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Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power*

ELIZABETH TRUJILLO**

ABSTRACT

As international trade receives the brunt of local discontent with globalization trends and recent changes by the Trump administration have put into question the viability of such trade arrangements moving forward, there has been a clear trend in using international trade fora for managing regulatory barriers on economic development. This paper will discuss this recent trend in international trade toward increased regulatory cooperation through the creation of formalized transnational regulatory bodies, such as the U.S.-EU Regulatory Cooperation Body that was being discussed in the TTIP negotiations and comparable ones in the Canadian-EU Trade Agreement as well as U.S.-Mexico and U.S.-Canada Regulatory Councils. In examining the informal transnational

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regulatory networks that have emerged from trade integration, it becomes clear that fragmentation has created non-centralized avenues for dialogue among various stakeholders to influence domestic regulation, especially in areas of environmental regulation, energy, and sustainable development. The paper argues that this trend has led toward the institutionalization of regulatory cooperation through preferential trade agreements, rather than multilaterally. Transnational regulatory networks and more formalized means of regulatory cooperation have influenced the executive branch, traditionally charged with negotiating trade agreements, from lead negotiator to a "regulatory partner" working not only for reducing barriers to trade, but also more specifically for the streamlining of regulatory standards that impact costs of inputs along the supply chain. Given today's negative climate around globalization and recent U.S. initiatives to diminish the role of agencies all together to implement regulation, this trend could take yet another turn—one that centralizes decisions regarding regulation in the President and his cabinet.

INTRODUCTION

As Brexit negotiations are under way in Brussels and NAFTA renegotiations continue on the other side of the Atlantic, one can only ponder at so much popular discontent over trade, twenty-three years after the "golden decade" for globalization. The 1990s was an important decade for globalization advocates: the European Union (EU) solidified its political and legal shape in November 1993 and the World Trade Organization came into existence with its robust dispute settlement body in January 1995. In 1994, the Free Trade Agreement for South American countries known as the MERCOSUR was finalized, and the North American Trade Agreement (NAFTA) was executed. What has been referred to as "the constitutional moment" for globalization was born;[1] international and regional institutions would be the guiding light for economic globalization through the rule of law and international courts. Despite the benefits that Europe, Britain, and the United States

1. *See, e.g.*, JOHN H. JACKSON, THE WORLD ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (1998); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); Joost Pauwelyn, The Transformation of World Trade, 104 MICH. L. REV. 1, 2 (2005); Robert Howse, *Moving the WTO Forward–One Case at a Time*, 42 CORNELL INT'L L.J. 223 (2009); Ernst-Ulrich Petersmann, *The WTO Constitution and the Millennium Round, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 111–133 (Marco Bronckers & Reinhard Quick eds., 2000). *But see* Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUROPEAN J. INT'L L. 647 (2006) (challenging the view that the WTO is a constitutional entity).

have enjoyed from international trade, being the major architects of the trading system and international institutions that we have today, these regions have exhibited a shift away from globalization toward isolationism, from liberalizing trade and integrating economies, toward protectionism. However, this trend has not diminished the role of transnationalism, particularly as it pertains to regulatory coordination among countries, especially at the regional level. This is primarily evident when taking a close look at recent negotiations for preferential trade agreements, such as the Trans-Pacific Partnership Agreement (TPP),[2] the Canadian-EU Trade Agreement (CETA), and the the Trans-Atlantic Trade and Partnership Agreement (TTIP). These agreements primarily address non-tariff barriers, as opposed to tariff barriers, and create mechanisms for institutionalizing regulatory coordination through the creation of transnational regulatory coordination committees and/or boards. In this way, they bring regulators and trade policy makers together and in turn, expand the influence of the U.S. executive branch in the development of regulations that are also trade-friendly.

This paper will examine the ways in which international trade agreements have influenced the role of the "transnational executive,"[3] bringing together agency expertise, through the negotiating power of the executive, with commerce and trade. In the United States, this trend, in combination with trade promotion or "fast-track" authority, which has limited the congressional ability to dispute already negotiated trade provisions once the agreement is ready for congressional vote, has expanded executive power to participate in regulatory processes in new ways, especially for the environment and energy. The paper will discuss the current trend in international trade toward increased regulatory cooperation through the creation of formalized transnational regulatory bodies, such as the U.S.-EU Regulatory Cooperation Body discussed in TTIP negotiations. It will examine the more informal transnational regulatory networks emerging from trade integration, as ways in which non-centralized avenues for dialogue among various stakeholders may influence domestic regulation, especially in areas of environmental regulation, energy, and

2. President Trump signed an executive order withdrawing the United States from the signed Trans-Pacific Partnership (TPP). Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017). However, the remaining parties continue ahead with a possible signing of the TPP, without the United States, in March 2018. *See* Shawn Donnan, et al., *Trans-Pacific Trade Deal to Go Ahead Without US*, FINANCIAL TIMES (Jan. 23, 2018), https://www.ft.com/content/7a10d70a-0031-11e8-9650-9c0ad2d7c5b5.

3. For discussions on the evolving legal system of transnationalism, see the collection of articles found in Issue 2 of Volume 24 of the *Indiana Journal of Global Legal Studies*.

sustainable development. In doing so, these regulatory networks change the role of the executive branch, traditionally charged with negotiating trade agreements, from lead negotiator to a "regulatory partner" working not only for reducing barriers to trade, but also more specifically for the streamlining of regulatory standards that impact costs of inputs along the supply chain.

The paper will proceed as follows. The first part will discuss recent changes in the approach of the executive branch when it comes to regulation, focusing on the traditional principles in administrative law that facilitate the use of trade agreements as platforms for domestic regulatory reform by the executive branch. Furthermore, it will demonstrate a trend in transnational cooperation among agencies across borders. It will also discuss some of the nuanced relationships among the legislative, judicial, and executive branches as the role of presidential authority shifts, especially when coupled with its power to negotiate international trade agreements which address domestic regulation.

The second section will discuss the ways regulation has changed from command and control mechanisms toward more market-driven voluntary forms of regulations. In this trend, regulatory networks have emerged, setting standards for countries and across borders. These transnational regulatory networks, consisting of state and non-state actors including the private sector have also influenced international standard-setting organizations as well as international trade. This bottom-up strategy for regulation has implications for governance;[4] and in particular, for the kinds of technical expertise reaching agencies. As regulators increasingly participate in the execution of trade agreements, they can also influence economic strategies.

The third part will examine recent trade agreements and their focus on the reduction of non-tariff barriers, rather than tariffs, and the development of transnational regulatory councils to enhance regulatory harmonization and convergence across borders. It will compare these trends in the NAFTA, CETA, TTIP, and TPP, and specifically consider the ramifications for environmental sustainable development and natural resources. Even though the TPP and TTIP agreements have been put on hold for now,[5] these plurilateral agreements marked an important trend in negotiating trade agreements, with a domestic emphasis on using preferential trade agreements to further economic

4. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 HARV. ENVTL. L. REV. 1, 1 (2001).

5. *See* references cited *supra* note 2.

and regulatory goals rather than the multilateral framework, and they will likely remain as models for future trade agreements.

Finally, the paper will discuss some of the challenges ahead with using international trade agreements as platforms for changing domestic regulatory policy. It will examine some ways in which this trend in preferential trade agreements not only impacts domestic policies but also those of the developing world. It will discuss the geopolitical contexts in which the transnational executive authority is negotiating such trade agreements, wherein different economic powers are impacting their outcome. Finally, the paper will conclude with reflections on the transformative effects on executive power in the context of trade and regulatory cohesion.

