277. *Id.* at 94.

278. *Id.* at 95; *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/JCH6-ETZG] (last visited July 30, 2017).

279. Ederington, *supra* note 276, at 90.

280. *Id.*

281. *See supra* note 30.

sustainable goals.[282] Sustainable development requires balancing economic development and environmental protection. It cannot be attained in isolation, and trade is not conducted in a vacuum. Trade has both positive and negative environmental impacts; the two are "inextricably linked."[283] Framing those impacts within the objective of sustainable development enables decision-makers to properly evaluate and plan for them. In addition, trade policy creates powerful economic incentives that can ensure the effectiveness of sustainable development measures by preventing a race to the bottom.[284]

Finally, trade and foreign investment are (or ought to be) a means of achieving sustainable development, not an end in and of themselves.[285] The unlimited pursuit of expanded trade and foreign investment is not "a viable policy in a densely populated world of finite resources."[286] As discussed above, Vienna interprets agreements in context. Incorporating sustainable development directly into FTAs is therefore crucial to ensuring that trade and investment agreements are interpreted within that framework. Without integration, sustainable development will never attain a status and influence equal to trade and investment policy.[287]

2. Obligations of Method and Obligations of Achievement

While sustainable development will remain a crucial balancing tool for decision-making processes, trade partners should also seek to endow it with stronger legal force. Nations should begin to move sustainable development away from obligations of method

282. The role of trade in attaining sustainable development objectives has been recognized by both the Rio Declaration and the WTO. *See Sustainable Development*, *supra* note 24; *see also* EUROPEAN PARLIAMENT RESEARCH SERV., PE 573.929, BRIEFING: EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT 2 (2016) ("Provisions on sustainable development should ensure that trade and investment do not develop to the detriment of, but rather support, environmental protection and social development."); JII, *supra* note 79, ¶¶ 1.c, 7.a.

283. Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728, 734 (1992); *see also* Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L. J. 607, 615 (1994). Foreign direct investments also have direct environmental impacts. *See* BENEDETTO, *supra* note 139, at 3–4.

284. *See, e.g.*, Dunoff, *supra* note 283, at 616 *see also* Weiss, *supra* note 283, at 730.

285. Weiss, *supra* note 283, at 728.

286. Dunoff, *supra* note 283, at 614.

287. *See* Weiss, *supra* note 283, at 729.

and towards obligations of result.[288] This can be accomplished through lexical changes that move from soft to hard verbs.[289] For example, in CETA's Article 22.1.3, the Parties "aim to" take various actions towards promoting sustainable development.[290] In future FTAs, Parties could instead "commit," "strive," or "ensure."

The Parties currently aim to "promote dialogue and cooperation between the Parties with a view to developing their trade and economic relations in a manner that supports their respective labour and environmental protection measures and standards."[291] In the future, nations could instead "[*commit*] to developing their trade and economic relations in a manner that supports their respective labour and environmental protection measures and standards, through, among other things, dialogue and cooperation."

Under Article 22.3.2, the Parties "shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection."[292] In future agreements, partners could instead "[*ensure*] that trade and economic flows and practices [*effectively*] contribute to enhancing decent work and environmental protection." The word "encouraging" in the following subparagraph could be changed to "requiring," with the result that voluntary schemes and best practices of social corporate responsibility would be adopted in fact, and sustainability considerations would actually be integrated into public and private consumption decisions.

To offer a final example from the chapter on trade and environment, Article 24.9.1 currently reads: "The Parties are resolved to make efforts to facilitate and promote trade and

288. Barral, *supra* note 4, at 390 ("Unlike obligations of result, which require the achievement of the result defined by the obligation, obligations of means require only the deployment of all possible means to achieve the result, without promising to achieve it.").

289. The various political obstacles that would complicate such linguistic changes exceed the scope of this note. However, such challenges should be embraced and addressed, rather than used to excuse inaction. Integrating stronger language is not impossible, and should become less contentious with time. Article 22.3.3 and 24.5.2–3 provide examples of instances where forceful language was successfully employed in CETA. *See* CETA, *supra* note 14, art. 22.3.3, 24.5.2–3.

290. CETA, *supra* note 14, art. 22.1.3.

291. *Id.*

292. *Id.* art. 22.3.2.

investment in environmental goods and services."[293] This could be changed to "The Parties [*shall*] facilitate and promote. . . ."

Small linguistic changes like these would have a significant impact on how these provisions are interpreted by future tribunals. The impact could be even greater if the multilateral tribunal foreseen under CETA is eventually established,[294] as such a tribunal would likely compare new FTAs to CETA's baseline and develop its own persuasive body of jurisprudence.

