Promoting renewables through free trade agreements? An assessment of the relevant provisions

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Promoting renewables through free trade agreements? An assessment of the relevant provisions

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Abstract

The vast network of free trade agreements that are being negotiated around the world could be seen as a viable vehicle to facilitate trade in renewable energy goods, services, and technologies. Unlike WTO agreements, modern FTAs contain an increasing number of provisions dealing, directly or indirectly, with renewable energy. The purpose of this paper is twofold. First it aims at providing a taxonomy of the main techniques used by countries to include provisions on renewable energy in their FTAs, by focusing on all the agreements signed by the EU and the US. These techniques are then further analysed comparing different agreements, as each technique can have a very different impact based on the scope of the relevant provisions, their degree of generality/specificity, as well as their specific content. Second, this paper builds on this analysis to further investigate the ways in which FTAs distance themselves from WTO Agreements in their attempt to regulate renewable energy. In this regard, the paper pinpoints three characteristics of FTAs: the model used to incorporate renewable energy provisions in their chapters, the tendency to promote dispute prevention, and the shift towards a more balanced dispute resolution.

***Keywords**: free trade agreements, renewable energy provisions, environmental provisions, trade and environment, trade and renewable energy.*

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Elena Cima

1. INTRODUCTION

The multilateral trading system, embodied by the World Trade Organization (WTO), has experienced a certain difficulty in the integration of provisions dealing with renewable energy, and more broadly environmental protection, into its substantive rulemaking. That an *environmental* clause, in one form or another, did not find its way into the General Agreement on Tariffs and Trade (GATT) in 1947 nor in the WTO in 1994, might be one of the reasons behind countries' efforts to pursue this very same objective through regional, bilateral, or unilateral initiatives.[1]

1 Generally, multiple, at times even conflicting, reasons motivate countries' willingness to enter into bilateral or regional trade agreements. As to the introduction of environmental clauses in FTAs, the flexibility of regional agreements and the limited number of negotiating parties allow for faster negotiations and more precise provisions. For certain powerful countries, such as the United States, or even the European Union, addressing certain issues—which are of particular economic importance for them—in FTAs can help build "a coalition of like-minded countries" or simply ensure the diffusion of certain rules before they are tackled at the multilateral level. *See* Olivier Cattaneo, "The Political Economy of PTAs", in Simon Lester & Bryan Mercurio (eds.), *Bilateral and Regional Trade Agreements. Commentary and Analysis*, Cambridge University Press, 2009: 28, 36.

Promoting renewable energy through the vast network of free trade agreements (FTAs) represents a possible approach to facilitate trade in renewable energy goods, services, and technologies and create a better trading environment for renewables. It has been suggested that "*trade mechanisms can be an effective tool for securing environmental objectives*" and "*regional trade arrangements could be designed to provide for an attractive package to settle trade-offs and conflicts of interest*" as well as facilitate an increased use of renewable energy sources.[2] However, while the applicability of WTO rules to trade measures adopted in relation to renewable energy has been studied far and wide,[3] literature mapping out and classifying systematically renewable energy-related or specific provisions in free trade agreements is more limited.[4]

The goal of this paper is twofold. First, it aims at providing a taxonomy, and subsequent analysis, of the main techniques used by countries to include provisions on renewable energy in their FTAs. Second, it builds on this analysis to further investigate the ways in which FTAs distance themselves from WTO Agreements in their attempt to regulate renewable energy. In this regard, three main features of FTAs have been identified. The first one shows a shift in the way renewable energy provisions have been incorporated in trade agreements towards a model where domestic policies in favour of renewable energy development and trade are not merely 'tolerated' but rather promoted. The second feature points

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2 Rafael Leal-Arcas, "Climate Change Mitigation from the Bottom Up: Preferential Trade Agreements to Promote Climate Change Mitigation"*,* 7 *Carbon & Climate Law Review* (2013): 34

3 Thomas Cottier *et al.* (eds.), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum,* Cambridge University Press, 2009; Yulia Selivanova, *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter*, Kluwer Law International, 2011; Rafael Leal-Arcas, Andrew Filis, and Ehab S. Abu Gosh, *International Energy Governance: Selected Legal Issues*, Edward Elgar Publishing, 2014. Yulia Selivanova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector*, International Centre for Trade and Sustainable Development Geneva, 2007. Aaron Cosbey and Petros C. Mavroidis. "A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO," *Journal of International Economic Law* 17(1) (2014): 11–47; Robert Howse, "Climate Change Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis," *International Institute for Sustainable Development* 13 (2010); Luca Rubini, "The Subsidization of Renewable Energy in the WTO: Issues and Perspectives," *Working Paper No. 2011/321*, 35 (2011); Andrew D. Mitchell and Christopher Tran, "The Consistency of the EU Renewable Energy Directive with the WTO Agreements," Georgetown Law Faculty Working Papers. Paper 119 (2009); Daniel Peat, "The Wrong Rules for the Right Energy: The WTO SCM Agreement and Subsidies for Renewable Energy," *Environmental Law and Management* 24 (2012).

4 *See* Rafael Leal-Arcas 2013; Gehring et al, *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs). An Overview,* ICTSD Issue Paper No. 3, Aug. 2013.

to the increased efforts towards dispute prevention, while the third one evidences a move towards a more balanced dispute resolution system, which allows for environmental voices to be heard and where free trade and environmental values can be treated on equal footing. These features reflect the tendency of FTAs to achieve a 'deeper' integration compared to WTO Agreements, which is the result of a broader mandate of the negotiators, as well as of the institutions and individuals involved in the administration of the agreements, who are able to deal with renewable energy and environmental issues directly.

Accordingly, I will proceed in three steps. The first step consists of singling out all the provisions that, in one way or another, deal with renewable energy (Section 2). As a second step, this paper classifies the relevant provision based on the different techniques used by trade agreements, as well as their purposes (Section 3). As a third and final step, Section 4 builds on this analysis and explores the main trends and features that characterize modern FTAS vis-à-vis multilateral trade agreements. Finally, Section 5 concludes.

2. SCOPE OF THE RESEARCH

2.1. The free trade agreements studied

Before turning to the analysis of the agreements, it is worth noting an important definitional point: there is considerable variation in the terminology used for trade agreements. Depending on the number of parties, they can fall into one of three general categories: bilateral, plurilateral, or multilateral (generally a term reserved for WTO agreements). The WTO refers to all trade agreement outside its scope as regional trade agreements. Regional trade agreements, in their traditional form, are concluded by regional trading blocs to further integrate the economies of the member countries. This form is clearly exemplified by the North American Free Trade Agreement (NAFTA), which was concluded by the governments of Canada, Mexico, and the United States (US) in 1995 to achieve greater economic integration in the North American region. Another classis example is offered by the European Economic Area (EEA) Agreement, which brings together the Member States of the European Union (EU) and three states of the European Free Trade Association (EFTA)—Iceland, Lichtenstein, and Norway—in one single

market. More recently, the term has been used to define agreements between countries that do not necessarily belong to the same regional bloc.[5] All the agreements signed by the EU or the US with non-neighbouring countries—between US and Singapore and between the EU and South Korea for example—belong to this more recent trend. Often, these agreements are also referred to as preferential trade agreements or free trade agreements. Throughout this paper, I will use the term free trade agreements to refer to all the agreements analysed, even though some of them do not use the word 'free trade' in the title.[6]

Modern FTAs exhibit features entirely different from those possessed by earlier agreements. FTAs signed before the establishment of the WTO in 1995 mostly took the form of free-trade areas or customs unions, allowed within the framework created by the WTO to permit neighbouring countries to facilitate trade among each other.[7] Generally, they only concerned trade in goods and were limited to tariff liberalization. After the establishment of the WTO and the extension of multilateral trade agreements to trade in services and trade-related aspects of intellectual property rights, free trade agreements started expanding their scope as well by covering the same subjects.[8] Their substance kept evolving over time and they now tend to include provisions in areas that are not covered by WTO agreements (so called WTO extra or WTO-X provisions) and these areas include *inter alia* environmental protection and renewable energy.[9] Not only such agreements gradually expanded in scope and coverage but they also grew in

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5 Often referred to as 'loose' regional trade agreements. *See* Simon Lester, Brian Mercurio, & Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Cambridge University Press, 2015: 4, 5.

6 Some agreements use more general terms in their title, such as 'economic partnership agreement' or 'association agreement'.

7 The legal basis for FTAs is provided for by GATT Article XXIV and GATS Article V. The former, at paragraph 5, states that "*the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.*" GATT, Art. XXIV(5).

8 Henrik Horn, Petros C. Mavroidis and André Sapir, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*," Bruegel Blueprint Series* 7 (2009).

9 Other WTO-X provisions cover, inter alia, competition policy, labor market regulations, data protection, human rights, taxation, and illegal immigration. The distinction between 'WTO plus' (WTO+) or 'WTO extra' (WTO-X) provisions was used in a study conducted by Henrik Horn, Petros C. Mavroidis, and André Sapir in 2009. In this study, the authors investigate whether preferential trade agreements contain provisions which are under the current WTO mandate but where the Parties accepts bilateral commitments that go beyond those they have agreed to at the multilateral level (WTO+) and provisions that deal with issues lying outside the current WTO mandate (WTO-X). Horn, Mavroidis, and Sapir 2009.

number, as the Doha Round continues to flounder and the Parties to the WTO fail to achieve consensus in multilateral negotiations.

In the global landscape of FTAs, the US and the EU play a leading role, as they jointly account for around 80 percent of the rules that regulate the functioning of world markets,[10] and have thus become the two main hubs in the pattern of such agreements. As a result, the set of agreements scrutinized in this paper consists of all FTAs signed by the EU and the US with other WTO Members as of November 2016.[11] Three agreements will receive special attention, as they represent, respectively, the earliest and the latest attempts to draft trade agreements that go beyond what have been traditionally considered trade rules. The earliest attempt is exemplified by NAFTA, which is unique among regional trade agreements with respect to its specific treatment of energy, and because for the first time the Parties negotiated a side agreement almost exclusively devoted

10 André Sapir, *Europe and the Global Economy*, in *Fragmented Power: Europe and the Global Economy*, Bruegel, 2007.

11 The analysis includes all the FTAs signed by the US and the EU, in force and notified to the WTO, as well as some of the most recently signed agreements, not yet entered into force: *EEA* (entered into force Jan. 1, 1994), *EU-Turkey* (signed Mar. 6, 1995; entered into force Jan. 1, 1996), *EU-Tunisia* (signed Jul. 7, 1995; entered into force Mar. 1, 1998), *EU-Israel* (signed Nov. 20, 1995; entered into force Jun. 1, 2000), *EU-Morocco* (signed Feb. 26, 1996; entered into force Mar. 1, 2000), *EU-South Africa* (signed Oct. 11, 1999; entered into force Jan. 1, 2000), *EU-Mexico* (signed Dec. 8, 1997; entered into force Oct. 1, 2000), *EU-FYRoM* (signed Apr. 9, 2001; entered into force Jun. 1, 2001), *EU-Egypt* (signed Jun. 25, 2001; entered into force Jun. 1, 2004), *EU-Chile* (signed Nov. 18, 2002; entered into force Feb. 1, 2003), *EU-Albania* (signed Jun. 1, 2006; entered into force Dec. 1, 2006), *EU-Montenegro* (signed Oct. 1, 2007; entered into force Jan. 1, 2008), *EU-CARIFORUM* (signed Oct. 15, 2008; entered into force Nov. 1, 2008), *EU-Cote d'Ivoire* (signed Nov. 26, 2008; entered into force Jan. 1, 2009), *EU-Cameroon* (signed Jan. 15, 2009; entered into force Aug. 4, 2104), *EU-Papua New Guinea and Fiji* (signed Jul. 30, 2009; entered into force Dec. 20, 2009), *EU-South Korea* (signed Oct. 6, 2010; entered into force Jul. 1, 2011), *EU-Colombia-Peru* (signed Jun. 26, 2012; entered into force Mar. 1, 2013), *EU-Georgia* (signed Jun. 27, 2014; entered into force Sep. 1, 2014), *EU-Moldova* (signed Jun. 27, 2014; entered into force Sep. 1, 2014), *EU-Ukraine* (signed Jun. 27, 2014; entered into force Jan. 1, 2016), *EU-Singapore* (signed Oct. 17, 2104); *CETA* (signed Oct. 30, 2016); *US-Israel* (signed Apr. 22, 1985; entered into force Aug. 19, 1985), *NAFTA* (signed Dec. 17, 1992; entered into force Jan. 1, 1994), *US-Jordan* (signed Oct. 24, 2000; entered into force Dec. 17, 2001), *US-Singapore* (signed May 6, 2003; entered into force Jan. 1, 2004), *US-Chile* (signed Jun. 6, 2003; entered into force Jan. 1, 2004), *US-Australia* (signed My 18, 2004; entered into force Jan. 1, 2005), US-Morocco (signed Jun. 15, 2004; entered into force Jan. 1, 2006), *US-CAFTA-DR* (signed Aug, 5, 2004; entered into force Mar. 1, 2006), *US-Bahrain* (signed Sep. 14, 2005; entered into force Aug. 1, 2006), *US-Peru* (signed Apr, 12, 2006; entered into force Feb. 1, 2009), *US-Oman* (signed Jan. 19, 2006; entered into force Jan. 1, 2009), *US-Colombia* (signed Nov. 22, 2006; entered into force May 15, 2012), *US-Panama* (signed Jun. 28, 2007; entered into force Oct. 31, 2012), *US-South Korea* (signed Jun. 30, 2007; entered into force Mar. 15, 2012), *TPP* (signed Feb. 4, 2016).

to environmental matters. At the other end of the spectrum, chronologically speaking, stand the Trans-Pacific Partnership or TPP,[12] signed in October 2015 by 12 countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam), and CETA, which is negotiated between Canada and the EU.