I. REGULATORY COORDINATION AND EXECUTIVE AUTHORITY IN THE UNITED STATES

President Obama's 2012 executive order, No. 13609, which was built on an earlier executive order calling for the improvement of regulation and regulatory review, directs executive branch agencies and encourages independent regulatory agencies to identify regulations with international impact and also to strive to eliminate unnecessary regulatory divergences.[6] It also explicitly recognizes the relevance in international trade in impacting and shaping domestic regulation.

The order defines "International regulatory cooperation" as a bilateral, regional, or multilateral process, other than processes that are covered by section 6(a)(ii), (iii), and (v) of this order, in which national governments engage in various forms of collaboration and communication with respect to regulations.[7]

This push for transnational regulatory cooperation and recognition of the role of international trade in shaping domestic regulation formally bridges the State Department and other administrative agencies in various ways, concentrating the responsibility of developing policies for the social policy space in the executive branch and less in the legislative. In part, it was a response to the need for interagency coordination, where many areas of regulation and administration are fragmented and have overlapping administrative scope.[8] One of the primary purposes of congressional delegation of authority to administrative agencies is to facilitate centers of expertise and

6. *See* Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012).

7. *Id.* at 26,414.

8. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133–34 (2012) (stating that "interagency coordination is one of the great challenges of modern governance").

specialization in key areas concerning the public interest, like environmental protection. However, with the increased number of agencies and specialized areas of expertise, there can be redundancy and inefficiency in the creation and execution of regulations.[9] Some scholars have suggested various ways in which there can be more streamlining of agency work, including various types of coordination tools such as interagency consultation, interagency agreements, and joint policymaking.[10] Another tool may include more centralized mechanisms through the President's ability to deploy different councils and task forces, bringing together various areas of expertise to consult on specific topics.[11] Using international trade agreements as a platform for aggregating agency expertise on issues from food safety and licensing measures, to management of fisheries and cross-border trade provides yet another avenue not only for agency coordination, but also for the President to use his authority as key trade negotiator to centralize these coordination efforts further and set the agenda for both international trade and regulation. Interestingly, one of the first regulatory agencies was the Interstate Commerce Commission (ICC), which, at the time, handled the regulatory aspects of the railroad industry in the late 1800s and was key to the economic development of the United States. In the years that followed, the U.S. Congress expanded its regulatory scope into areas of food and drugs, unfair competition, shipping, and radio. The next section will provide some background on the ways in which regulatory authority in the United States passed from the legislative branch to the executive one.

A. Regulatory Authority in the United States

1. Delegation and Chevron Doctrines

Professor Jaffe noted that delegation of legislative power to agencies is "the dynamo of modern social services state."[12] Debates in the United States around the delegation doctrine turn on the balance between whether such power should remain within congress or delegated to agencies and between decentralization by transferring such power to

9. *Id.* at 1135 (discussing areas where such redundancy and inefficiencies may manifest).

10. *See id.* at 1136.

11. *Id.*

12. Louis L. Jaffe, *An Essay on the Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 592 (1947).

bureaucratic yet specialized work of agency expertise.[13] Furthermore, the extent of federal agency power over state regulatory authority is not always clear under the Administrative Procedure Act,[14] despite the role of U.S. courts to strike the right balance.[15] Traditionally, the hope has been that the technical expertise of agencies would be better situated to implement congressional legislation, especially at the time of the New Deal when there was an increase of specialized agencies and rise in social programs. However, the extent to which agencies should have such authority has been the topic of much scholarly debate, especially concerning issues of accountability and the rights of individuals.[16]

Despite legislative powers in the United States being vested in Congress, throughout U.S. jurisprudential history, there has been an understanding that the resources of Congress may be best used by delegating some of its powers to more specialized agencies that can implement congressional statutes at lower decision costs.[17] Furthermore, under the Necessary and Proper Clause of Article I of the U.S. Constitution, Congress may establish, through statute, the establishment of a program along with implementation guidelines but delegate the actual implementation to the experts and technicians

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13. U.S. Constitution Article I, Section 1 provides the initial authority for Congress to legislate: "[a]ll legislative Powers herein granted shall be vested in a Congress . . . ." U.S. CONST. art. I, § 1. This Article has been the basis for the non-delegation doctrine in which the U.S. Supreme Court in 1892 reiterated the general principle that Congress cannot delegate its legislative power. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

14. Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2012).

15. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028 (2008) (examining "how the Court may be employing administrative law as a vehicle for addressing federalism concerns" and "assess[ing] how well administrative law performs this role and how the Court should understand the relationship between federalism and administrative law"). This article identifies the federalism-reinforcing features of Administrative law, but concludes that the Court's decisions have not gone far enough in this respect.

16. *See generally, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 132–33 (1980) (arguing that the Supreme Court, in reviewing administrative decisions, should devote itself to assuring majority governance while protecting minority rights); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 15–20 (1978) (examining the causes of the enduring sense of crisis associated with the administrative process and arguing a theory of legitimacy for the administrative process must be created); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 63 (1965) (proffering that courts and administrative agencies "are in a partnership of lawmaking and law-applying" that operates in a matrix of congressionally delegated authority).

17. *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (recognizing, for the first time, that Congress could delegate policymaking authority under "an intelligible principle" within the statute that would guide agency discretion); s*ee generally* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 9–36 (2001) (discussing the evolution of the delegation doctrine).

inside an agency.[18] The Supreme Court has struggled with the pragmatism of the delegation doctrine with the need to protect the democratic principle of ensuring that decisions concerning social policy remain within the legislative branch rather than in the hands of technocrats that may not come under the same scrutiny ensured by the democratic process.[19]

Overall, the traditional literature for Congress's delegation power is that delegation takes away its own policy-making authority, transferring it to the executive branch, as the heads of agencies are Presidential appointments and members of his cabinet.[20] This transference, however, is a zero-sum game because Congress will always fight for its legislative authority when necessary and structural competition among the branches will prevent from overreach of any one branch.[21]

In addition to the delegation doctrine, Courts have used the *Chevron* doctrine to provide deference to agency decisions when there are gaps or ambiguities in the congressional statute regarding issues within the agency's purview. The Court noted in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, that "the court may not substitute its own construction for a reasonable interpretation"[22] by an agency. A detailed analysis of judicial nuances of the *Chevron* doctrine is beyond the scope of this paper. Suffice it to say that it allows the Court to provide a reasonable review of the agency's analysis of the text of a statute in conjunction with a

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18. U.S. CONST. art. I, § 8, cl. 18. For judicial elaboration on the contours of the justifications of such delegation, see, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that the Live Poultry Code, approved by an executive order, was invalid because Congress had improperly delegated legislative power to the Executive Branch); J.W. Hampton Jr. & Co., 276 U.S. at 396 (finding that Congress could not delegate its purely legislative power to a commission, but, having laid down the general rules under which a commission should proceed, it could require the application of such rules to particular situations).

19. A "public interest" perspective on administrative agencies focuses on the role of agencies as being for the promotion of a social policy or "public value." A "public choice" view would emphasize that administrative agencies are the result of competing interest groups and self-serving legislators. *See* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148–49 (1977) (distinguishing between the two models).

20. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1469–76 (2015) (discussing the conventional separation of power issues with the delegation doctrine).