3. Deeper Integration of Sustainable Development

The objective of sustainable development should be more frequently invoked throughout the whole body of future agreements. In CETA, the principle of sustainable development is invoked only in the Preamble and the chapters on trade and sustainable development, trade and labor, and trade and environment.[295] Sustainable development should be added to each enumeration of the right to regulate, especially in the investment protection chapter. For example, Article 8.9.1 could be revised to read, "[f]or the purpose of this Chapter, the Parties reaffirm their right to regulate . . . to achieve legitimate policy objectives, such as *sustainable development*, the protection of public health, safety, the environment. . . ." This could have a significant impact by tying sustainable development explicitly to the right to regulate and to investment protection. The principle's connection to that right is currently implicit, through the inclusion of environmental protection. The influence of sustainable development could also be increased by including chapters on investment and sustainable development, labor, and environment, respectively, in addition to the current chapters on trade.

4. Clarifying the Scope of the Right to Regulate

In the past, arbitral tribunals have resisted using balancing tests to limit investor rights.[296] To ensure that this balancing occurs, the right to regulate should be explicitly invoked against all investor rights and protections.[297] For example, the right to regulate could

293. *Id.* art 24.9.1
294. *Id.* art. 8.29.
295. *See, e.g.*, CETA, *supra* note 14, recital 9, art. 22.1, 22.3, 24.2.
296. Van Harten, *supra* note 42, at 163.
297. Van Harten, *supra* note 42, at 163.

be reasserted within Article 8.10 (establishing the Parties' obligation to provide fair and equitable treatment), particularly in connection with the manifest arbitrariness standard.[298] The Parties need not wait for a future FTA to make this change; Article 8.10.3 provides that they shall regularly review the content of this obligation.[299] While the right to regulate is mentioned in relation to expropriation,[300] it should be moved from the Annex into the general text of Article 8.12.

5. Imposing Actionable Responsibilities on Investors[301]

Politically speaking, this may be one of the most difficult recommendations to implement. However, it constitutes the next logical step for New Generation FTAs.[302] To foster responsible, sustainable investments, foreign investors must collaborate with the contracting Parties. Without affirmative obligations, investors will continue to be litigious, striving to protect their investments by simply invalidating state actions that impact them. Imposing actionable responsibilities on investors would reverse the incentive structure of FTAs and make investors partners with the States in furthering these objectives.

Peter Muchlinski, Professor of International Commercial Law at the University of London, provides some very practical suggestions, comparing the models of the United Nations Conference on Trade and Development ("UNCTAD") and the Commonwealth Secretariat.[303] Investor obligations could be voluntary or mandatory, or some combination of both.[304] Examples from UNCTAD include obligations or incentives to (1) obey the host State laws, with a penalty should the investor fail to do so; (2)

298. CETA, *supra* note 14, art. 8.10.2(c).

299. *Id.* art. 8.10.3.

300. *Id.* annex 8-A.3 ("For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.").

301. *See* Van Harten, *supra* note 42, at 161**;** Muchlinski, *supra* note 13, at 56–57.

302. Muchlinski, *supra* note 13, at 56 ("In order to evolve beyond the limitations of first generation IIAs as instruments for sustainable development, the reform of existing provisions is not enough. New provisions that seek to further such goals are also needed.").

303. *Id.* at 57–58.

304. However, Parties must ensure that they do not violate their non-discrimination obligations.

follow corporate human rights due diligence processes; and (3) observe social corporate responsibility standards.[305] The Commonwealth Secretariat would also explicitly prohibit investors from committing grave human rights violations and add civil liability provisions requiring investors to purchase insurance and/or to post a bond with the host state.[306]

To these suggestions could be added incentives to: (1) offset the carbon emissions of investments by purchasing credits or adding sinks to the host State's territory; (2) ensure that any buildings or new construction owned by investors meet performance-based energy efficiency requirements; and (3) contribute to local, community-based environmental projects.

6. Lessening Tribunal Discretion

One way to ensure that the right to regulate receives due consideration by the ICS Tribunal is to lessen the ICS Tribunal's discretion when evaluating the Parties' investment protection obligations.[307] Despite the strides CETA made in the investment protection chapter, it still provides considerable discretion to the ICS Tribunal, through language like "manifest arbitrariness"[308] and "manifestly excessive."[309] In addition, the factors used by the ICS Tribunal in evaluating whether indirect expropriation has occurred are vague, open-ended, and non-exhaustive.[310] Treaty drafters should define "manifest arbitrariness" and "manifestly excessive," or at least provide a test or factors for the ICS Tribunal to employ, thus narrowing its margin of discretion.[311] Measures that seek to further sustainability in good faith should be explicitly excluded from any definition of "manifest arbitrariness" or "manifestly excessive measures."