2.2. The provisions analysed

For the purpose of this research, I have classified the provisions relevant to trade in renewable energy in three broad categories: 1) *'renewable energy-specific'*, *2) 'renewable energy-related'*, and 3) *'renewable energy-affecting'* provisions.

2.2.1. "Renewable energy-specific" provisions

As already mentioned, despite the strategic nature of the energy sector, the WTO legal framework does not contain energy-specific disciplines, let alone *renewable*-energy specific disciplines. A number of recent FTAs, however, do mention renewable energy sources and goods/services in their text, and do contain provisions aimed at promoting their development and dissemination.[13] Such are the provisions that expressly mention the terms 'renewable energy' or 'sources', or even the broader expressions 'cleaner', 'alternative', or 'sustainable fuels'. As this paper will clarify, these provisions are often scattered in a number of different chapters or titles of the agreements, while very rarely, if ever, a whole section or chapter is entirely devoted to them.

2.2.2. "Renewable energy-related" provisions

Renewable energy policies represent one component of the broader category of measures aimed at protecting the environment and, even more broadly, promoting sustainable development. It follows that provisions that pursue environmental or

12 Despite the fact that the text of the agreement contains only a few new environmental provisions, some of which are actually weaker than those included in recent US FTAs, and that it does not mention climate change or provide for binding commitments regarding renewable energy, it does contain several elements of novelty that is worth analysing.

13 FTAs that expressly refer to renewable energy include the TPP, as well as those signed by the EU with Chile, South Korea, Colombia and Peru, Moldova, Georgia, Ukraine, and Singapore, and CETA.

sustainable development objectives are related and often applicable to renewable energy as well, in particular when they focus on specific environmental issues that are directly relevant to renewable energy, such as climate change. For instance, the general exceptions contained in GATT Article XX(b) and (g)—which are often referred to in most FTAs—can apply to renewable energy measures. Similarly, a provision that liberalizes trade in environmental goods could include renewable energy goods under its broad coverage. An increasingly widely used procedure involves featuring an 'environment' chapter within the trade agreement, or an 'environment' section within a broader chapter on 'sustainable development'. Another option is to have a side agreement on the environment or other related matters. This procedure was pioneered in the NAFTA with the conclusion of the North American Agreement on Environmental Cooperation (NAAEC), a separate, yet linked, legal treaty among the NAFTA parties. It is worth noting that the location of the provisions related to renewable energy can influence their effectiveness. A side agreement or a whole chapter on the environment, although they clearly show an increasing and pressing interest in regulating the environmental impact of trade measures, risk being ineffective if not linked to the usually stronger and more efficient dispute settlement system applicable to the general chapters of the agreement.[14]

2.2.3. "Renewable energy-affecting" provisions

This last category of provisions includes all those provisions that, although not explicitly related to renewable energy or even to environmental or sustainable development objectives, may indirectly, yet concretely, impact trade in renewable energy, as they apply horizontally to all sectors. These might include *inter alia* provisions on intellectual property,[15] investment, or trade facilitation.

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14 *See* later section 4.3.

15 In particular, provisions on technology transfer can be very relevant. *See* Keith E. Maskus, "Patents and Technology Transfer through Trade and the Role of Regional Trade Agreements," Think Piece, MCTI Conference January 2016. A number of FTAs signed by the EU include, among the areas of cooperation between the Parties, the promotion of "*technological innovation and the transfer of new technology and know-how*" in general terms (*EU-Tunisia, EU-Morocco*, *EU-Mexico*) or in the energy sector (*EU-Chile*), while others explicitly refer to the transfer of environmentally-friendly technologies (*EU-South Africa*). The role that technology transfer and a more relaxed intellectual property regime might play in fostering renewable energy development and deployment, especially for developing countries, which are still highly dependent on foreign technologies, has been at the centre of heated debates during the past decade. *See* Keith E. Maskus, "Private Rights and Public Problems: The Global Economic of Intellectual Property in the

3. A TAXONOMY OF RENEWABLE ENERGY PROVISIONS

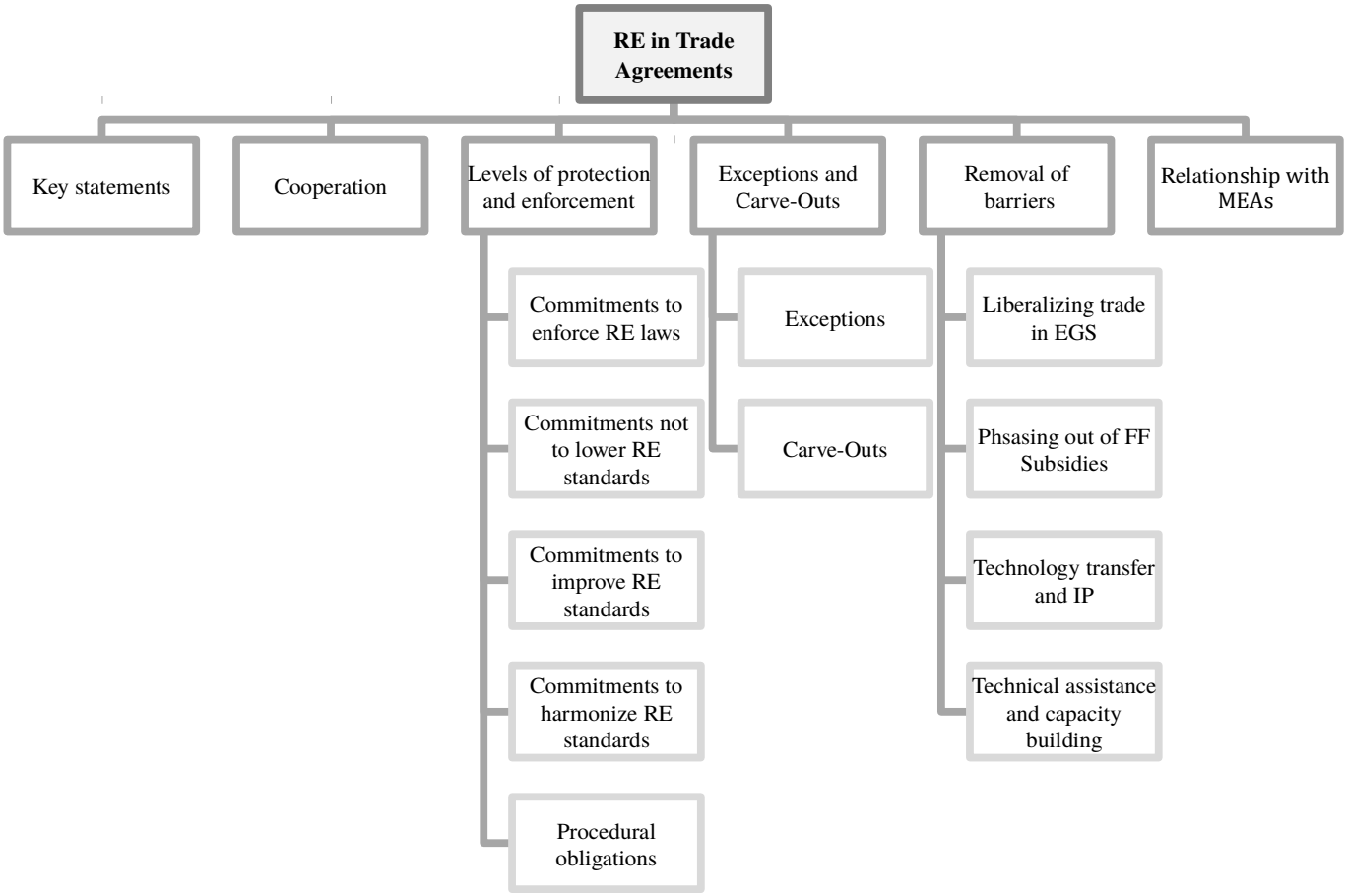
There are several ways to classify the provisions incorporated into FTAs, including location in the agreement, reasons for the inclusion, objective, scope of the provisions, their specificity/generality, and degree of commitment and enforcement. In terms of the length and location, provisions related or specific to renewable energy in trade agreements vary considerably, ranging from as little as a line or two in the preamble, to a whole section or even chapter. The introduction of these provisions within the text of a trade agreement can have multiple objectives, including accessing new markets, increasing investment opportunities, facilitating transit through customs and setting common customs rules, and stimulating research and development related to renewable energy technologies. As to the reasons that motivate countries to negotiate such provisions, one of the main reasons is the pressure deriving from the largely shared understanding that trade and climate change are interrelated and that renewable energy development and diffusion can contribute greatly to the global climate change mitigation efforts, as well as national security concerns. The US and the EU represent a prime example of the success of such efforts, as the US Trade Promotion Act of 2002 contains a requirement to include environmental provisions in all trade agreements to which the country is a party, while the EU has placed significant emphasis on sustainable development in many of its trade agreements.[16]

21st Century," *Peterson Institution for International Economics* (2012); Keith E. Maskus and Ruth L. Okediji, "Intellectual Property Rights and International Technology Transfer to Address Climate Change: Risks, Opportunities, and Policy Options," *ICTSD Issue Paper No.32* (2010); UNEP and ICTSD, *Patents and Clean Energy: Bridging the Gap between Evidence and Policy* (2010).

16 *Bipartisan Trade Promotion Authority Act of 2002.* Council of the European Union, *Review of the EU Sustainable Development Strategy,* 10917/06 (Jun. 26, 2006). This different approach is reflected in the fact that FTAs signed by the US tend to gather environmental provisions within a chapter dedicated solely to the environment, while EU FTAs often include their environmental provisions in a broader title devoted to sustainable development, and which also includes labour provisions. Section 2(11) of the US Trade Promotion Act reads: "The principal negotiating objectives of the United States with respect to labor and the environment are (D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development; [and] (E) to reduce or eliminate government practices or policies that unduly threaten sustainable development." According to the EU Sustainable Development Strategy, "*The Commission and Member States will increase efforts to make globalisation work for sustainable development by stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. In this context, the EU should be working together*

In this paper, I have decided to classify the renewable energy provisions incorporated into trade agreements according to the technique used. As *Figure 1* shows, some of these categories, can then be further broken down in even more specific sub-categories.