21. *See id.* at 1468; *see also* Jack M. Beermann, *Congressional Administration,* 43 SAN DIEGO L. REV. 61, 147 (2006); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2359 (2006); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004).

22. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984).

court's inquiry into the legislative purposes behind the measure in question.[23] It also stands for the general principle that if the agency's review is reasonable, the Court will defer to the agency interpretation of the law in question, which may include not only a statutory provision but also the scope of agency expertise as well as relevant procedural formats.[24] Justice Scalia embraced the idea that judicial deference to agency interpretations forced the legislative branch to "bear the 'costs' of delegations by assigning policy-making choices to the executive[,]"[25] which in turn caused Congress to "choose when and how it delegates authority."[26] Furthermore, such judicial deference allows courts to deflect judicial lawmaking to the executive branch, thereby allowing the political process to "correct" any "excessive [congressional] delegations."[27]

While much of the traditional literature on agency power focuses on specific areas of public policy with which each agency specializes, calls for efficiency and more transparency among different regulatory spheres have allowed for enhanced inter-agency coordination. This "shared regulatory space" would allow regulators from different specialized agencies to better coordinate policies with overlapping goals.[28] Fragmentation of agencies can result in regulatory bargaining over which agency is best situated to oversee certain regulations; this in turn can have perverse effects on the stringency of certain regulations such as environmental protection. Legislators, regulators, and the President may have varying views in this regulatory bargaining process. Lawmakers may address these areas of conflict in different ways, including creating new agencies or delegating policy discretion to more than one agency, creating fragmentation.[29] At times, fragmentation may allow for more independence and specialization of agency work. On the

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23. AMAN & MAYTON, *supra* note 17, at 492.

24. *See id.*; *see also* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999). Relevant case law regarding judicial interpretations of reasonableness include: AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999); Continental Air Lines, Inc. v. DOT, 843 F.2d 410 (D.C. Cir. 1988); Int'l Union, UMW v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988); NRDC v. Thomas, 805 F.2d 410 (D.C. Cir. 1986).

25. Rao, *supra* note 20, at 1474.

26. Decker v. Northwest Envtl. Def. Ctr., 568 U.S. 597, 619 (2013).

27. Rao, *supra* note 20, at 1475.

28. *See* Freeman & Rossi, *supra* note 8, at 1136. *But see* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (proposing that agency heads possess substantial discretion in reorganizing the internal structures and processes of an agency and that as a result of this authority and external political factors, the unit of analysis should be primarily on intra-agency coordination, rather than on inter-agency coordination).

29. *See* Freeman & Rossi, *supra* note 8, at 1141.

other hand though, resulting redundancies and inefficiencies can undermine the regulatory goals themselves.[30]

Cross-border regulatory cooperation, through transnational networks, has allowed for increased dialogue among regulators across borders.[31] This paper will further discuss the ways in which recent trends in international trade agreements to establish mechanisms for cross-border regulatory coherence have further expanded this "shared regulatory space," allowing the executive branch to merge domestic regulatory goals with that of trade liberalization policy. In doing so, domestic agency coordination may be enhanced, but also regulatory bargaining becomes more centralized in the executive power through the President's constitutional authority to negotiate trade agreements.[32]

The expansion of congressional delegation authority, along with its close brother the *Chevron* doctrine, combined with the trade promotion authority (fast-track authority), which takes away some congressional power over approval of trade agreements, raises important questions about the transformative power of international trade on the power of the executive branch in the United States.[33]

2. Trade Promotion Authority

Foreign affairs, which include the negotiation of international treaties, does not belong exclusively to Congress. Broad delegations of congressional power to the executive branch are traditionally tolerated as decided in the Supreme Court case, *United States v. Curtiss-Wright Export Corp*., which involved Presidential authority with respect to international sale of arms involving U.S. companies.[34] International trade is both within the scope of congressional authority, under the Commerce Clause of the Article 1, section 8 of the U.S. Constitution, as well as within that of the executive branch under Article II. The

30. *See id.* at 1141–45.

31. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (describing government officials' networks to exchange information and coordinate activity across national borders to tackle crime, terrorism, and daily international interactions).

32. Article II §2 provides the President with authority to enter into treaties with two-thirds of Senate approval. U.S. CONST. art. II, § 2. But see U.S. CONST. art. I, § 8 which provides Congress with the authority to regulate commerce.

33. Bipartisan Comprehensive Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (2015); Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015); *see also* Ian F. Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, CONG. RES. SERV. 2–8 (June 15, 2015) (summarizing history of Trade Promotion Authority and legislative renewals of Trade Agreements Authority).

34. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

President has the power to make Treaties but only with the "consent and advice" of two-thirds of the Senate.[35]

The congressional Trade Promotion Authority, or "fast-track authority," first put into place in the 1970s, allows for increased inter-branch harmony and efficiency.[36] In short, from 1974 to 1993, Congress allowed that, in turn for being updated during the negotiation process of a trade treaty, there would only be an up or down vote (without amendments) and a simple majority in voting for the final negotiated agreement.[37] It is an authority granted for a temporary period of time before it must be renewed by Congress, which occurred prior to the approval of the NAFTA in 1994. In 2002, President Bush signed the Trade Act which included a renewal of fast-track authority and which provided for some changes in procedures to allow for more input from Congress during the negotiating process.[38] Under this Bipartisan Trade Promotion Authority, several U.S. trade agreements were signed including Colombia, Panama, and South Korea.[39]

The fast-track authority has been criticized by many as being undemocratic, a means of circumventing the democratic process of legislative debate on issues of international trade which are, in principle, within the power of the legislative branch under the Commerce Clause.[40] However, these debates have been somewhat quieted with the understanding that for a temporary period of time,

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35. U.S. CONST. art. I, § 8.

36. Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 695 (1996).

37. CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL D. WATKINS, 1 CASE STUDIES IN U.S. TRADE NEGOTIATION, at 187–94 (2006).

38. Trade Act of 2002, 19 U.S.C. §§ 3803–3805 (2004).

39. *See* REPORT TO CONGRESS ON THE EXTENSION OF TRADE PROMOTION AUTHORITY: CONSISTENT WITH SECTION 2103(C)(2) OF THE TRADE ACT OF 2002 (2005).

40. *See, e.g.,* Leslie Alan Glick, *World Trade After September 11, 2001: The U.S. Response*, 35 CORNELL INT'L L.J. 627, 637–38 (2002) (discussing Congress's debate over legislative authority and the constitutionality of TPA); Natalie R. Minter, *Fast Track Procedures: Do They Infringe upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107 (1995). *But see* Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 236 (1995) (discussing the ways that fast track provides necessary flexibility to the Executive Branch in negotiating trade agreements) and Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 143–48 (1992) (arguing that fast track is not undemocractic). In the context of NAFTA and fast-track authority, see the debate regarding "congressional-executive agreements" in Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1223 (1995); and David M. Golove, *Against Free-Form Formalism*, N.Y.U. L. REV. 1791 (1998).

such authority is constitutional.[41] Furthermore, the renewal within the 2002 Trade Act allowed for increased participation and comment during the treaty negotiation process, tempering concerns of a steep democratic deficit at play. Though the 2002 Trade Act expired in 2007, it remained in effect for agreements already being negotiated until their execution.[42] In preparation for the conclusion of the TPP and TTIP agreements, Congress in 2015 approved the Trade Preferences Extension Act, signed into law by President Obama.[43]

When fast-track authority is understood together with congressional delegation power and the *Chevron* doctrine, it raises interesting questions regarding (1) the role of administrative agencies in shaping executive authority when it comes to policies that will impact domestic regulatory practices vis-à-vis trade liberalization policies; and (2) the ways in which recent preferential trade agreements containing more formal structures for enhanced cross-border regulatory convergence, have the effect of concentrating regulatory priorities in the executive branch, away from the legislative branch. As a result, the expert knowledge of administrative agencies transforms to include trade liberalization goals and vice versa. This is especially true in the recent models for trade agreements where the focus of negotiations has been less on tariff reduction and more on non-tariff management, which in turn, requires increased regulatory convergence across borders. This will be further explored in the following sections which will focus on the relevance of two trends in this context: (1) the ways in which international trade impacts domestic regulation; and (2) the ways in which regulation has transitioned toward more market-driven mechanisms rather than traditional command and control forms of regulation.