305. *See* Muchlinski, *supra* note 13, at 57–58.

306. *Id.* at 58.

307. *See* Henckels 2016, *supra* note 56.

308. CETA, *supra* note 14, art. 8.10.2(c). It's also unclear whether this list is exhaustive or not. *See* Van Harten, *supra* note 42, at 156; Henckels 2016, *supra* note 56, at 36.

309. CETA, *supra* note 14, annex 8-A.3; *see also* Henckels 2016, *supra* note 56, at 32 ("[S]tates have increasingly begun to recognize that the creation of imprecise norms has resulted in a transfer of power to arbitrators.").

310. *See* CETA, *supra* note 14, annex 8-A.2.

311. *See* Henckels 2016, *supra* note 56, at 37.

V. CONCLUSION

In the past, trade and investment agreements have exposed governments to troubling liability for actions taken in the public interest, and in particular environmental protection. New Generation FTAs attempt to rectify this power imbalance by emphasizing the State's right to regulate, particularizing provisions on environmental protection and sustainable development, and curbing investor rights.

Sustainable development is inherently incorporated into the right to regulate through environmental protection because the latter is one of the three pillars of sustainable development. This interpretation is consistent with the major international cases addressing the right in the context of sustainable development. The incorporation of sustainable development into the right to regulate significantly broadens the legal framework available to the Parties to justify their regulatory measures. Applying this interpretation to CETA shows that the agreement provides ample materials for exercising and justifying the right to regulate in furtherance of sustainable development. However, the Parties must remain vigilant and continue to promote this objective to maximize the protection it enjoys.

Reading binding sustainable development obligations into CETA is not only plausible, it is imperative. Humans have degraded the natural environment to a degree never before seen. The climate is changing, with grave consequences. International trade and investment have a crucial role to play in redressing the harm. All FTAs should enter the New Generation. They should build on CETA's example to create and strengthen small coalitions of nations dedicated to sustainability. Together, these partnerships will foster global collaboration and fortify multilateral undertakings like the Paris Agreement. To pass the earth on to the next generation whole, we must exceed all that we have achieved before.

ANNEX I – THE EVOLUTION OF CHAPTER EIGHT, INVESTMENT PROTECTION

Table 1 - Comparing relevant changes made between 2014 and 2016 in the Investment Chapter

CETA Sept. 26, 2014	CETA Sept. 14, 2016
—	**Article 8.9 Investment and regulatory measures** 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section. 3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy: (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a

	breach of the provisions of this Section. 4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy9 or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority10, or requiring that Party to compensate the investor therefor.
Article X.9 Treatment of Investors and of Covered Investments Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. Manifest arbitrariness;	**Article 8.10 Treatment of investors and of covered investments** 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment; or A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.	(c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.	3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.
When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.	4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.	5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.
For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not	

establish that there has been a breach of this Article.	6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article. 7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.
Section 6: Investor-State Dispute Settlement **Article X.17: Scope of a Claim to Arbitration** Without prejudice to the rights and obligations of the Parties under Chapter [XY] (Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under: Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or Section 4 (Investment Protection) of this Chapter; and where the investor claims to have suffered loss or damage as a result of the alleged breach. Claims under subparagraph 1(a) with respect to the expansion of a	**SECTION F** **Resolution of investment disputes between investors and states** **Article 8.18** Scope 1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under: (a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or (b) Section D, where the investor claims to have suffered loss or damage as a result of the alleged breach. 2. Claims under subparagraph 1(a) with respect to the expansion

covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment. For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process. This Section shall apply to the restructuring of debt issued by a Party in accordance with Annex X (Public Debt). A tribunal constituted under this Section may not decide claims that fall outside of the scope of this Article.	of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment. 3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process. 4. A claim with respect to restructuring of debt issued by a Party may only be submitted under this Section in accordance with Annex 8-B. 5. The Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.
Article X.22: Submission of a Claim to Arbitration If a dispute has not been resolved through consultations, a claim may be submitted to arbitration under this Section by: an investor of the other Party on its own behalf; or an investor of the other Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly. A claim may be submitted under the following arbitration rules: the ICSID Convention; the ICSID Additional Facility	**Article 8.23 Submission of a claim to the Tribunal** 1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by: (a) an investor of a Party on its own behalf; or (b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly. 2. A claim may be submitted under the following rules: (a) the ICSID Convention and Rules of Procedure for Arbitration