Figure 1. Taxonomy of renewable energy provisions in FTAs



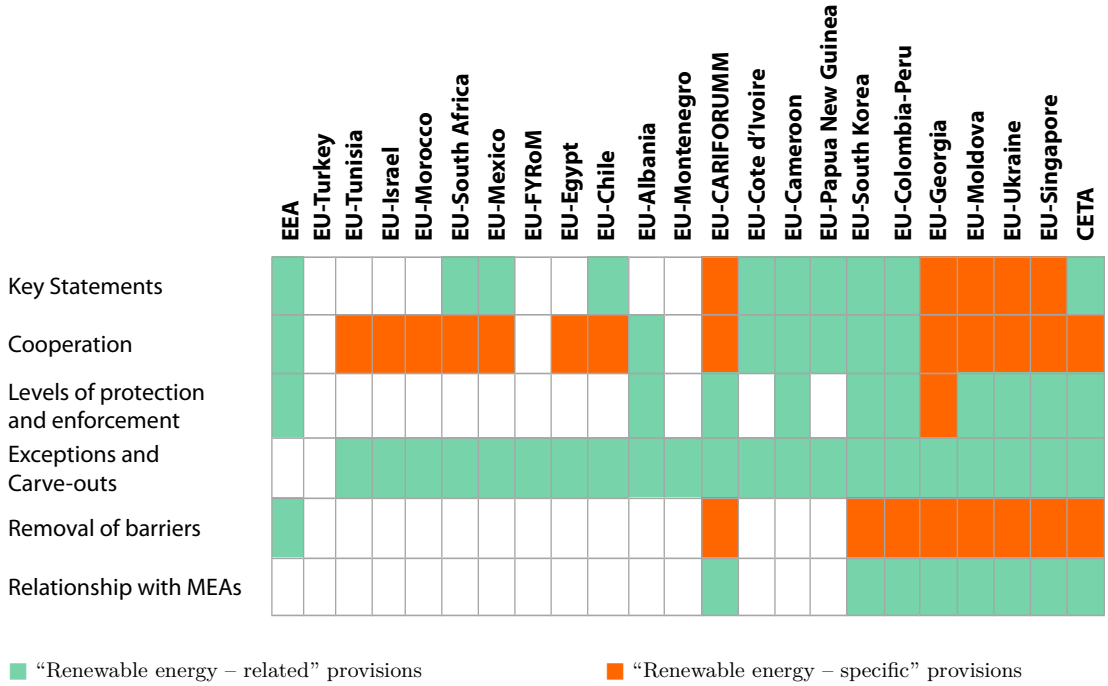
Source: Compiled by the author

Note: RE stands for 'renewable energy', EGS for 'environmental goods and services', FF for 'fossil fuels', MEAs for 'multilateral environmental agreements', and IP for 'intellectual property'.

with its trading partners to improve environmental and social standards and should use the full potential of trade or cooperation agreements at regional or bilateral level to this end."

Two of these techniques look more familiar than others as they are used in WTO Agreements as well. This is the case of broad statements referring to sustainable development and environmental objectives and the use of exception clauses to allow the adoption of domestic measures that pursue legitimate policy objectives. The preamble to the Marrakesh Agreement establishing the WTO lists, among the objectives of the agreement, sustainable development and the need to both protect and preserve the environment. As to exception clauses, the classic examples are article XX of the GATT and XIV of the GATS, which will be explored in further detail later on in this contribution. In particular, with reference to exception clauses, FTAs vary greatly with regard to both content and scope. Some merely reproduce or refer to the relevant provisions of the GATT or the GATS, while others create their own list of exceptions, which is usually broader than the ones we find in WTO agreements. As to the other techniques, they are entirely new to FTAs, as no corresponding provisions can be found in WTO agreements. Nevertheless, the WTO does acknowledge their importance, as

Table 1. Renewable Energy Provisions in EU FTAs



"Renewable energy – related" provisions "Renewable energy – specific" provisions

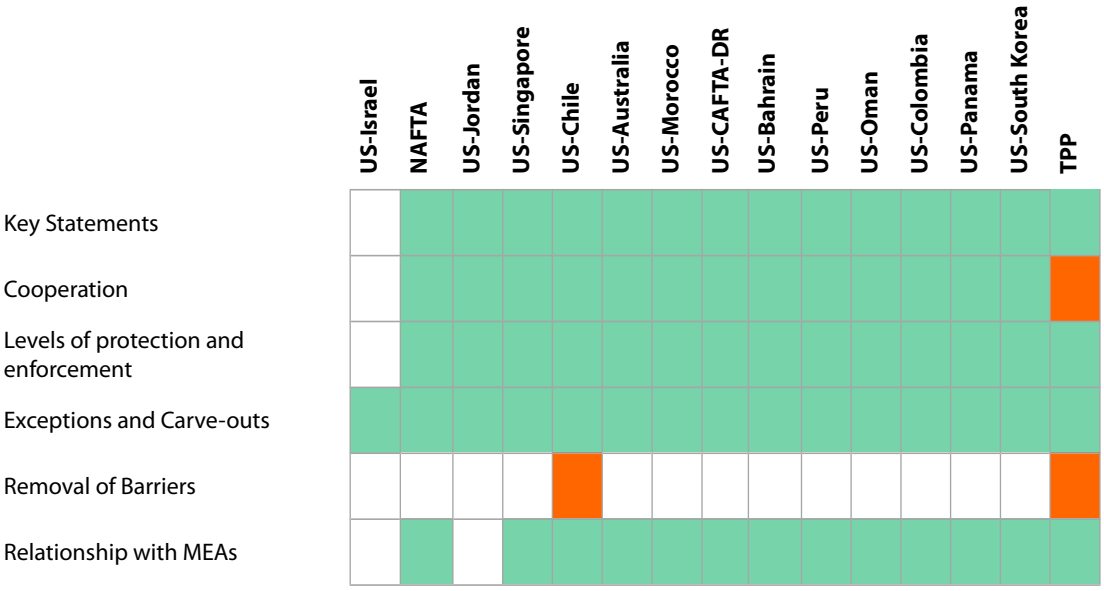
Source: Compiled by the author

Note: the presence of 'renewable energy-specific' provisions is not alternative but rather cumulative to the existence of 'renewable energy-related' ones.

the current negotiations on trade and environment within the framework of the Doha Development Agenda (DDA) focus on three of these additional techniques: the relationship between WTO rules and multilateral environmental agreements (MEAs), future collaboration between the WTO and MEA secretariats, and the elimination of tariff and non-tariff barriers on environmental goods and services.[17]

The following subparagraphs offer an overview of the different techniques used to incorporate renewable energy provisions in FTAs, identifying the instances where they go beyond WTO provisions. Although *Table 1* and *Table 2* map the use of renewable energy provisions in all the FTAs analysed, it is worth noting that the same technique used in different agreements can still have a very different overall impact, based on the scope of the provisions, their degree of generality/specificity, as well as their specific content.

Table 2. Renewable Energy Provisions in US FTAs



"Renewable energy – related" provisions "Renewable Energy – specific" provisions

Source: Compiled by the author

Note: see table 1.

17 On this topic, in January 2014, the EU has started negotiations with other 13 WTO Members (now 16) to draft a plurilateral Environmental Goods Agreement. See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116 (last accessed, Nov. 12, 2016).

3.1. Key statements

Virtually all the FTAs analysed contain broad key statements referring to sustainable development, the environment, or even renewable energy.[18] Such key statements include, first of all, the definition of the Agreement's objectives, usually listed in the preamble. As a matter of fact, all the FTAs signed by the US contain at least one reference to the goal of protecting the environment in their preamble, even when a side agreement covering environmental issues has been drawn up separately, and so do most agreements signed by the EU.[19] The language of the preamble is important as it reflects the value Parties place on the environment and as it can be very useful to help interpret substantive provisions within the trade agreements as it is evidenced by the evolution of the WTO trade/environment case law. Before the establishment of the Organization in 1995 and the introduction, in the the preamble to the Marrakesh Agreement, of a reference to *sustainable development* and the need to both protect and preserve *the environment* among the Organization's objectives, the first generation of GATT Panels dealing with trade-related environmental measures[20] showed a certain unwillingness to take into account environmental needs. In the decisions following 1995, both the Panel and Appellate Body have adopted a more environmentally-friendly approach and the very same provisions have been interpreted more broadly, partly because of the the recent developments in international environmental law, and partly precisely because of the language of the preamble to the Marrakesh Agreement.[21] Quoting Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the Appellate Body in the landmark *Shrimp/Turtle* decision clarified that

> *"An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the Marrakesh Agreement Establishing the World Trade Organization […]*

18 One notable exception is the *US-Israel* FTA, as well as the agreements signed between the EU and Turkey, Tunisia, Israel, Morocco, FYRom, Egypt, Albania, and Montenegro.

19 *See supra* note 18.

20 *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* BISD/29S/91; *Canada – Measures affecting Exports of Unprocessed Herring and Salmon* BISD/35S/98; *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes* BISD/37S/200.

21 *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2; *United States – Import Prohibition of Certain Shrimps and Shrimp Products* WT/DS58; *European Communities- Measures Affecting the Prohibition of Asbestos and Asbestos Products,* Report of the Panel WT/DS135.

> *acknowledges that the rules of trade should be 'in accordance with the objective of sustainable development', and should seek to 'protect and preserve the environment'."*[22]

Similar statements, highlighting the objectives of the agreements, can be easily found in the vast majority of FTAs. Some of these statements are very broad, thus resembling the language used in the preamble to the Marrakesh Agreement.[23] Examples can be found in the *US-Jordan*, *US-Morocco,* and *US-Bahrain* FTAs, which gather both the social and environmental pillars of sustainable development in one single statement,[24] expressing the parties' desire to strengthen *"the enforcement of labour and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation."*[25]

The preamble to other FTAs includes one or two statements exclusively devoted to the environment. In the *US-CAFTA-DR* FTA, for instance, the Parties agreed to

> *"IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories;"*[26]

Other provisions include additional reference to promoting regional environmental cooperative activities as well as existing commitments to

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22 Appellate Body Report, *US – Import Prohibition of Certain Shrimps and Shrimp Products,* para 12.

23 The Preamble to the Marrakesh Agreement, in the relevant part, reads: "*Recognizingthat their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development* […]."

24 The *EU-Chile* FTA provides for a narrower variant of this statement where it expresses the need: *"to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements."*

25 *US-Bahrain*, Preamble.

26 *US-CAFTA-DR*, Preamble.

multilateral environmental agreements.[27] In many cases, MEAs are referred to broadly, while in others the preamble contains a commitment to specific agreements. The *EU-Colombia-Peru* FTA, for instance, mentions both the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, as the Parties "*recognize that climate change is an issue of common and global concern that calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, for the benefit of present and future generations of mankind*."[28] Some of the most recent trade agreements signed by the EU go even further and contain an explicit reference to the need to promote energy efficiency and the use of renewable energy and commit, more broadly in the energy sector, to enhance the security of energy supply and facilitate the development of appropriate infrastructure.[29]

The objectives pursued by the Parties through their FTAs are often not limited to the preamble but can be found in other parts of the text, and in particular at the beginning of the chapters or titles devoted to 'sustainable development' or 'the environment'.[30] Furthermore, besides their objectives, a number of FTAs contain broad statements acknowledging that trade and the environment affect one another and calling for the pursuit of trade liberalization and environmental protection in a mutually supportive manner. Article 13.1(2) of the *EU-South Korea* FTA, among others, conveys the Parties' understanding that "*economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development*."[31] This broad statement is then reflected and further developed in those provisions that require Parties to take into account the environment when designing other laws and policies, such as Article 40 of the *EU-Egypt* FTA, according to which

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27 In the Preamble to the *US-Chile* FTA, the Parties agree to, inter alia, "*CONSERVE, protect, and improve the environment, including through managing natural resources in their respective territories and through multilateral environmental agreements to which they are both parties*", while in the US-Singapore FTA, they reaffirm "*the importance of pursuing the above in a manner consistent with the protection and enhancement of the environment, including through regional environmental cooperative activities and implementation of multilateral environmental agreements to which they are both parties*." Provisions specifically dealing with cooperation and FTAs' relationship with MEAs will be analyzed in the next sections in further detail.

28 *EU-Colombia-Peru,* Art. 275. *See* also *EU-Singapore*, Art. 13.6.

29 *See* the Agreements signed by the EU with CARIFORUM, Moldova, Georgia, and Ukraine.

30 The chapters on sanitary and phytosanitary measures often contain such statements as well. *See EU-South Korea*, Art. 5.1, *EU-Colombia-Peru,* Art. 85, *EU-Georgia*, Art. 50, *EU-Moldova*, Art.176, and *EU-Ukraine*, Art. 59.

31 *EU-South Korea*, Art. 13.1(2).

"*conservation of the environment and ecological balance shall be taken into account in the implementation of the various sectors of economic cooperation to which it is relevant.*"[32]

3.2. Cooperation

Most FTAs contain provisions on bilateral or regional cooperation on several matters. Some even have side agreements on environmental cooperation, such as NAFTA (with NAAEC) and the *US-South Korea* FTA (*US-Korea Environmental Cooperation Agreement*). These provisions vary greatly, and they can be classified according to different parameters, such as the areas covered by cooperation and the depth of the cooperation commitments.