B. Regulatory Convergence through International Trade

International trade rules encourage trade liberalization and discipline governments from passing protectionist measures. Article III of the General Agreement on Trade and Tariffs (GATT) provides that fiscal and non-fiscal measures must not discriminate against imports as compared to "like domestic products."[44] While tariffs have significantly

41. *See* Margaret M. Kim, *Trade Promotion Authority: Evaluating the Necessity of Congressional Oversight and Accountability*, 40 SETON HALL LEGIS. J. 317, 325–26 (2016) (discussing constitutional basis of TPA).

42. Among the trade agreements approved during this time are: U.S.-Panama, U.S.-Colombia, and U.S.-Peru.

43. Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015).

44. *See* General Agreement on Tariffs and Trade, Art. III, Oct. 30, 1947, 61 Stat. pt. 5.

been reduced worldwide, non-tariff barriers (NTBs), those non-fiscal measures (such as regulatory measures) that may impact trade, still challenge international trade regimes. For this reason, much of the focus of the TPP and the TTIP negotiations were on finding ways to reduce non-tariff barriers, both through direct commitments in certain sectors like licensing requirements for intellectual property rights,[45] but also by establishing specialized committees and transnational regulatory coordination bodies that would encourage and allow regulators of Parties to convene, review, and monitor the establishment and implementation of regulation.[46]

Through the trade governance mechanisms found in the WTO and preferential trade agreements, the relationship between trade norms and regulatory ones has evolved, and in some instances, become more intertwined. This is particularly evident in the area of trade and environment, the relationship which will be the focus in this paper as it relates to regulatory convergence. There are key moments where the contestation of trade goals with those of environmental sustainability have allowed for the emergence of a dialogical focus on the contours of the relationship, allowing for possible shifts in the normative objectives of either domain while considering the multilateral, regional, and domestic aspects.[47]

A dialogic approach has traditionally been associated with the role of courts and the ways in which they "communicate" with other branches of government. In international law, scholars such as Ruti Teitel and Anne-Marie Slaughter have examined the various ways that judicial comity manifests itself transnationally—fostering international reciprocity of international norms and enhancing the ability of these norms to travel across jurisdictional lines, even taking hold domestically. [48] In the trade context, different legal norms may interact transnationally. These interactions allow for cross-fertilization of trade

45. *See* Trans-Pacific Partnership Agreement, arts. 18.1-.83, Feb. 4, 2016 [hereinafter TPP], https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

46. *See generally infra* Part IV, section A.

47. *See generally* Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16 J. INT'L ECON. L. 535 (2013) (using a dialogical approach to examine the vertical, horizontal, and diagonal dimensions of the trade and environmental relationship resulting in increased convergence between the norms of these two camps).

48. *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication,* 29 U. RICH. L. REV. 99, 117–19 (1994) (proposing that transnational judicial communication allows for norms to travel across legal systems and therefore, enhance cross fertilization for dissimilar areas of the law); *see also* Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 Harv. L. Rev. 2570, 2584–87 (2004).

and non-trade issues.[49] In focusing on the "dialogue" between trade and environmental norms through the vertical relationship between WTO dispute settlement bodies and regulatory processes of Member States, there is a dynamic process of the judiciary "engaging" with elements of domestic agency decisions.[50] Trade dispute settlement bodies decide the viability of non-tariff trade barriers under trade jurisprudence for example.[51] This process has in fact forced trade adjudicators into legal areas outside the trade scope, including environmental law and domestic regulation. An example of this is one of the first trade and environment cases, *US Tuna I*, in which the GATT dispute settlement body had to decide whether a U.S. moratorium on imports of Mexican yellowfin tuna under the U.S. Marine Mammal Protection Act violated trade commitments.[52]

Furthermore, the committee work of the WTO specialized bodies has an administrative character, especially as it supports the Secretariat on specific challenges for trade, such as the tense relationship between trade and environment.[53] The horizontal relationship between the adjudicatory and administrative functions of the WTO creates another form of dialogue that may lead to cross-fertilization of trade and environmental norms. The discursive and dynamic aspects of adjudication can find their way into the administrative function of the WTO.[54] The workings of the Secretariat and its working groups and committees allows the administrative parts of the WTO to become a political forum through which Member States may dialogue and reach

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49. *See generally* Trujillo, *A Dialogical Approach*, *supra* note 47 (discussing ways that trade and environmental norms travel transnationally and converge).

50. *See* Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161 (2000) (discussing the dialogic aspects of the judiciary interacting with non-judiciary elements); *see also* ELIZABETH TRUJILLO, REFRAMING THE TRADE AND ENVIRONMENT LINKAGE FOR SUSTAINABLE DEVELOPMENT IN A FRAGMENTED WORLD (forthcoming 2018) (reframing the trade and environment relationship through a sustainable development lens and using a dialogical approach to identify three ways in which trade and environmental norms have converged during the various phases of the trade and environment relationship: vertically, horizontally, and diagonally).

51. *See infra* Part II.

52. Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991) [hereinafter *US-Tuna I*] (concerning quantitative restrictions prohibitions under GATT Article IX; however, the DSB stated that if GATT Article III applied to this case, there could in fact be a violation of national treatment commitments).

53. *See* Trujillo, *A Dialogical Approach*, *supra* note 47, at 539 (proposing that adjudication is only one aspect of cross-fertilization of trade and environmental issues and "[t]he discursive and dynamic aspects of adjudication can find their way into the administrative function of the WTO," also contributing toward cross-fertilization of environmental and trade norms).

54. *See id*.

agreement (or not) on matters concerning trade and the environment.[55] Furthermore, committee decisions (and ministerial decisions) may in fact influence treaty interpretations of dispute settlement bodies, further impacting the ways in which trade and environmental issues may converge.[56] Another way in which trade and environmental norms converge vertically, and horizontally in some instances, is in the interaction between the multilateral framework of the WTO and the regional frameworks of preferential trade agreements, such as the MERCOSUR. *Brazil-Recycled Tyres*,[57] concerning Brazil's moratorium on the importation of recycled tires for non-MERCOSUR members, provides an example of this dynamic.[58] However, a detailed discussion on these vertical and horizontal dimensions is beyond the scope of the paper, as the primary focus will be on a third dimension for trade and environmental normative convergence.[59]

A diagonal approach allows us to appreciate the impact that fragmentation has on the convergence of trade and environmental norms. From this perspective, there is no hierarchy *per se* in which to invoke various legal norms[60]—a trade dispute settlement body may consider legal norms in or outside of trade or in other international treaties and international environmental communities may be borrowed from trade norms.[61] In this context, there may be parallel regimes having jurisdiction on similar issues—regional/multilateral, such as in

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55. *See* Shaffer, *supra* note 4 (applying three alternative frames of the WTO's handling of trade and environmental issues, the author discusses the "intergovernmental perspective" as one that allows states to bargain in the WTO Committee on Trade and Environment and respond to various stakeholder interests).