Rules where the conditions for proceedings pursuant to paragraph (a) do not apply; the UNCITRAL Arbitration Rules; or any other arbitration rules on agreement of the disputing parties. In the event that the investor proposes arbitration rules pursuant to sub-paragraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such arbitration rules within 30 days of receipt, the investor may submit a claim under the arbitration rules provided for in subparagraphs 2(a), (b) or (c). For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention. The investor may, when submitting its claim, propose that a sole arbitrator should hear the claim. The respondent shall give sympathetic consideration to such a request, in particular where the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. The arbitration is governed by the arbitration rules applicable under paragraph 2 that are in effect on the date that the claim or claims are submitted to arbitration under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted	Proceedings; (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; (c) the UNCITRAL Arbitration Rules; or (d) any other rules on agreement of the disputing parties. 3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c). 4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention. 5. The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. 6. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section,

pursuant to Article X.42(3)(b) (Committee). A claim is submitted to arbitration under this Section when: the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID; the request for arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID; the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or the request or notice of arbitration pursuant to other arbitration rules is received by the respondent in accordance with subparagraph 2(d). Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors relating to this Section. Each Party shall ensure this information is made publicly available.	subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article 8.44.3(b). 7. A claim is submitted for dispute settlement under this Section when: (a) the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID; (b) the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID; (c) the notice under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or (d) the request or notice initiating proceedings is received by the respondent in accordance with the rules agreed upon pursuant to subparagraph 2(d). 8. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.
Article X.25: Constitution of the Tribunal Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the	**Article 8.27 Constitution of the Tribunal** 1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23. 2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of

disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed in accordance with paragraph 3. The Secretary-General of ICSID shall, upon request of a disputing party, appoint the remaining arbitrators from the list established pursuant to paragraph 4. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise. Pursuant to Article X.42(2)(a), the Committee on Services and	the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada11 and five shall be nationals of third countries. 3. The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2. 4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements. 5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as

Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 15 individuals but may agree to increase the number of individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators. Arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law and the resolution of disputes arising under international investment or international trade agreements. Arbitrators shall be independent of, and not be affiliated with or take instructions from, a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts	they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term. In principle, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued. 6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country. 7. Within 90 days of the submission of a claim pursuant to Article 8.23, the President of the Tribunal shall appoint the Members of the Tribunal composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve. 8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and shall be appointed for a two-year term and shall be drawn

of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party. If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 6, it shall send a notice of its intent to challenge the arbitrator within 15 days after: the appointment of the arbitrator has been notified to the challenging party; or, the disputing party became aware of the facts giving rise to the alleged failure to meet such requirements. The notice of an intention to challenge shall be promptly communicated to the other disputing party, to the arbitrator or arbitrators, as applicable, and to the Secretary-General of ICSID. The notice of challenge shall state the reasons for the challenge. When an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge, in which case the disputing parties may request the challenged arbitrator to resign. The arbitrator may, after the challenge, elect to resign. A decision to resign does not imply acceptance of the validity of the grounds for the	by lot from among the Members of the Tribunal who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the CETA Joint Committee. The Vice-President shall replace the President when the President is unavailable. 9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal. 10. The Tribunal may draw up its own working procedures. 11. The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Section. 12. In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee. 13. The fees referred to in paragraph 12 shall be paid equally

challenge. If, within 15 days from the date of the notice of challenge, the challenged arbitrator has elected not to resign, the Secretary-General of ICSID shall, after hearing the disputing parties and after providing the arbitrator an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators, as applicable. A vacancy resulting from the disqualification or resignation of an arbitrator shall be filled promptly pursuant to the procedure provided for in this Article. **Article X.26: Agreement to the Appointment of Arbitrators** For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than nationality: the respondent agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and an investor may submit a claim to arbitration or continue a claim under the ICSID Convention or, as the case may be, the ICSID Additional Facility Rules only if the investor agrees in writing to the	by both Parties into an account managed by the ICSID Secretariat. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears by a Party shall remain payable, with appropriate interest. 14. Unless the CETA Joint Committee adopts a decision pursuant to paragraph 15, the amount of the fees and expenses of the Members of the Tribunal on a division constituted to hear a claim, other than the fees referred to in paragraph 12, shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 8.39.5. 15. The CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions. 16. The ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support. 17. If the CETA Joint Committee has not made the appointments pursuant to paragraph 2 within 90 days from the date that a claim is submitted for dispute settlement, the Secretary General of ICSID shall, at the request of either