As far as the areas covered by cooperation are concerned, some provisions show the Parties' resolution to cooperate on matters related to trade and sustainable development broadly, like it appears from the *EU-South Korea* FTA, where Parties "*underline the benefit of cooperation on trade related to social and environmental issues as part of a global approach to trade and sustainable development.*"[33] Other provisions narrow the focus of the cooperation efforts by referring to negotiations on trade-related environmental issues of mutual interest,[34] to the need to pursue cooperative environmental activities and strengthen environmental performance,[35] or the rational use of non-renewable natural resources and the sustainable use of renewable natural resources, thus promoting environmental protection, the prevention of environmental deterioration, and the control of pollution.[36] Finally, a third set of provisions deals specifically with cooperation regarding renewable energy development and trade. For instance, Article 57 of the *EU-Tunisia* FTA identifies, as priority areas of cooperation between the Parties, the promotion of renewable energies and the promotion of

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32 *EU-Egypt*, Art. 40. Other examples include Article 86.2(2) of the *EU-Albania* FTA and Article 34 of the *EU-Mexico* FTA. In some cases, the reference is specific to a given sector, such as trade and investment (*EU-CARIFORUM*, Art. 188), mining (*EU-South Africa*, Art. 58), transport, and tourism.

33 *EU-South Korea*, Art. 13.1.

34 *EU-Singapore*, Arts. 13.6 and 13.10; *EU-South Korea*, Art. 13.5; *EU-Colombia-Peru*, Art. 270; *CETA*, Art. 24.4.

35 *See*, among others, *EU-Singapore*, Art. 13.10, *EU-South Africa,* Art. 57, *CETA*, Art. 22.3, and *US-Singapore*, Art. 18.6.

36 *See*, among others, *EU-Israel,* Art. 50, *EU-Morocco*, Art. 48, *EU-Egypt,* Art. 44, and *EU-South Africa*, Art. 48.

energy-saving and energy efficiency.[37] Likewise, Article 23 of the *EU-Mexico* FTA specifies that cooperation shall "*aim to develop [the Parties'] respective energy sectors, concentrating on the promotion of transfer of technology and exchanges of information about their respective legislation.*"[38]

A second distinction between cooperation provisions can be drawn on the basis of whether they provide for relatively vague statements or clearly specify the obligations of the Parties. This second distinction crosscuts the previous one, as broad or detailed commitments can be agreed on in all the different areas of cooperation laid out above. A first category encompasses those provisions that simply state the will of the Parties to cooperate with each other, without any further explanation or clarification. Other provisions take an additional step, by listing different activities through which cooperation in the environmental/ renewable energy sector shall be carried out, such as "*exchanges of information, training of human resources, transfer of technology and joint technological development and infrastructure projects, designing more efficient energy generation processes, promoting the rational use of energy, supporting the use of alternative renewable sources of energy which protect the environment, and the promotion of recycling and processing residues for use in generating energy.*"[39] As the quoted Article 23.2 of the *EU-Mexico* FTA shows, cooperation might refer to many different forms of interaction. Sometimes, cooperation is limited to a mere commitment to exchange and share information,[40] while in other cases it can involve deeper commitments, such as joint activities to be conducted by the Parties, ranging from working together on issues of regional interest to conducting joint scientific research.[41] Some of these deeper efforts often require a proper institutional setting. In order to do so, the *EU-Singapore* FTA invests the Trade Committee established by the Parties to decide on the adoption of implementing

37 See also *EU-Israel*, Art. 51, *EU-Morocco*, Art. 57, *EU-South Africa*, Art. 57, *EU-Mexico*, Art. 23, *EU-Egypt*, Art. 53, *EU-Chile*, Art. 22, *EU-CARIFORUM*, Art. 138. Other examples include *EU-Georgia, EU-Moldova, EU-Ukraine*, and *CETA*.

38 *EU-Mexico*, Art. 23.

39 *EU-Mexico*, Art. 23.

40 *EU-Mexico*, Art. 23 and 34; *EU-Chile*, Art. 22; *EU-CARIFORUM*, Art. 138; *EU-Singapore,* Art. 13.10; *EU-Ukraine*, Art. 338; *CETA*, Art. 24.12; *US-Peru*, Art. 18.10; *US-Singapore*, Art. 18.6; *US-Chile,* Art. 19.5.

41 *NAAEC*, Preamble; *EU-Tunisia*, Art. 47; *EU-Morocco*, Art. 47; *EU-Mexico*, Art. 23 and 34; *EU-Chile*, Art. 22; *EU-CARIFORUM*, Art. 138; *US-Singapore*, Art. 18.6; *US-Chile*, Art 19.5; *US-Australia*, Art. 19.6; *US-CAFTA-DR*, Art. 17.9. Other examples include *EU-Georgia, EU-Moldova, EU-Ukraine*, and *CETA* Arts. 22.3 and 24.12.

measures. Similarly, Article 20.12(3) of the TPP states that the Parties shall designate one or more authorities responsible for cooperation to serve as national contact points on matters related to the coordination of cooperation activities. The most fitting example of institutional setting created to serve the agreement's environmental cooperation objectives is provided by NAAEC, which established a "*framework [...] to facilitate effective cooperation on the conservation, protection and enhancement of the environment*"[42] setting up the Commission for Environmental Cooperation (CEC) to facilitate joint activities.[43]

3.3. Levels of protection and enforcement of laws

When signing FTAs, countries maintain regulatory sovereignty, which is the prerogative to establish their own levels of (environmental) protection as well as to modify their (environmental) laws and policies accordingly and, in a few cases, "*in a manner consistent with the Multilateral Trade Agreements*" they are parties to.[44] These provisions are generally not limited to the recognition of the Parties' right to establish their own levels of environmental protection but they further provide for specific obligations ("each Party *shall"*)[45] that countries need to comply with in the laws, standards, and policies they adopt domestically. These might include the obligation to use scientific knowledge when designing environmental measures, to ensure public participation in their adoption, to publish the measures once adopted, and to monitor the state of the environment while conducting environmental assessments.

Additionally, these laws need to be effectively enforced. The environmental chapter of the TPP, at Article 20.3, provides that the Parties to the agreement shall not fail to effectively enforce their environmental laws "*through a sustained or recurring course of action or inaction in a manner affecting trade or*

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42 *NAAEC,* preamble.

43 Gary Clyde Hufbauer, Daniel C. Esty, Diana Orejas, Luis Rubio and Jeffrey J. Schott, *NAFTA and the Environment: Seven Years Later,* Institutional for International Economics, 2000: 18, 20, 21. The CEC is composed of a Council, which is the governing body, a Secretariat, which provides the Council with technical assistance, and the Joint Public Advisory Committee (JPAC), which constitutes a channel for nongovernmental organizations.

44 *CETA*, Art. 24.3

45 To quote McCaffrey, the intent of the Parties to create legal obligations is exemplified by words such as "*'shall,' but also, 'agree,' 'undertake,' and the like. [...] [while] terminology such as 'should' and 'will' do not typically indicate such intent.*" Stephen C. McCaffrey, *Understanding International Law*, LexisNexis, 2006: 82

investment between the Parties" or encourage trade or investment by weakening or reducing the protection afforded in their environmental laws.[46] This provision is particularly interesting in that it contains two distinct obligations: the commitment of the Parties to enforce their environmental laws and regulations, and the commitment not to relax such laws as a means to encourage trade or investment. The second commitment, which is aimed at addressing the risk of a 'race to the bottom' and can be found in the investment chapter of several FTAs, found its earlier expression in Article 1114(2) of NAFTA:

> "*The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.*"[47]

Once again, provisions of this kind rarely contain merely a right but a series of obligations as well. Article 5 of NAAEC shows how precise and specific these obligations can be:

> *"With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action […] such as: (a) appointing and training inspectors; (b) monitoring compliance and investigating suspected violations, including through on-site inspections; (c) seeking assurances of voluntary compliance and compliance agreements; d) publicly releasing non-compliance information; (e) issuing bulletins or other periodic statements on enforcement procedures; (f) promoting environmental audits; (g) requiring record keeping and reporting; (h) providing or encouraging mediation and arbitration services; (i) using licenses, permits or authorizations; (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations; (k) providing for search, seizure or detention; and (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.*"[48]

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46 *TPP*, Art. 20.3.

47 *NAFTA*, Art. 1114(2).

48 *NAAEC*, Art. 5.

Some countries decide to go even further and commit to achieve high levels of environmental protection, further clarifying the they "*shall strive to continue to improve those laws*" over time.[49] However, despite the use of the word *shall*, such important objective is circumscribed in terms of the Parties' obligation to merely 'strive to' improve their laws, thus ending up couched in hortatory rather than mandatory language.[50]

3.4. Exceptions and carve-outs

Exceptions and carve-outs within trade agreements provide for 'windows' to accommodate policies aimed at fostering trade in renewable energy goods, services, and technologies. Such clauses identify situations where trade disciplines will not be applied as they might constrain regulators and policymakers from adopting or applying measures aimed at pursuing such policy objectives.[51] Exceptions, whether general or specific, are usually contained in a special provision and they identify circumstances in which the breach of other provisions of the agreement is justified. On the other hand, carve-outs do not assume the breach of any rule of the FTA, as they function as a removal of part of the restriction or prohibition imposed by a given provision, with the effect that said provision will not apply to the *carved-out* situation.

3.4.1. General and specific exceptions

Although several WTO agreements include articles providing for such exceptions,[52] the provision which is generally discussed and referenced to in many FTAs is GATT Article XX. The exceptions in Article XX allow members to apply measures inconsistent with GATT obligations as long as they do not constitute

49 *EU-South Korea*, Art. 13.3; *US-Jordan*, Art. 5; *US-Singapore*, Art. 18.1; *TPP*, Art. 20.3(3).

50 Other provisions that contain similar language are those stating that the Parties "*shall endeavour* to address any potential barrier to trade in environmental goods and services" or that "s*hall strive to* facilitate and promote trade and foreign direct investment in environmental goods and services." *See TPP*, Art. 20.18(3). *EU-Colombia-Peru*, Art. 271.

51 Gehring et al, 2013.

52 Other examples include GATS Art. XIV; TBT Arts. 2.2. and 2.3, SPS Arts. 2.3 and 2.4, and TRIPS Arts. 27.2 and 27.3.

"*(…) arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*" and fit into one of the cases provided for in the subparagraphs. Not only this provision does not explicitly refer to 'energy' or 'renewable energy', but it does not even mention the 'environment'.[53] Nevertheless, the exceptions under paragraphs (b) and (g) have most frequently been cited in trade disputes that involve environmental measures, and are now generally treated as environmental norms. The same can be said for Article XIV of the GATS which, however, only applies to trade in services and is narrower than GATT Article XX as it only applies to measures "*necessary to protect human, animal or plant life or health*" (GATS Art. XIV(b) and GATT Art. XX(b)) while no reference is made to measures "*relating to the conservation of exhaustible natural resources*" (GATT Art. XX(g)). These exceptions are not applicable to other WTO Agreements beyond the scope of the GATT or GATS, as both the case law and the literature suggest. It follows that these clauses cannot be used to justify measures adopted to promote renewable energy or, more broadly, to protect the environment, covered by the Agreement on Technical Barriers to Trade (TBT), on Sanitary and Phytosanitary Measures (SPS) or on Subsidies and Countervailing Measures (SCM). This system potentially allows Members to justify measures, such as total bans and quotas, which are widely known as more restrictive and trade-distorting than those covered by the other agreements.[54] As the next subparagraphs will show, the exceptions included in many FTAs address these concerns by expanding the scope of the corresponding provisions.

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53 When the GATT was drafted, environmental protection was not one of the main concerns of the international community. The relationship between trade and the environment, as well as their potential conflicts, were practically ignored until the 1970s when, after the 1972 Stockholm Conference, environmental law started to emerge and develop as an independent branch of international law. In those years, economic development was the priority, and it was pursued through agricultural growth, at the expense of environmental protection. Steve Charnovitz, "The World Trade Organization and the Environment," *Yearbook Of International Environmental Law* (1997): 98-116.