56. *See, e.g.*, Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011) [hereinafter *US-Tuna II*] (using a TBT Committee decision, the WTO Appellate Body determined the meaning of "international standards" in the TBT Agreement). *See generally*, Trujillo, *A Dialogical Approach*, *supra* note 47, at 560–562.

57. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

58. For more discussion on this dynamic, see generally Trujillo, *A Dialogical Approach*, *supra* note 47, at 562–573.

59. For a discussion on the vertical and horizontal dimensions of normative convergence of trade and environmental issues, see generally TRUJILLO, *supra* note 50; Trujillo, *A Dialogical Approach*, *supra* note 47.

60. Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 85, U.N. Doc. A/CN.4/L.682 (2006) (stating that the main sources of international law are not in a hierarchical relationship inter se).

61. *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2049–50 (explaining that one characteristic of a dialogical approach is that it has "bidirectionality"; and therefore, any court may initiate dialogue and engage with the jurisprudence of another).

the case of *Chile-Swordfish*, which was brought as both a WTO case and a UNCLOS case.[62] Because of the lack of hierarchy, the fragmentation in trade adjudication becomes particularly relevant in understanding the ways in which environmental issues and trade cross-fertilize, especially with respect to vertical and horizontal forms of judicial engagement.[63]

In addition and particularly relevant to this paper, this view also highlights the less formal means of convergence; namely, through the emergence of transnational regulatory norms which include voluntary, market-driven forms of regulation instead of the traditional command and control regulatory measures imposed and monitored by governments. These can include, for example, labeling schemes which are usually established by non-state actors like NGOs and sometimes monitored in conjuction with government.[64] The following section will focus on this form of convergence, in which regulatory networks create informal collaborations that help to establish new regulatory norms from the bottom up, and which eventually find their way into the regulatory processes of governments. Trade agreements are becoming one way to adopt these forms of regulatory norms.

II. REGULATORY NETWORKS AS PART OF TRANSNATIONAL GOVERNANCE

A. "Informal Collaboration": Transnational Regulatory Norms

The development of transnational regulatory coordination bodies such as the U.S.-Mexico Regulatory Cooperation Council; the U.S.-Canada Regulatory Cooperation Council; and the one being discussed in the TTIP, the U.S.-EU Regulatory Cooperation Body, seems like a natural progression in the life of transnational regulatory norms. Much

62. Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WTO Doc. WT/DS193/1 (Apr. 19, 2000); Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Case No. 7, Order of Dec. 16, 2003, ITLOS Rep. 65, 69–71, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/7_order_161203_en.pdf.

63. *See* Trujillo, *A Dialogical Approach*, *supra* note 47, at 568–577 (discussing the role of fragmentation in understanding the less formal means of convergence). *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICHMOND L. REV. 99 (exploring the commonalities in the various horizontal and vertical forms of communication among courts transnationally).

64. *See* Trujillo, *A Dialogical Approach*, *supra* note 47, at 579 (stating, "[i]n this new form of regulation, [non-state actors like] NGOs and private actors are working with intergovernmental organizations and governments to help create and monitor such standards").

has been written regarding the ways in which globalization has allowed regulators from different countries to increasingly work together to develop understanding of regulation across boundaries and in turn, influence the creation of new regulations, from the "bottom up."[65]

Transnational regulatory norms are those that derive from public and private networks working together to create standards and regulations that may or may not be necessarily mandatory, but that do get adopted either through industry practice, industry consensus, and/or the forces of the free market. They are transnational because they move across borders and sometimes across international regimes.[66] More understanding on these various movements of norms is needed; however, the actual movement from domestic across borders is *transnational* in nature and in scope.[67]

On the regulatory front, increasing transnational structures and partnerships allow for the establishment of new standards and regulatory change. Many of the transnational regulatory norms arising from these partnerships are different from traditional forms of state regulation because (1) they do not necessarily derive from state government processes; (2) they are not always mandatory; and (3) they are not specifically enforced by the state but rather by private entities responding to market pressures. NGOs have demanded stricter regulation of international businesses and the protection of labor rights and the environment. This has led to increased awareness of the need for corporate social responsibility, for example, which is even reflected in various sections of the TPP such as the investment, labor, and environment chapters of the same agreement.[68] While it is true that the corporate social responsibility provisions only require that parties encourage the enterprises operating in their respective territories to voluntarily implement voluntary standards of corporate social

65. *See, e.g.*, Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 204 (Michael Byers ed., 2000); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

66. *See* Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 246–47 (2012); *see also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003).

67. Shaffer, *supra* note 4, at 4 (distinguishing global law from transnational and explaining that there may be global law that moves through the international regime framework to influence or affect domestic law).

68. *See* TPP, *supra* note 45, art. 9.16; *id.* art. 19.7 (relating to labor); *id.* art. 20.10, (relating to the environment).

responsibility for their corporate practices, it is groundbreaking for trade agreements to incorporate such provisions at all.

Transnational regulatory norms also evolve from private actors working with intergovernmental organizations and NGOs to help create such standards. Some examples of relevant intergovernmental standards would include the International Organization for Standardization (ISO) and the Codex Alimentarius Commission. Both were established through the WTO to help set harmonized standards for creating environmentally safe products and food standards in the case of Codex. In these ways, global norms trickle down toward the domestic and the transnational.[69] Private firms have also collaborated with each of these global entities to create networks through which standards may be implemented and monitored by third parties. Many times these networks use standards by the intergovernmental organization. These networks allow for interaction of global regulatory norms and transnational ones, where the state may play a role but is not necessarily the source of regulation. In this way, global regulatory norms converge with transnational ones, impacting the ways in which regulations are implemented domestically.

Transnational regulatory norms are particularly evident with respect to labeling schemes. An eco-label, for example, is one that identifies the product's impact on the environment based on the life cycle of the product. It provides information to consumers about the relative environmental quality of a product. Several eco-labeling schemes, both public and private and even public/private regulatory schemes, turn to the international global standards of the ISO and Global Ecolabelling Network for guidance.[70] The Global Ecolabelling Network, for example, is a non-profit organization consisting of private and public organizations that operate eco-labeling schemes and

69. Shaffer, *supra* note 66, at 232 (distinguishing between global laws, which are "universal legal norms [that] are being created and diffused globally in different legal domains[,]" and transnational law, which "comprises legal norms that apply across borders to parties located in more than one jurisdiction").

70. Such eco-labels that use ISO and Global Ecolabelling Network include: Good Environmental Choice Australia; Biogarantie and Ecogarantie (Belgium); Qualidad Ambiental (Brazil); California Certified Organic Farmers; Canada Organic; Huan (China); Eco-Management and Audit Scheme (EU); Green Label (Hong Kong); Eco-Mark (Japan); Ecoleaf (Japan); carboNZero (New Zealand); Vitality Leaf (Russia); Singapore Green Labelling Scheme (Singapore); E-Mark (South Korea); Green Mark (Taiwan); Green Seal (United States). Many countries, including the United States, have multiple eco-labels, some referring to ISO but others with unknown resources or other private resources for guidance, such as ISEAL Code of Good Practice for Setting Social and Environmental Standards.

programs around the world, which comport with the ISO standards.[71] It includes outside monitoring and is voluntary.[72] Other schemes, especially in the United States, look to national standards, which are not necessarily connected to the ISO or any other international standardizing organization. In the EU, mandatory standards are not uncommon, though they usually are monitored and implemented by Member States even if the standards may be set by the EU Commission.