appointment of each member of the Tribunal.	disputing party appoint a division consisting of three Members of the Tribunal, unless the disputing parties have agreed that the case is to be heard by a sole Member of the Tribunal. The Secretary General of ICSID shall make the appointment by random selection from the existing nominations. The Secretary-General of ICSID may not appoint as chair a national of either Canada or a Member State of the European Union unless the disputing parties agree otherwise.
—	**Article 8.28 Appellate Tribunal** 1. An Appellate Tribunal is hereby established to review awards rendered under this Section. 2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b). 3. The Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in paragraph 7. 4. The Members of the Appellate

	Tribunal shall meet the requirements of Article 8.27.4 and comply with Article 8.30. 5. The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal. 6. Articles 8.36 and 8.38 shall apply to the proceedings before the Appellate Tribunal. 7. The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal: (a) administrative support; (b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate; (c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case; (d) remuneration of the Members of the Appellate Tribunal; (e) provisions related to the costs of appeals; (f) the number of Members of the Appellate Tribunal; and (g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal. 8. The Committee on Services

	and Investment shall periodically review the functioning of the Appellate Tribunal and may make recommendations to the CETA Joint Committee. The CETA Joint Committee may revise the decision referred to in paragraph 7, if necessary. 9. Upon adoption of the decision referred to in paragraph 7: (a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance; (b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section; (c) an award rendered pursuant to Article 8.39 shall not be considered final and no action for enforcement of an award may be brought until either: (i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated; (ii) an initiated appeal has been rejected or withdrawn; or (iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal; (d) a final award by the Appellate Tribunal shall be considered as a final award for the purposes of Article 8.41; and (e) Article 8.41.3 shall not apply.

—	**Article 8.29 Establishment of a multilateral investment tribunal and appellate mechanism** The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.
—	**Article 8.30 Ethics** 1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other

	international agreement. 2. If a disputing party considers that a Member of the Tribunal has a conflict of interest, it may invite the President of the International Court of Justice to issue a decision on the challenge to the appointment of such Member. Any notice of challenge shall be sent to the President of the International Court of Justice within 15 days of the date on which the composition of the division of the Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge. 3. If, within 15 days from the date of the notice of challenge, the challenged Member of the Tribunal has elected not to resign from the division, the President of the International Court of Justice may, after receiving submissions from the disputing parties and after providing the Member of the Tribunal an opportunity to submit any observations, issue a decision on the challenge. The President of the International Court of Justice shall endeavour to issue the decision and to notify the disputing parties and the other Members of the division within 45 days of receipt of the notice of challenge.

	A vacancy resulting from the disqualification or resignation of a Member of the Tribunal shall be filled promptly. 4. Upon a reasoned recommendation from the President of the Tribunal, or on their joint initiative, the Parties, by decision of the CETA Joint Committee, may remove a Member from the Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal.
Article X.27: Applicable Law and Interpretation A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation	**Article 8.31 Applicable law and interpretation** 1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. 2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to

shall have binding effect from a specific date.	the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party. 3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

ANNEX II – THE RIGHT TO REGULATE IN CETA

Table 2 - Selected CETA provisions on the right to regulate

Preamble 3	RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;
Preamble 5	RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories;
Article 8.9.1	For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
Article 24.3	The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.
Article 24.4.4	The Parties acknowledge their right to use Article 28.3 (General exceptions) in relation to environmental measures, including those taken pursuant to multilateral environmental agreements to which they are party.
Article 28.3.1	For the purposes of Article 30.8.5 (Termination, suspension or incorporation of other existing agreements), Chapters Two (National Treatment and

	Market Access for Goods), Five (Sanitary and Phytosanitary Measures), and Six (Customs and Trade Facilitation), the Protocol on rules of origin and origin procedures and Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.
Article 28.3.2	For the purposes of Chapters Nine (Cross-Border Trade in Services), Ten (Temporary Entry and Stay of Natural Persons for Business Purposes), Twelve (Domestic Regulation), Thirteen (Financial Services), Fourteen (International Maritime Transport Services), Fifteen (Telecommunications), Sixteen (Electronic Commerce), and Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary: (a) to protect public security or public morals or to maintain public order;33 (b) to protect human, animal or plant life or health;34 or (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or

	(iii) safety. 33 The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. 34 The Parties understand that the measures referred to in subparagraph (b) include environmental measures necessary to protect human, animal or plant life or health.