54 Most discussions have revolved around the applicability of GATT Article XX to the SCM Agreement. In this regard, the 2006 *World Trade Report* of the WTO Secretariat states that "*while Article XX in principle would apply to subsidies, the more specific rules of the SCM Agreement in any case are explicitly geared to remedying trade distortions arising from subsidization*" (at 201). Based on this vague statement and on the lack of textual support for a reading that would allow such extensive application of GATT exceptions clause, Howse suggests that it is "*unlikely that the Appellate Body would accept an Article XX defence to a claim under the SCM Agreement.*" Howse 2010, at 17. *See also* Rubini, 2011.

At a first glance, the general exceptions contained in most FTAs would appear a mere reproduction of those found in WTO agreements. In some instances, this is the case, as Parties limit themselves to reiterate the applicability to their trade in goods or/and services of the already existing rights and obligations under GATT Article XX and GATS Article XIV. Other agreements, instead, go further and formulate their own exception clauses so as to grant greater policy space for environmental regulations. Such broader coverage can be achieved either by modifying the wording of the exception, or by applying the latter more broadly than it happens in the WTO (or even both). As to the first approach, a number of FTAs explicitly refer to the environment in their exception clauses. Although the panels and the Appellate Body have come to interpret GATT exceptions as covering environmental measures, it is useful to have text in the FTA's clause that indicates the Parties' explicit agreement that this interpretation is correct. The *EU-Colombia-Peru* FTA, for instance, revises the GATT wording to explicitly include environmental measures.[55] A similar result is achieved by the *US-Jordan* FTA, which, in the context of trade in goods, clarifies that:

> "*The Parties understand that the measures referred to in GATT 1994 Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT 1994 Article XX(g) applies to measures relating to conservation of living and non-living exhaustible natural resources.*"[56]

Other Agreements omit the word 'necessary' when reproducing GATT Article XX(b) and simply refer to measures "*justified on grounds of […] the protection of health and life of humans, animals or plants*,"[57] thus eliminating the necessity test required by the GATT and broadening the coverage of the provision.

The second approach involves applying the general exceptions beyond the chapters on trade in goods and services, so as to include domestic measures in other areas, such as subsidies, investment, technical standards, and public procurement. For instance, Article 21.1 of the *US-Singapore* FTA extends GATT

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55 Article 106 refers to measures "*(b)necessary to protect human, animal or plant life or health, including those environmental measures necessary to this effect; […] (g)relating to the conservation of living and non-living exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic productionor consumption.*"

56 *US-Jordan*, Art. 12.

57 *EU-South Africa*, Art. 27.

Article XX to its chapters 2 through 6 (National Treatment and Market Access for Goods, Rules of Origin, Customs Procedures, Textiles, Technical Barriers to Trade).[58]

3.4.2. Carve-outs

Several FTAs provide for carve-outs that are relevant for trade in renewable energy. Once again, the most recent example is to be found in the text of the TPP. The 'Investment' chapter contains an environmental carve-out when regulating expropriation. Annex 9-B of the TPP, explicitly excludes from the definition of 'indirect expropriation'—which refers to a situation where the State takes effective control or otherwise interferes with the use, enjoyment, or benefit of an investment—"*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,safety and the environment"* except in rare circumstances.[59]

Similar environmental carve-outs can be found in other investment provisions, such as those on the prohibition of performance requirements. More precisely, the prohibition to impose or enforce the requirement to achieve a given level or percentage of domestic content, to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory, or to transfer a particular technology, production process, or other proprietary knowledge to a person in its territory, does not apply to measures *"(ii) necessary to protect human, animal, or plant life or health; or(iii)related to the conservation of living or non-living exhaustible natural resources."*[60] Interestingly, the exact same carve-out clause can be found in other trade agreements signed by the United States, such as the *US-Singapore* FTA (Article 15.8).

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58 The provision also contains the aforementioned clarification that "*the measures referred to in GATT 1994 Article XX(b) include environmental measures necessary to protect human, animal, or plant life or health, and that GATT 1994 Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources*", thus representing a combination of both approaches. *See* also *US-Chile,* Art. 23 and *CETA*, Art. 28.3.

59 *TPP*, Annex 9-B. Other examples include *CETA* (Art. 8.12 and Annex 8-A), *US-Chile* (Annex 10-D), *US-Australia* (Annex 11-B), *US-Morocco* (Annex 10-B), and *US-CAFTA-DR* (Annex 10-C).

60 *TPP*, Article 9.10. *See* also *NAFTA*, Art. 1106, *US-Peru*, Art. 10.9, *US-Chile*, Art. 10.5, and *US-Singapore*, Art. 15.8.

Similar provisions can be found in a number of other FTAs with regard to marking and labelling, government procurement, and trade facilitation.[61]

The *EU-Singapore* FTA stands out as it provides for a carve-out clause when regulating subsidies. Subsidies are especially relevant when dealing with renewable energy, as countries often resort to them—in the form of feed-in tariffs, funds, direct loans, loan guarantees, and tax breaks—to boost their domestic industry and overcome the initial economic hurdles this industry encounters. The WTO SCM Agreement used to have a carve-out clause in Article 8, referring to 'environmental' subsidies, which elapsed in 2000 and was not renewed by the contracting Parties.[62] As a result, renewable energy and environmental subsidies are subject to the general treatment of the SCM Agreement.[63] The *EU-Singapore* FTA allows Parties to provide for subsidies that *do* have trade effects on the other Party—as long as such effects are contained and the subsidy is limited to the minimum needed to achieve the objective—when such subsidies are necessary to achieve an objective of public interest, explicitly including subsidies *for environmental purposes.*[64] Similarly, Annex IX of the *EU-South Africa* FTA states that public aid provided to support environmental protection, among other public policy objectives, is "*as a general rule, also compatible with the proper functioning of [the] Agreement.*"[65] Another example is provided the EEA. Article 61, which regulates state aid, prohibits "*any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […] in so far as it affects trade between Contracting*

61 According to the *EU-Colombia-Peru* FTA, Parties that require mandatory marking or labeling or products shall not require the approval, registration, or certification of labels or marking as a precondition for sale in their respective markets "*d) unless necessary in view of the risk of the products to human, animal or plant health or life, the environment or national safety.*" Art. 81. See also TPP, Art. 15.3. *EU-Chile*, Art. 161. *EU-Colombia-Peru*, Art. 174; *EU-South Korea*, Art. 61(g).

62 Former Article 8 covered three categories of subsidies that, because comparatively less distorting, were considered legitimate and permissible: a) assistance for research activities; b) assistance for disadvantaged regions; and c) assistance to promote adaptation of existing facilities to new environmental requirements.

63 The SCM identifies two categories of subsidies. *Prohibited* subsidies, which can be either subsidies contingent upon exportation or subsidies contingent upon the use of domestic over imported products, are incompatible with the functioning of the Agreement as such (SCM, Art. 3). *Actionable* subsidies they are not prohibited *per se* but can be challenged if they produce an adverse effect on another country's industry and can justify the adoption of countervailing duties by the injured State (SCM, Art. 5).

64 Article 12.8, Annex 12-A(e).

65 *EU-South Africa*, Annex IX.

Parties."[66] However, under Article 61.3(c), "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*" *may* be compatible with the functioning of the Agreement.[67]

3.5. Removal of barriers

A wide variety of obstacles hamper trade and investment in renewable energy goods, services, and technology. Most FTAs generally deal broadly with removing barriers to trade in environmental goods and services, which are considered to include renewable energy as well.[68] Some of the most recent agreements, however, contain provisions that explicitly mention renewable energy. According to Article 24.9 of CETA, the Parties shall "*pay special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services*."[69] Another example is provided for by the *EU-Colombia-Peru* FTA, where the Parties express their will to "*promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change*."[70] The provision continues listing a number of different policies the Parties can adopt pursuant to the first paragraphs, such as a) facilitating the removal of trade and investment barriers to access to, innovation,

66 *EEA*, Art. 61.

67 This provision reproduces Article 107(3)(c) of the Treaty of the European Union (TFEU). To verify the compatibility of a state aid under Article 107(3)(c), the Commission addresses the questions whether the aid measure is aimed at a well-defined objective of common interest, whether the aid is well-designed to deliver the objective of common interest, and whether the distortions of competition and the effect on trade are limited so that the overall balance is positive. To answer the last question, the Commission undertakes a 'balancing test', weighing efficiency and equity rationales of government intervention against the costs of state aid, mostly in the form of trade distortion. The first rationale mentioned proves useful in the specific case of renewable energy, as it refers to the need to correct market failures, including, among others, addressing positive and negative externalities, and supplying public goods. The outcome of this test might result in circumstances where the positive effects of the measure outweigh the negative ones, thus labelling the measure as such as 'compatible' and therefore permitted. *Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3*, Methodology for Compatibility Analysis: The Balancing Test.

68 *TPP*, Art. 20.18

69 *CETA*, Art. 24.9.

development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation, taking into account the circumstances of developing countries; and b) promoting measures for energy efficiency and renewable energy that respond to environmental and economic needs and minimize technical obstacles to trade.

The aforementioned obstacles include, first of all, tariffs as well as non-tariff barriers. Paragraph 31(iii) of the Doha Ministerial Declaration calls for "*the reduction or, as appropriate, elimination of tariffs and non-tariff barriers to environmental goods and services.*" [71] The Declaration, however, stops short of defining them, and that explains why the WTO Committee on Trade and Environment, entrusted with these negotiations, began by examining the substantial amount of work already undertaken by the OECD and APEC to identify the scope of environmental goods.[72] Article 7.1 of the *EU-Singapore* FTA includes, among the agreement's objectives, the reduction of greenhouse gas emissions and identifies the removal or reduction of tariffs and non-tariff barriers as a means to promote, develop, and increase "*the generation of energy from renewable and sustainable non-fossil sources.*"[73] Similarly, the agreements signed by the EU in the most recent years include the need to address non-tariff barriers to facilitate and promote trade and investment in environmental goods and services more broadly.[74]

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70 Art. 275. Other FTAs that explicitly refer to renewable energy when mentioning the need to promote their production and related trade/investment are those signed by the EU with South Korea, Georgia, Moldova, and Ukraine.

71 *Doha Ministerial Declaration*, para. 31(iii). Eliminating or reducing tariffs in renewable-energy goods would reduce a tax that consumers in some countries still pay on these goods and would certainly facilitate trade, though it is unclear whether it would spur a major expansion in it. As a matter of fact, in most developed countries, tariffs are already low, and reducing tariffs is not without costs, in particular in terms the loss of tariff revenue, which for some poorer countries may be significant. These considerations raise legitimate questions regarding the necessity of such measures. On the other hand, combining the reduction of both import tariffs and non-tariff barriers will reduce their price and make them more accessible. *See* Ronald Steenblik, "Liberalisation of Trade in Renewable-Energy Products and Associated Goods: Charcoal, Solar Photovoltaic Systems, and Wind Pumps and Turbines*," OECD Trade and Environment Working Paper No. 07*, 2005: 6.

72 Ronald Steenblik, "Environmental Goods: A Comparison of the APEC and OECD Lists," *OECD Trade and Environment Working Paper No. 2005-04*, Nov. 2005; Robert Howse and Petrus B. van Bork, "Options for Liberalising Trade in Environmental Goods in the Doha Round," *ICTSD Project on Environmental Goods and Services, Issue Paper No. 2*, 2006: 2.

73 *EU-Singapore*, Art. 13.11.

74 *EU-South Korea*, Art. 13.6; *EU-Georgia*, Art. 231; *EU-Moldova*, Art. 367; *EU-Ukraine*, Art. 293.

Another significant obstacle to trade in renewable energy is the massive subsidization of fossil fuels.[75] Gradually phasing out fossil fuel subsidies would make renewable energy more competitive and facilitate its production, trade, and investment. However, a commitment in this sense can only be found in the agreement between the EU and Singapore, where the Parties agree to progressively reduce subsidies for fossil fuels. Moreover, such commitment is followed by a caveat clarifying that such a reduction should "*be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels*."[76] Ultimately, the provision, while recognizing the need to reduce greenhouse gas emissions and the Parties' intention to phase out fossil fuel subsidies, simultaneously undermines the normative significance of this acknowledgement by balancing it out with the need to "*limit distortions of trade as much as possible*."[77]

Other barriers are specific to developing and least-developed countries. As a matter of fact, most renewable energy technologies are developed in industrialized nations (as well as a few economies in transition like China) and a number of factors, such as the high initial investment costs necessary to develop such technologies, the monopolistic power granted to the technology owner, asymmetric information, and market restrictions, constitute almost insuperable obstacles for many less developed countries. In these circumstances, technology transfer and technical assistance can play a key role, and trade agreements between industrialized and developing/least-developed countries could help speed up and facilitate the process with provisions on promotion and disclosure of technological innovations, as well as facilitation of dissemination of technology. Most provisions dealing with technology transfer are included in chapters on intellectual property. Many FTAs recognize the importance of adopting measures aimed at facilitating information flows and of creating an adequate environment—through the development of human capital and an appropriate legal framework—in the host country. However, the Parties—even when they agree to "*prevent or control licensing practices or conditions pertaining to intellectual property rights which may adversely affect the international transfer of technology and which constitute an abuse of intellectual property rights by right holders*"—ultimately fail to provide

75 In 2014, fossil fuel subsidies amounted to 493 billion USD, about four times the amount of subsidies received by renewable energy. IEA. 2014. *World Energy Outlook 2014.*

76 *EU-Singapore*, Art. 13.11.