This changing regulatory landscape changes the state's traditional role in creating, monitoring, and enforcing regulation, for the private sector and civil society has taken on a larger role in setting regulatory standards and enforcing them.[73] This dynamic, which has been termed the "Transnational New Governance model," accommodates for the growing number of public-private partnerships establishing regulatory standards moving beyond borders.[74] NGOs such as Rainforest Alliance; the Brazilian IMAFLORA; and the Brazilian coffee industry association, ABIC, are working together to certify Brazilian coffee as "sustainable" and using the Rainforest Alliance Certified seal.[75]

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71. *See generally* GLOBAL ECOLABELLING NETWORK, https://globalecolabelling.net (last visited Jan. 31, 2018). *See also* ISO CENTRAL SECRETARIAT, ENVIRONMENTAL LABELS AND DECLARATIONS: HOW ISO STANDARDS HELP (2012), https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/environmental-labelling.pdf.

72. Other organizations, like ISEAL Alliance, are global associations for social and environmental standards, whose members consist of private entities, NGOs, and governments that establish and monitor the standards. ISEAL is also privately funded, with some support from governmental institutions like the World Bank and FAO. *But see* DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 148 (2007) (explaining that the GMO case between the EU and the United States demonstrates that NGOs are also limited in their influence vis-à-vis the state and political and consumer preferences).

73. *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 505–06 (2009) (describing regulatory arrangements consisting of firms and industry groups as well as NGOs and members of civil society groups such as labor unions and socially responsible investors).

74. *Id.* at 542. For more discussions on New Governance, see also IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4 (Donald R. Harris et al. eds., 1992); THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2002); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 L. & POL'Y 49 (1999).

75. For more on IMAFLORA's mission, see IMAFLORA, Instituto de Manejo e Certificação Florestal e Agrícola http://www.imaflora.org/imaflora.php (last visited Mar. 15, 2018). For more on Rainforest Alliance, see RAINFOREST ALLIANCE, https://www.rainforest-alliance.org (last updated 2018). For more on ABIC coffee association, see ASSOCIAÇÃO BRASILEIRA DA INDÚSTRIA DE CAFÉ, http://abic.com.br/en/ (last visited Mar. 15, 2018). For information on the joint efforts of IMAFLORA and Rainforest Alliance, see http://imaflora.blogspot.com/2017/10/rainforest-alliance-assume-completa.html. Note that

The ISO 14000 series environmental standards are readily used to help set up eco-labeling criteria for organizations that operate eco-labeling schemes for private industries.[76] The ISO has tried to standardize the principles, practices, and key characteristics relating to different voluntary environmental labeling types. It provides a forum for private business to coordinate standards through a market-based form of regulation based on consumer information.[77] The consensus-based development of ISO standards also provides a forum for international dialogue on harmonization of domestic standards.[78]

Governments that have their own eco-labeling scheme also may look to international standards, such as ISO, to set up their own criteria. For example, the German Blue Angel label was established in 1978 by the state and continues to be monitored by the state as well. While it is a voluntary label, it applies to consumer products and services and follows the international standards found under the ISO and Global Ecolabelling Network.[79] The Blue Angel label has become so commonplace and prestigious that it has contributed to changing consumer behavior. The German Federal Environment Agency monitors these changes and incorporates them into established requirements and test methods for products.[80] In this way, global regulatory norms have converged with transnational and domestic ones, allowing for some harmonization and predictability with respect to the use of the Blue Angel label. It has become one of the most trusted labels in Germany and is widely used by the private sector and by consumers to determine the environmental friendliness of the products they are purchasing. Criteria are developed for each product group, and the German Federal Environmental Agency requires that companies in Germany constantly

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failures of the Rainforest Alliance concerning labor rights have recently been discussed at Dom Phillips, *Coffee from Rainforest Alliance Farms in Brazil Linked to Exploited Workers*, THE GUARDIAN (Jan. 4, 2017, 2:00 PM), https://www.theguardian.com/sustainable-business/2017/jan/04/coffee-rainforest-alliance-utz-brazil-pesticides-exploited-workers-pay.

76. *See, e.g.*, GLOBAL ECOLABELING NETWORK, https://globalecolabelling.net/ (last visited Feb. 25, 2018).

77. David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 81 (2009).

78. *Id.* at 85.

79. Blue Angel also is reviewed and adapted according to new scientific information and needs, and it follows ISO 14020, 140211, 14022, and 14025. *See Our Label for the Environment*, BLUE ANGEL, https://www.blauer-engel.de/en/our-label-environment (last visited Dec. 12, 2017). The Blue Angel label was actually the model for the international standard, ISO 14020 standard, which is the standard by which many new global environmental standards have been developed.

80. *See id.* for success stories of Blue Angel.

be improving the environmental friendliness of their products.[81] It also specifies the particular resource that is protected to the greatest extent by the product. If the product protects the water to the greatest extent, then the label will have below it an indication to this effect. The four protection goals include: water, climate, natural resources, and environmental and health.[82]

B. Trade and Transnational Regulatory Norms

Transnational regulatory norms are making their way into international trade agreements, recognizing the relevance of labeling to trade liberalization. Since the inception of the TBT Agreement and SPS Agreements in 1994, several WTO cases have addressed labeling.[83] More specifically, cases involving labeling have focused on (1) whether the state has mandated the use of the label; (2) whether the label is in accordance to international standards or to an international standardizing body to which the respondent is a member; and (3) whether the application of the labeling standard discriminates between imports and like domestic products. WTO jurisprudence in this regard has focused primarily on whether the label amounts to a trade restriction by balancing the discriminatory impacts a label may have on imports against the legitimate purpose of the label itself. Environmental standards for labeling schemes that comport to international standards may be recognized as legitimate for purposes of trade compliance, since

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81. *See What Is Behind It?*, BLUE ANGEL, https://www.blauer-engel.de/en/blue-angel/what-is-behind-it (last visited Dec. 12, 2017). The Blue Angel label was actually the model for the international standard, ISO 14020 standard, which is the standard by which many new global environmental standards have been developed.

82. *See The Logo*, BLUE ANGEL, https://www.blauer-engel.de/en/blue-angel/what-is-behind-it/the-logo (last visited Dec. 12, 2017).

83. *See, e.g.*, Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291, WT/DS292, WT/DS293 (adopted Sept. 29, 2006) [hereinafter EC – Biotech Products]; First Written Submission, *United States—Measures Affecting the Production and Sale of Clove Cigarettes: Recourse to Article 22.6 of DSU*, WTO Doc. DS406 (adopted Dec. 19, 2013) [hereinafter US – Clove Cigarettes]; Request for Panel, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO Doc. WT/DS384/8 (adopted Oct. 9, 2009) (Canada); Request for Panel, *United States – Certain Country of Origin Labelling Requirements*, WTO Doc. WT/DS386/7 (adopted Oct. 13, 2009) (Mexico); Pane Report, *United States—Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011) [hereinafter US – Tuna Panel Report]; Report of Appellate Body, *United States—Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter US – *Tuna II AB*].