77 Ibid.

for the necessary mechanisms to effectively achieve the said results, thus weakening their overall commitment.[78] Technical assistance and capacity building are often part of the cooperative efforts undertaken by many countries. According to Article 138 of the *EU-CARIFORUM* FTA, for instance, environmental cooperation should include awareness-raising and training activities, as well provision of technical assistance.[79] The *EU-Colombia-Peru* FTA comprises an entire title (XIII) devoted to *Technical Assistance and Capacity Building*, which should be aimed at boosting sustainable economic development and contributing to the achievement of the objectives of the UNFCCC.[80]

3.6. Relationship with MEAs

The negotiations on trade and the environment that are part of the Doha Development Agenda focus, *inter alia*, on the relationship between WTO rules and MEAs. One of the main tasks of the WTO Committee on Trade and Environment[81] is precisely to clarify such relationship, as evidenced by *Item 1* of the ten items listed in the Decision on Trade and the Environment around which the CTE has structured its work, which refers to "*the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements*."[82] In terms of treaty language, no WTO agreement refers to MEAs, while many existing FTAs do. In the recent text of the TPP, as well as in many agreements signed by the EU, the Parties affirm their commitment "*to implement the multilateral environmental agreements to which [they are parties]*."[83] Some countries go even beyond this broad commitment and explicitly list the UNFCCC and the Kyoto Protocol among the MEAs they commit to implement and even refer to the commitment to reach the ultimate objective of both the Convention

78 *EU-South Korea*, Art. 10.3.

79 *EU-CARIFORUM,* Art. 138.2(e) and (f).

80 *EU-Colombia-Peru*, Arts. 286(e) and 324.

81 The CTE was established as a result of the Uruguay Round of trade negotiations by the Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994.

82 *Report (1996) of the Committee on Trade and Environment*, WT/CTE/112 November 1996, at 2 (emphasis added).

83 *TPP* Art. 20.4. *See* also *EU-South Korea*, Art. 13.5(2); *EU-Colombia-Peru*, Art. 270; and *EU-Singapore*, Art. 13.6.

and the Protocol, and to cooperate on the development of the future international climate change framework.[84] In these cases, the purpose of mentioning certain MEAs is to simply reaffirm the Parties' commitments undertaken elsewhere rather than prescribing new commitments, and therefore are likely not covered by the agreements' dispute settlement provisions. However, they represent useful interpretive tools that help better understand the real intentions of the Parties and can be used to interpret other provisions of the same Agreement.

In other circumstances, countries decide to spell out the relationship between the provisions in the FTA and those contained in MEAs. In principle, the absence of any inherent hierarchy of treaty norms means that they all—regardless the specific area of law which they pertain to—have the same legal status. The result is that, were a conflict to arise, it would not be an easy task to determine what rules prevail and the general rules of treaty interpretation, enshrined in the VCLT would represent the only tool available to shed some light on the issue. Thus, clarifying the relationship between trade and environmental norms *ex ante* could avoid embarking in such interpretive exercise. The earliest example is Article 104 of NAFTA, which states that:

> "*In the event of any inconsistency between this Agreement and the specific trade obligations set out in [certain environmental agreements], such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.*"[85]

Although it refers to specific environmental agreements,[86] this provision allows for the flexibility to amend the list of agreements to which this deference is granted, as it adds "*the agreements set out in Annex 104.1*" to the list of MEAs, and then specifies that "*the Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.*"[87] The practical relevance of NAFTA Article 104 is, nevertheless, very limited for at least two reasons. First, it

84 *EU-Colombia-Peru*, Art. 270; *EU-South Korea*, Art. 13.5(3).

85 *NAFTA*, Art. 104.

86 The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), the *Montreal Protocol on Substances that Deplete the Ozone Layer*, and the *Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and Their Disposal.*

87 Art. 104.2.

is very unlikely that a trade-related provision of a MEA will contradict trade provisions contained in NAFTA. Similarly, never a dispute was started at the WTO claiming the inconsistency between a MEA provision and a WTO norm. On the contrary, MEAs often identify certain environmental objectives and then authorise the Parties to adopt the measures they deem necessary to achieve such objectives. In these cases, the inconsistency is not to be found between the trade provision in a FTA and the environmental provision of a MEA but rather between the former and the specific trade measures adopted by one of the Parties and therefore outside of the scope of Article 104.[88] Second, even if MEAs were to set out specific trade obligations, not all measures adopted by the Parties pursuant to such obligations would trigger Article 104, as the Parties would still have to choose "*the alternative that is the least inconsistent with the other provisions of this Agreement*." In other words, the *least trade restrictive measures*, echoing the 'necessity' requirement in GATT Article XX.[89]

Despite the lack of practical strength that this provision might initially seem to possess, clarifying in the text of trade agreements their relationship with the relevant MEAs can signal the recognition by the Parties of the legitimacy of environmental rules and principle and can be used, in case renewable energy measures are challenged, to interpret existing exceptions and other provisions in light of the commitment to adopt such measures.

4. PROMOTING RENEWABLES THROUGH FTAS?

The EU Commission has summarized in a few well-chosen words the potential function of free trade agreements, pointing out that they "*can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation. Many key issues, […] which remain outside the WTO at this time can be addressed through*

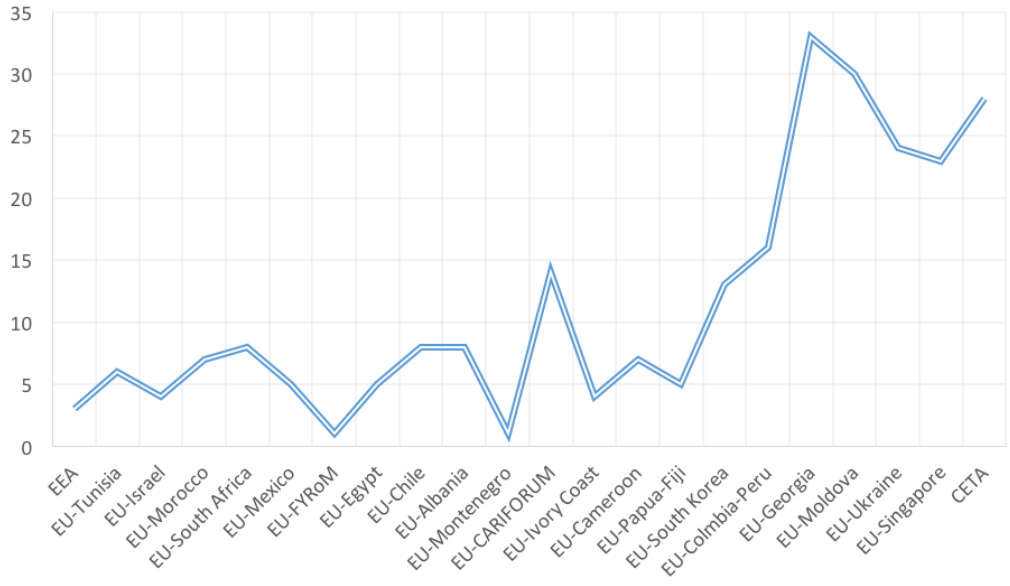
88 John H. Knox, "The Neglected Lessons of the NAFTA Environmental Regime," *Wake Forest Law Review* 45 (2010): 391, 400.

89 Jeffrey L. Dunoff, "Institutional Misfits: The GATT, the ICJ & Trade-Environment Dispute," *Michigan Journal of International Law* 15 (1994): 1044, 1073-74.

FTAs."[90] The question is whether such key issues encompass renewable energy development and diffusion, and environmental protection more broadly. The goal of this section is twofold. First, it aims at analysing the provisions classified in the previous paragraphs and identify some trends in the way FTAs have incorporated renewable energy provisions throughout the years. Second, I will build on this analysis and identify some features of FTAs *vis-à-vis* WTO agreements with regard to renewable energy.

The first trend shows an increase in the number of provisions applicable to renewable energy (whether specific or related to renewable energy). A clear example of such trend is provided by the agreements signed by the US with Israel in 1985 and with Peru in 2006. The former contains only one provision relevant to trade in renewable energy, while the latter contains more than 15. *Figure 2* shows this trend in EU FTAs.

Figure 2. Number of provisions specific/related to RE in FTAs signed by the EU (chronologically)

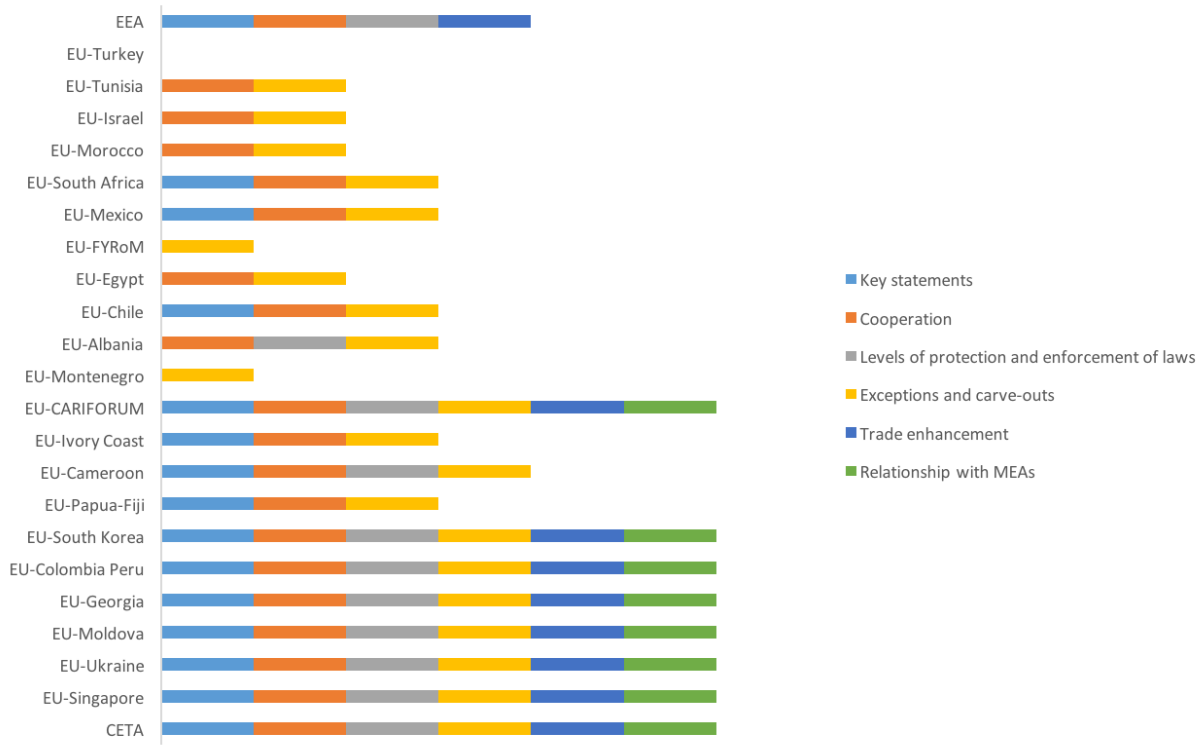


Source: Compiled by the author

90 European Commission, *Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*, Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM/2006/0567 of 4 October 2006, Brussels, at p. 11, as quoted in Olivier Cattaneo 2009, at 35.