WTO panels tend to look to international standards for guidance when adjudicating domestic regulatory measures.[84]

When governments use international standards, both the SPS and TBT agreements, for example, raise a presumption that such schemes are legitimate and not protectionist.[85] When governments monitor such regulatory schemes based on other criteria than international standards, they run a higher risk that such schemes will be in violation of the trade commitments, especially if those measures are mandatory.[86] Article 3 of the SPS Agreement, for example, encourages governments to harmonize their sanitary and phytosanitary measures based on international standards, and creates a presumption of compliance if in fact those measures do conform with international standards.[87] There is a presumption of compliance in the TBT Agreement if the technical regulation comports to international standards, which can be rebutted with proof that those international standards are ineffective for fulfilling the legitimate objective of the technical regulation.[88] The TBT Agreement does not define "international standard." However, in the 2012 *US-Tuna II* case, the Appellate Body made significant steps forward in defining this according to a TBT Committee Decision that defined the parameters of a legitimate international standardizing body under the TBT Agreement.[89]

US-Tuna II was the first time that the WTO ruled on the interpretation of Article 2.1 and dealt with these fine distinctions between state-centered "mandatory" regulations versus voluntary standards that tend to be anchored in the private sector. Both the Panel and the AB were willing to look to international standards and the ISO

84. *US-Tuna II*, *supra* note 56.

85. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3, Apr. 15, 1994, 1867 U.N.T.S. 493; Agreement on Technical Barriers to Trade, art. 2.4, Apr. 15, 1994, 1868 U.N.T.S. 120. The same is true under NAFTA. North American Free Trade Agreement, arts. 701–724, 901–915, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289.

86. *See, e.g.*, Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 86 (ruling that an EU moratorium on the approval of biotech products as well as national marketing and import bans regarding genetically modified organisms were in violation of GATT); *see also* Joint Communication, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/28 (Sept. 30, 2009).

87. Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 85, art. 3(1)–(2), annex A(3).

88. Agreement on Technical Barriers to Trade, *supra* note 85, art. 2.4, annex 1 (explaining standards under the Agreement must be approved by a recognized body, and that the ISO/IEC Guide 2 is used for guidance in defining standards and technical regulations); *see also US-Tuna I*, *supra* note 52.

89. *See US-Tuna II*, *supra* note 56, at ¶¶ 353–54; *see also* Trujillo, *A Dialogical Approach*, *supra* note 47, at 561–62.

definitions in interpreting provisions under the TBT Agreement. Recent free trade agreements encourage the establishment of voluntary mechanisms of environmental regulation by the private sector.[90] After *US-Tuna II*, though, it is unclear how much state oversight will convert an otherwise "voluntary" regulation into a mandatory one for purposes of the TBT Agreement. The *US-Tuna II* decision, finding the U.S. labeling scheme mandatory, seems to imply that virtually any state action may in fact turn a labeling scheme into a mandatory technical regulation.[91] Arguably, though, private voluntary standards would not raise questions of trade compliance since trade focuses on state action rather than private action, unless the state is involved in the enforcement of those voluntary standards.

Trade regimes are also influencing the ways in which modern environmental regulation is developing, encouraging market-driven mechanisms that are voluntary at the regional level and harmonization of environmental standards at the multilateral level. This is nicely depicted in the TPP as well as drafts of the TTIP agreement. The CETA, recently ratified by the EU and Canada, contains separate chapters on Sustainable Development, the Environment, and Labor, containing specific provisions regarding the need for trade to be flexible so as to allow governments to implement climate change and clean energy mitigation policies.[92] Some of these international standards are making their way into domestic legislation and domestic standards, and, as in the case of Blue Angel, have also influenced the character of international standards. For example, in 2016 the German government decided to make its National Sustainable Development Strategy "a key framework for achieving the SDG's in Germany."[93]

Germany presented its first National Sustainable Development Strategy in 2002, which included national sustainability goals and indicators, and continued to consult with civil society groups and reported its progress. Germany has a Council for Sustainable Development, an independent advisory council which oversees the creation and implementation of sustainable development strategies. It released the third edition of the Sustainability Code, which is intended

90. *See, e.g.*, *US-Tuna II*, *supra* note 56, at ¶¶ 353–54; United States-Colombia Trade Promotion Agreement, U.S.-Colom., art. 18.5, Nov. 22, 2006, 125 Stat. 462; United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 18.5, Apr. 12, 2006, 121 Stat. 1455; Dominican Republic-Central America-United States Free Trade Agreement, art. 17.4, Aug. 2, 2005, 43 I.L.M. 514.

91. *See US-Tuna II*, *supra* note 56, at ¶¶ 193–94.

92. *See infra* Part IV.A.2(b).

93. *See* REPORT OF THE GERMAN FEDERAL GOVERNMENT TO THE HIGH-LEVEL POLITICAL FORUM ON SUSTAINABLE DEVELOPMENT 2016 (2016), https://sustainabledevelopment.un.org/content/documents/10686HLPF-Bericht_final_EN.pdf.

to provide companies with guidance regarding its strategic orientation toward incorporating sustainable development standards and provide customers and investors more transparency for making important business decisions concerning sustainable development. Though the Code was developed in Germany and created voluntary standards, it is tied to voluntary international reporting standards, making it suitable for companies doing business globally.[94] Many of the tools in the Code are with respect to company disclosures on areas concerning natural resource management, greenhouse gas emissions, product management, and stakeholder engagement, as well as other sustainable development goals concerning disclosures on labor standards and ensuring human rights standards for different levels of business supply chains.[95]

These are good examples of ways in which transnational regulatory networks have evolved into more formalized institutions for developing and implementing new standards fit for the twenty-first century. They are bottom-up in the sense that they have local and domestic governance structures, but they "dialogue" outside their jurisdictions with other standards-setting entities such as civil society, other state regulators, and within the international arena. International agreements, like the 2015 Paris Summit Agreement, also provide a more formal multilateral framework for countries to dialogue with each other on their progress regarding domestic decarbonization strategies and to report (every five years) on this progress.[96] International trade, particularly through preferential trade agreements, is responding to these global concerns for climate change and the need to comply with sustainable development goals by incorporating provisions that attempt to address these concerns and recognize the need for international trade to become more flexible in allowing domestic sustainable development strategies.

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94. *See* GERMAN COUNCIL FOR SUSTAINABLE DEV., THE SUSTAINABILITY CODE: BENCHMARKING SUSTAINABLE BUSINESS 7–9 (4th rev. ed. 2017), https://www.deutscher-nachhaltigkeitskodex.de/fileadmin/user_upload/dnk/dok/kodex/The_SustainabilityCode_2017.pdf.

95. *Id.*

96. Conference of the Parties to the U.N. Framework Convention on Climate Change, Paris Agreement, FCCC/CP/2015/10/Add.1 (Dec. 12, 2015), http://www.unfccc.int/files/home/application/pdf/paris_agreement.pdf.