A second trend shows an increase in the number and variety of techniques used. Most of the trade agreements signed by the US since NAFTA show significant changes and advances in their approach to encourage State parties to actively engage in environmental protection. For instance, FTAs like the one between the US and Peru or Singapore show a broader range of provisions, as well as a higher level of commitment than could be found in the text of either NAFTA or NAAEC. The same can be said for trade agreements signed by the EU. The introduction of certain provisions and the use of certain techniques in earlier FTAs have affected more recent negotiations and agreements. Once a provision is introduced or a technique used in a given agreement, subsequent agreements signed by the same Parties with other trading partners tend to maintain said provisions and techniques. *Figure 3* offers a visual representation of this practice, as the vertical axis shows the agreements signed by the EU, listed chronologically

Figure 3. Techniques used in FTAs signed by the EU (chronologically)



Source: Compiled by the author

top-down, while the horizontal axis shows the types of provisions contained in the said agreements. Certainly, many concurring factors can contribute to the reasons why certain provisions or techniques are used in certain agreements rather than others. However, on average, this study illustrates that it is rare for subsequent agreements to abandon a technique or a type of provision altogether, further showing that the use of environmental provisions creates a foundation, that is then built upon in later negotiations.

An additional step requires analysing the language used in these provisions, as well as their scope and specificity. It is possible to note that, with a few exceptions, recent provisions show a broader scope of application, as well as a higher level of commitment than could be found in the text of earlier agreements. If we take a quick look at cooperation provisions regarding renewable energy specifically, a clear trend emerges. The trade agreements signed by the EU with Tunisia and Morocco, respectively in 1995 and 1996—and the first ones to deal with renewable energy in their provisions on cooperation—simply mention that cooperation between the Parties should focus on renewable energy and promoting the saving of energy and energy efficiency.[91] The *EU-Mexico* FTA, signed in 1997 and entered into force in 2000, further specifies the activities through which such cooperation shall be carried out, including exchanges of information, training of human resources, and transfer of technology,[92] while the later *EU-Chile* FTA clarifies the specific objectives of such cooperative activities, explaining each of them in further details.[93] Last, the agreement between the EU and Singapore, concluded in 2014 and not yet in force, shows an even broader scope, as it expressly mentions, among the areas of cooperation, eco-labelling, green public procurement, and all "*trade-related aspects of the current and future international climate change regime, including ways to address adverse effects of trade on climate, as well as means to promote low-carbon technologies and energy efficiency*."[94] Finally, it is not only a matter of terminology and scope of the relevant provisions, but also of creating an adequate institutional backup, as later agreements tend to do more often and systematically than earlier ones (*see* infra 4.2)

91 *EU-Tunisia*, Art. 57; *EU-Morocco*, Art. 57.

92 *EU-Mexico*, Art. 23.

93 *EU-Chile*, Art. 22.

94 *EU-Singapore*, Art. 13.10

This analysis lays the foundations for identifying three main features of FTAs *vis-à-vis* multilateral trade agreements with regard to renewable energy. The first feature refers to the model used by trade agreements to incorporate renewable energy provisions in their chapters. The second feature is closely linked to the first one and refers to the tendency of dealing with potential conflicts between trade liberalization and the promotion of renewable energy *ex ante* rather than *ex post* through mechanisms aimed at dispute prevention, while the third one with giving more space to environmental concerns once a dispute does arise. Finally, section 4.4 focuses on the reasons that underpin the emergence of such features: it depicts FTAs negotiators and institutions as having a broader mandate than WTO bodies, allowing the resulting agreements to deal directly with renewable energy-related issues, with the effect of achieving a deeper integration than the one resulting from the agreements signed under the umbrella of the WTO.

4.1. From exception to promotion

The approach adopted in WTO Agreements when dealing with renewable energy provisions—and more broadly with environmental provisions—is often referred to as 'exceptions model'.[95] This model presupposes that trade liberalization represents the main goal the agreement is designed to achieve through a number of obligations each Member has to comply with (non-discrimination, elimination of quantitative restrictions, and transparency represent the pillars of the system). Everything else, that cannot be strictly labelled as 'trade' but merely 'trade-related', like the development and diffusion of renewable energy goods, services, and technologies, enter trade agreements through a few small windows. Such windows are generally worded as narrowly-constructed exceptions to the main free trade rules and principles, allowing for a certain flexibility in countries' domestic policy decisions in a number of areas, including that of environmental protection. The original text of the 1947 GATT, introduced two such exceptions at Article XX, letters b and g, which allow Member States to violate other GATT provisions with the adoption of measures "*necessary to protect human, animal, or plant life or health*" or "*relating to the conservation of exhaustible natural resources*",

95 Knox 2010, at 395. Samuel Barkin, "Trade and Environment Institution," in *Handbook on Trade and the Environment*, 2010: 318, 319.

provided they do not constitute an unnecessary or unjustifiable discrimination or a disguised restriction to trade.[96] Other provisions in other WTO agreements follow the same approach.[97] One of the elements of novelty of the Uruguay Round was the drafting of a brand new Preamble to the Marrakech Agreement establishing the WTO. This preamble identified sustainable development and environmental protection as legitimate objectives of the agreements and of the Organization itself. The language of the preamble has been often referred to by the WTO panels and Appellate Body to interpret WTO provisions and, in particular, said exceptions, when confronted with disputes regarding social or environmental measures.[98] This interpretation has allowed a less strict application of GATT Article XX. The latter has nevertheless remained a mere exception—a window—in a house where free trade remains the rule. As a consequence, this approach ultimately leads to the mere incorporation in the trade regime of any discussion on the relationship between trade and the environment—and more specifically renewable energy—thus creating a hierarchy between trade values and non-economic ones.[99]

As illustrated in the first part of this paper, this model has been used extensively by many FTAs, which have reproduced the wording of GATT Article XX, thus including an environmental exception amongst their provisions.[100] However, modern FTAs have mostly adopted a different model, called 'rules model' and pioneered by NAFTA, which differs from the 'exceptions model' in a number of ways.[101] In a nutshell, this model promotes environmental measures to the level of obligations, rather then mere exceptions, thus actively pushing for high levels of environmental protection and, in many of the cases analysed in this contribution, increasing use of alternative and renewable energy sources. This model was initially used by NAFTA negotiators and represented the core of the

96 GATT Art. XX, *chapeau*.

97 *See* GATS Art. XVI.

98 See *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* BISD/29S/91; *Canada – Measures affecting Exports of Unprocessed Herring and Salmon* BISD/35S/98; *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes* BISD/37S/200; *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2; *US – Import Prohibition of Certain Shrimps and Shrimp Products* WT/DS58; *EC- Measures Affecting the Prohibition of Asbestos and Asbestos Products,* Report of the Panel WT/DS135.

99 Jeffrey L. Dunoff, "Rethinking International Trade," *U. Pa. J. Int'l Econ. L.* 19 (1998).

100 *See* para. 3.4 above.

101 Knox 2010, at 395-96. Barkin 2010, at 395-98.

so-called 'Pollution-Haven Package', the introduction of which was the result of deepening fears that US and Canadian companies would relocate their operations in Mexico, where environmental standards were lower, thus having detrimental effects on the Mexican environment, and that the US and Canada would then lower their own environmental standards to keep companies at home leading to a snowballing 'race to the bottom'. The result of these fears has been the introduction, in the text of both NAFTA and NAAEC, of a number of provisions that directly address this issue and create environmental obligations for the Parties.[102]

More recent FTAs have adopted a similar 'rules model', including, in their text, provision directly aimed at regulating the Parties' environmental laws, regulations, and standards. Accordingly, the framework has changed, and now next to the free-trade principles generally enshrined in trade agreements, we can easily spot the explicit reference to environmental principles. These include the common-but-differentiated-responsibilities principle, the prevention and precautionary principles, the polluter-pays principle as well as the principle of sovereignty over natural resources.[103] Against this background, many FTAs contain several provisions that impose obligations on the Parties' law-making and policy-making activities. Examples are provided by those provisions that require the Parties to take into account scientific knowledge when designing environmental measures or assessment,[104] to ensure public participation in the adoption of environmental measures,[105] to make such measures public,[106] and to conduct periodic environmental impact assessments.[107] Finally, the institutional framework that most of these agreements establish helps monitoring and implementing these provisions, as the next paragraph will show.

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102 *NAAEC*, Arts. 1-8.

103 *See,* as way of example, Article 267(4) of the *EU-Colombia-Peru* FTA and 292 of the *EU-Ukraine* FTA. Article 73.2 of the EEA provides an excellent example: "*Action by the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay.*"

104 *See*, among others, *EU-Korea*, Art. 13.8; *EU-Ukraine*, Art. 297; *EU-Singapore*, Art. 13.9; *CETA*, Art. 24.8.

105 *See*, among others, *EU-Singapore*, Art. 13.13; *CETA*, Art. 24.7. *US-Singapore*, Art. 18.5; *US-Colombia*, Art. 18.7; *US-South Korea*, Art. 20.7; *TPP*, Arts. 20.8-9.

106 *See*, among others, *CETA*, Art. 24.7 and *TPP*, Art. 20.7.

107 *See*, among others, *EU-Singapore*, Art. 13.14.

4.2. Commitment towards dispute prevention

The 'exception model' employed by WTO Agreements leads to balancing free trade and other values judicially through a dispute settlement process, focusing on the eligibility of the respondent state under GATT Article XX or other equivalent exception clauses. The lack of environmental rules—let alone rules on renewable energy—leads to the decision of such disputes almost solely based on standards developed and applied by the WTO adjudicatory bodies. The panel and Appellate Body can apply only WTO provisions, while they are not allowed to apply provisions contained in environmental agreements, which they can only take into account in the interpretive process, pursuant to Article 31 of the VCLT. As a result, environmental principles end up playing a secondary role when compared to WTO provisions in any given WTO dispute. An early example is provided by the 1986 *US – Trade Measures Affecting Nicaragua* dispute, where the panel, while agreeing with Nicaragua that the GATT could not operate in a vacuum and that GATT provisions must be interpreted within the context of the general principles of international law, nevertheless considered it to be outside its mandate to take up the questions at stake because the Panel's task was to examine the case before it "*in the light of the relevant GATT provisions*", although they might be inadequate and incomplete for the purpose.[108] Although the introduction of the objective of sustainable development in the preamble to the 1995 WTO Agreement has led to the adoption of more environmentally-friendly panel and Appellate Body reports, where the very same provisions have been interpreted more broadly,[109] ultimately WTO panels and Appellate Body are only required to apply the provisions contained in the 'covered agreements' and therefore environmental norms can be used solely to interpret said provisions as "*relevant rule[s] of international law applicable between the Parties*" under Article 31(3)(c) of the VCLT (*see* infra para. 4.3).

On the other hand, many recent FTAs set up number of institutional and procedural mechanisms, which are aimed at dispute prevention, rather than dispute resolution. These mechanisms include the establishment of national or bilateral bodies invested with monitoring and enforcement powers, which ensure

108 *US – Trade Measures Affecting Nicaragua* (Report of the Panel, L/6053) 13 October 1986, para 5.15.

109 *See supra* note 20-21.

the correct implementation of the agreement by the Parties.[110] Additionally, many FTAs provide for multiple consultation stages before the dispute settlement mechanism is triggered. Most agreements signed by the US, for instance, call for two initial stages of consultations—three stages under the TPP[111]—where Parties to the agreement bring issues to light with the intent to find a mutually satisfactory solution. By doing so, they provide for one, sometimes even two, additional stages of consultations compared to the WTO system. Only if consultations fail to resolve the dispute, Parties may bring the claims before a dispute panel.

Another element that is fairly new in FTAs and that works in this direction is the possibility for institutions created under the environmental and trade chapters to cooperate in a number of areas, including dispute prevention. NAFTA offers a quite interesting example of such model. NAAEC created the Commission on Environmental Cooperation (CEC), while NAFTA established the Free Trade Commission (FTC). Article 10.6 of the NAAEC provides that the Council of CEC *shall* cooperate with the FTC to achieve NAFTA's environmental goals and objectives. To this end, the CEC has the mandate to, *inter alia*, provide assistance in consultations under Article 1114 of NAFTA,[112] contribute to the *prevention* or resolution of environment-related trade disputes by seeking to avoid disputes, making recommendations to the FTC about the avoidance of such disputes, and identifying experts able to provide information or technical advice to NAFTA committees, working groups, and other NAFTA bodies, and to otherwise assist the Free Trade Commission in environment-related matters. This provision expressly mentions *dispute* prevention as one of the main objectives of the CEC-FTC cooperation, and some of the tasks assigned to the CEC could actively contribute to the achievement of this goal. Although, unfortunately, there has been no concrete progress toward developing an ongoing mechanism for the institutional cooperation contemplated in the NAAEC, the insertion of this

110 On October 5, 2015, the White House issued a statement by the President on the TPP, declaring that the new agreement "*includes the strongest commitments on labour and the environment of any trade agreement in history, and those commitments are enforceable, unlike in past agreements.*"

111 *TPP*, Arts. 20.20, 20.21, 20.22.

112 *NAFTA*, Art. 1114 (Environmental Measures) reads, in the relevant part: "*The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. […] If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.*"

provision clearly shows the commitment of the negotiators towards increasing dispute prevention.

An overall assessment of the effectiveness of these mechanisms would require empirical research, which could be taken up by future scholarship. The reason for it is that the simple acknowledgement that, unlike for WTO Agreements, where a quite rich case law exists, no trade-environment dispute has ever been brought to either the trade or environmental dispute settlement procedures set up by FTAs[113] is not in itself sufficient evidence of the efficacy of FTAs in preventing disputes. As a matter of fact, the lack of disputes under the dispute settlement mechanisms established by FTAs can sometimes be explained with the decision of the complainant to bring the dispute at the WTO. This can happen in any case of overlapping jurisdiction, which may occur whenever trade disputes arise between the Parties to an FTA, who are also WTO Members regarding obligations that are the same or similar to those of a covered agreement.[114] As the Appellate Body noted in *Peru – Agricultural Products*, it is up to the challenging Member to choose the appropriate forum,[115] and several can be the reasons why a State might choose the WTO rather than an FTA dispute settlement system. Such factors include the costs of bringing a dispute, the efficacy of the forum, as well as the subject matter of the dispute or the scale of its relevance. The *US – Tuna II (Mexico)*[116] dispute shows that when a dispute involves systemic issues with multilateral implications, the WTO represents a more suitable forum. Moreover, even if a dispute is brought under an FTA dispute settlement mechanism, only the Parties to the FTA can participate, which might prompt other WTO Members who are affected by the same measure to bring a parallel dispute at the WTO.

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113 The only disputes that exist under NAFTA have been brought under Chapter 11 (Investment) and were not trade-related. For an overview of environment-related investment disputes, *see* Jorge E. Viñuales, "Foreign Investment and the Environment in International Law: The Current State of Play," in Kate Miles (ed.), *Research Handbook on Environment and Investment Law,* Cheltenham: Edward Elgar, 2016.

114 *See* Gabrielle Marceau, "The Primacy of the WTO Dispute Settlement System," *Questions of International Law* (Dec. 23, 2015), available at http://www.qil-qdi.org/the-primacy-of-the-wto-dispute-settlement-system/ (last accessed Nov. 15, 2016).

115 Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R (Aug. 31, 2015), para. 5.18.

116 *United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, DS381.

Therefore, Parties might choose to challenge the measure directly at the WTO precisely to avoid such duplication of proceedings.[117]

4.3. Towards a more 'balanced' dispute resolution

Besides the commitment towards dispute prevention, free trade agreements regulate dispute resolution, including through a range of consultative and dispute settlement mechanisms. In most FTAs, the general dispute settlement procedures cover all the chapters of the agreement, including the one on the environment (or sustainable development). This is the case of the TPP, as well as all trade agreements signed by the US after 2007. Many agreements signed by the EU, on the other hand, allow the Parties to only have recourse to the procedures especially provided for in the chapters on 'environment' or 'sustainable development' for any matter arising under those chapters. These procedures are often weaker then those provided for the remaining chapters, as they tend to only include government consultations and the establishment of a panel of experts. Nevertheless, they do exist, and allow for a more balanced dispute settlement process than the one offered by the WTO DSB for two reasons.

First, they allow for 'environmental voices' to be heard. As a matter of fact, while all trade disputes—even when they involve non-trade concerns such as the protection of the environment—can be brought to the WTO, environmental disputes cannot be judged by an international environmental tribunal. It follows that, at the multilateral level, a state wanting to enforce compliance with an international environmental norm can, having no recourse to international adjudication, adopt trade sanctions against the alleged violator. However, in this case, the latter will be able to complain at the WTO, while the state imposing the sanction will not have any court to resort to.[118] Dispute settlement mechanisms introduced by FTAs make up for this shortcoming by allowing Parties to challenge the other Party's violation of any environmental provisions of the Agreement. In addition to party dispute settlement, in the attempt to contribute to the enforcement of environmental commitments, most US agreements, including the

117 Marceau 2015. *See also* Claude Chase et al, "Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?" WTO Staff Working Paper ERSD-2013-07 (2013).

118 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, 2003: 23.

TPP, outline a framework for a public submission process. Through this process, any NGO or person residing in an FTA Party nation is allowed to file a submission asserting that a party is failing to implement or substantially enforce its own environmental laws.[119]

Second, were a trade dispute to arise under the FTA's dispute settlement mechanism, the adjudicatory bodies would have the power to interpret and apply all the provisions of the agreement, including those that deal with environmental protection. This possibility marks a clear departure from the WTO approach as the latter allows for environmental norms to enter a dispute only as "*relevant rule of international law applicable between the Parties*" under Article 31(3)(c) of the VCLT.[120] In case of disputes administered under an FTA, free trade principles and obligations on the one hand, and environmental principles and obligations on the other will have to be balanced against one another in each individual dispute.

4.4. A broader mandate

I argue that the features outlined in the previous paragraphs represent the consequence of a broader mandate of FTA negotiators and institutions when compared to that of the WTO bodies. The preamble to the 1947 GATT identifies the "*substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce*" as the Agreement's objective. Although, throughout the years, the issue area of the trade regime has expanded, and, as the preamble to the Marrakesh Agreement clarifies, sustainable development and the need to both protect and preserve the environment appear among the Organization's objectives, the leading justification

119 *Id.*

120 Certain non-WTO legal texts, such as the WCO Harmonized System (HS) Convention and the WIPO Copyright Treaty, have been given a higher prominence in the interpretation process by both the panel and the Appellate Body, being identified as 'context' under Article 31(2)(a) of the VCLT. Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R (Sep. 12, 2005), para. 199; Report of the Panel, *United States – Section 110(5) of the US Copyright Act*, (hereinafter *US – Section 110(5) Copyright Act*) WT/DS160/R (Jun. 15, 2000), paras. 6.43-6.70.

for a multilateral trading system is still an economic one that considers the reduction of trade barriers as the objective of the GATT first and of the WTO now.[121]

This understanding of the objective of the trade regime has affected the scope of the mandate of WTO bodies both at the political and judicial level. At the political level, the institution created at the end of the Uruguay Round to deal with trade and the environment, the Committee on Trade and Environment (CTE), has interpreted its mandate quite narrowly. The 1994 Decision establishing the CTE states that there should be no contradiction between upholding an "*open, non-discriminatory and equitable multilateral trading system [...] and acting for the protection of the environment, and the promotion of sustainable development*."[122] However, on the other hand, this cooperation should not exceed the competence of the multilateral trading system, which is here defined as "*limited to trade policies and those related aspects of environmental policies which may result in significant trade effects for its members*."[123] Whenever Members ask the CTE to deal with aspects related to environmental protection or sustainable development more broadly, the Committee generally dismisses such requests as they fall outside or go beyond the scope of its mandate. This tendency is clearly exemplified by the first meeting of the CTE in 1996, when it was stated that "*the WTO has no competence in the are of environmental matters per se*" and that

121 As summarized by Jackson, the objective of the GATT/WTO system "*is to liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as 'comparative advantage'.*" According to Brand, "*the fundamental goal of the WTO system is the reduction of trade barriers through rules consistent with the underlying theory of comparative advantage*," while as explained by Hudec, "*the GATT's economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies.*" These statements reflect one of the main models that have been used to justify the world trade system, the so-called 'efficiency model'. *See* John H Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?" *Wash. & Lee L. Rev* 49 (1992): 1227, 1231; Ronald A. Brand, "Sustaining the Development of International Trade and Environmental Law," *Vt. L. Rev.* 21 (1997): 823, 842. Two further models or explanations of the international trade regime can be traced back to game theory and to embedded liberalism. *See* Kenneth W. Abbott. "The Trading Nation's Dilemma: The Functions of the Law of International Trade." *Harv. Int'l. LJ* 26 (1985): 501 and John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," *International Organization* 36, No. 02 (1982): 379–415, respectively.

122 *Marrakech Declaration on Trade and Environment* (Apr.14, 1994). *See* also para. 6 of the Doha Declaration.

123 *Id.*

"*consideration of environmental principles lies outside the mandate of the WTO.*"[124]

Similarly, with regard to the judicial level, the WTO panels and Appellate Body have often stressed the limits of their own mandates. Not only are they only allowed to apply the covered agreements, but their interpretation of the organization's function and objectives leaves a limited space to other non-trade objectives of the regime. In the *US – Shrimps* dispute, which belongs to that group of disputes showing the greatest openness towards the environment so far, the Panel clarifies that the *chapeau* of GATT Article XX "*only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system.*"[125] The Panel continues:

> "*In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.*"[126]

At the bilateral and regional level, such constraints do not seem to exist. FTAs negotiators have a broad mandate, as they are capable of negotiating both trade and non-trade rules equally. Environmental organizations, such as UNEP, are even involved in supporting and advising negotiators when it comes to the drafting of environmental provisions when negotiators do not directly possess the relevant expertise. The long preambles to these agreements list a wide array of objectives that they aim to achieve, including sustainable development and the protection of the environment. All these objectives are *equally* part of the overarching purpose that guides the countries' negotiations as well as defines their future expectations.

Politically, the inclusion of environmental protection among the primary objectives of the agreements and the lack of the purely economic justification

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124 Report (1996) of the Committee on Trade and Environment, WT/CTE/1 (Nov. 12, 1996) paras. 9 and 48. During the same meeting, the view was expressed that the CTE "*has neither the mandate nor the capability to conduct studies on the environmental impact of service trade or its liberalization.*" *See* para. 157.

125 Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/R, §7.44.

126 *Id.*, § 7.45.

behind the creation of the multilateral trading system, is reflected in the mandate of the institutions established through the agreements themselves. Once again NAFTA offers a straightforward example, in that the Committee on Environmental Cooperation, and in particular the Council among its bodies, is invested with a competence in the area of environmental matters *per se*[127] and is asked to cooperate with the free trade commission precisely to achieve the environmental goals and objectives of the agreement.[128] Other FTAs, such as the TPP, create similar committees, invested with similar competences. At the judicial level, the members of a panel established under an FTA to decide a trade/environment dispute would have the capacity to apply all the provisions contained in the agreement, including environmental principles and rules and would not be constrained by an underlying purely economic rationale when interpreting their role.

5. CONCLUSIONS

Free Trade Agreements and WTO agreements are two very different creatures. Their goal is different, their functions are different, and the way they operate is different as well. The trends registered with regard to modern FTAs show a precise evolution in the way countries negotiate trade agreements and in the reasons underpinning such negotiations. An evolution towards what has been called 'deep integration', to refer to the harmonization and coordination of domestic non-trade policies, such as competition and environmental policies, labour and products standards, among others.[129] Such 'deep integration' goes beyond the immediate objectives of multilateral trade agreements, aimed at achieving trade liberalization through the removal of tariffs and non-tariff barriers.

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127 See Article 10 of NAAEC for a list of the Council's tasks.

128 *NAAEC*, Article 10.6.

129 The 2006 EU 'Global Europe' document lists, among the objectives of the new European FTA strategy, the need to "*tackle non tariff barriers through regulatory convergence whenever possible*." Pravin Krishna, "The Economics of PTAs," *in* Simon Lester & Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements. Commentary and Analysis*, Cambridge University Press, 2009: 11, 26. *See* Robert Z. Lawrence, *Regionalism, Multilateralism and Deeper Integration*, The Brookings Institution, 1997 and Arvind Panagariya, "The Regionalism Debate: An Overview," *World Economy* 22(4) (1999).

This evolution applies to all non-trade concerns with no notable exceptions, including renewable energy promotion. As this study as shown, most FTAs today include provision dealing directly or indirectly with renewable energy, not only through the creation of a certain policy space for countries to pursue their own environmental goals, but also through the introduction of concrete obligations that apply to all Parties to the agreement. Whether these agreements practically contribute to the promotion of renewable energy goods, services, and technologies and facilitate their trade and related investment, remains an open question, which falls outside the scope of this contribution and could be addressed by further empirical studies. What can be learned from this research, on the other hand, is that modern FTAs present certain new features which make them more suitable than their multilateral counterparts to achieve this goal.