III. PREFERENTIAL TRADE AGREEMENTS AND TRANSNATIONAL REGULATION

A. Transnational Regulatory Cooperation Bodies as Models: NAFTA, TPP, CETA, and TTIP

1. NAFTA

History informs us that bilateral and regional negotiations of trade and investment agreements can serve as models for future multilateral commitments. In some cases, like NAFTA, concurrent negotiations can influence one another and even recognize the other agreement. NAFTA negotiations and the Uruguay Round negotiations were happening around the same time, both being enacted in January 1994. NAFTA affirmed the existing rights and obligations of parties to the GATT, incorporating specific provisions of the GATT, such as the GATT National Treatment provision for market access of goods,[97] and the TBT Agreement for its chapter on Standard Related Measures, within the parameters of its own understandings of national treatment under Article 904.[98] Interestingly, the NAFTA SPS measures chapter also recognizes, in part, the obligations and rights of the GATT on the parties, but specifically excludes national treatment obligations of Article 301 (which refers to the GATT) and provisions of Article XX (b) of the GATT. It is also stricter than the SPS Agreement in some aspects, allowing parties to have more restrictive SPS measures than international standards[99] and incorporating its own definitions of discriminatory action.[100] It specifically takes into account "technical and economic feasibility" in determining the necessity threshold for a party's measure in furthering the regulatory goal.[101] The NAFTA SPS chapter also recognizes a temporary precautionary principle allowed only for a limited period of time when the science is uncertain around a measure.[102] These allowances in NAFTA reflected the concern at the time by environmental and health interest groups in the United States that environmental and safety standards would race to the bottom as a

97. *See* North American Free Trade Agreement, art. 301, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].
98. *See id.* art. 903–04.
99. *See id.* art. 713(2)(3).
100. *See id.* art. 712.
101. *See id.* art. 712(5).
102. *See id.* art. 712(4).

result of trade, especially because of different standards in Mexico.[103] It was also the first U.S. regional agreement of its kind and served as a model for many of the subsequent U.S. free trade agreements, like the Central American Free Trade Agreement (CAFTA).

However one perceives the relative influence of regional negotiations for setting standards for future trade agreements and regulatory tolerance, NAFTA had a regulatory impact on Mexico. In some instances, it led Mexico to increase its labor and environmental standards; in others, it resulted in an influx of U.S. goods, including food products, into Mexico, which had mixed consequences for Mexico's local production, especially in agriculture.[104] Though no formal, overriding, regulatory cooperation body was formed at the time of NAFTA, transnational regulatory networks found a home in some of the side committees and agreements developed alongside or immediately after NAFTA. The focus was on capacity building, especially for Mexico, and U.S. regulators were instrumental in aiding Mexican regulators to improve and/or develop their own regulatory structures, many of which reflected U.S. standards.[105] For environmental issues, some regulatory cooperation developed through the North American Agreement for Environmental Cooperation (NAAEC) and the Commission of Environmental Cooperation (CEC). Also, regulatory cooperation continued in specific areas through the La Paz and Boundary Waters Treaties (for U.S.-Mexico) and the renegotiation of the Canada U.S. Boundary Waters Treaty aimed primarily at managing the Great Lakes.

As of 2010, the United States entered into separate negotiations with Canada and Mexico to establish High-Level Regulatory Cooperation Councils, comprised of senior-level regulatory, trade, and foreign affairs officials. These function more as transnational networks,

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103. *See* Jagdish Bhagwati, *Environment in Peril?*, *in* IN DEFENSE OF GLOBALIZATION, 135–61 (2007) (finding that concerns of environmental race to the bottom were not as dramatic as a result of free trade as originally anticipated).

104. By 1991, about two-thirds of the government-controlled industries were sold. Deregulation of the industries stimulated foreign investment. NAFTA solidified a trend in Mexico to replace import substitution programs with export promotion. Agricultural reforms in Mexico, begun in the 1980s to eliminate agricultural subsidies, expanded into the 1990s. Between 1990 and 1991, import controls and government direct price supports to the producer of nine of the eleven basic crops were abolished, and subsidies granted to agricultural inputs, credit, and insurance were drastically reduced. *See* MARK WEISBROT, STEPHEN LEFEBVRE, & JOSEPH SAMMUT, DID NAFTA HELP MEXICO? AN ASSESSMENT AFTER 20 YEARS 13 (2014) (discussing the trends in Mexico brought about by NAFTA).

105. *See* Raustiala, *supra* note 65, at 44–46. After NAFTA, Mexico created a new enforcement office, *Procuraduría Federal de Protección al Ambiente* (PROFEPA) to enforce regulatory standards for management of border environmental issues. *See id.* at 47. PROFEPA's scope is broader today, also managing natural resources, maritime resources, as well as forestry. *See* PROFEPA, http://www.profepa.gob.mx (last visited Dec. 12, 2017).

comprised of working groups from the regulatory agencies of each country, than formal regulatory bodies, as are being discussed in the TTIP. However, they promise to have impact in enhanced regulatory convergence between the United States and Canada and the United States and Mexico.[106] The U.S.-Mexico High-Level Regulatory Cooperation Council Work Plan identified seven key areas of mutual interest: "food safety, E-certification for plants and plant products, trucking safety, nanomaterials, E-health, oil and gas, and conformity assessment."[107] The purpose was to make regulations more compatible; increase simplification and transparency; as well as enhance technical cooperation. The Work Plan also included "Food Safety Modernization," which extends to the production, processing, and handling of food being exported and imported.[108] It was also intended to engage stakeholders, including industry associations. The oil and gas working groups focus on Mexico's hydrocarbons resources in the Gulf of Mexico, including ways of minimizing risk in exploration activities as well as emergency response plans, auditing and inspection, and training.

Between the United States and Canada, the regulatory cooperation is focused on several areas of common interest, including natural resources and pipeline management; natural gas use in transportation of vehicles; food safety (with reciprocal recognition of each other's food safety systems); and energy efficiency standards. There is an emphasis on information sharing of regulations but also of policy reviews so as to enhance regulatory cooperation. Stakeholder participation, including industry associations, is also recognized as important. Information that is considered business proprietary shall remain confidential and not publicly disseminated.[109] The Council will also be made up of the central agencies of each country, including the trade and foreign affairs agencies. By establishing these regulatory cooperation councils as an extension of NAFTA and including participation of the trade and foreign affairs agencies of the respective parties, there is an explicit political

106. For the SPP Regulatory Cooperation Framework, the three countries will work together in a "Security and Prosperity Partnership of North America." *See* CANADA/UNITED STATES/MEXICO SPP REGULATORY COOPERATION FRAMEWORK, https://obamawhitehouse.archives.gov/sites/default/files/omb/oira/irc/spp_regulatory_cooperation_framework.pdf (last visited Feb. 28, 2018).

107. UNITED STATES-MEXICO REGULATORY COOPERATION COUNCIL: PROGRESS REPORT TO LEADERS 3 (2013), https://www.trade.gov/hlrcc/ (click "HLRCC – Progress Report – August 2013" to begin download).

108. *See id.* at 8.

109. *See* DEP'T OF NAT. RES. OF CANADA'S EXPLOSIVES SAFETY AND SEC. BRANCH ET AL., U.S.-CANADA REGULATORY COOPERATION COUNCIL REGULATORY PARTNERSHIP STATEMENT 2, https://www.trade.gov/rcc/documents/j-rps-nrcan-dot-phmsa-rps.pdf (last visited Dec. 13, 2017).

and jurisdictional recognition that regulation and trade go hand in hand, further bringing the trade and regulatory discourses together into the same normative realm. This trend toward normative convergence continued into the TPP and the TTIP phase of trade governance.

It is unclear whether the Trump Administration will continue the work of the North American Regulatory Cooperation Councils. As of the writing of this article, they were still in place, though NAFTA is under renegotiations.[110] Recently, the Canadian American Business Council published a statement arguing in favor of ensuring the permanence of the Council.[111] Regarding the U.S.-Mexico Regulatory Council, a workplan was put into place in February 2016.[112] President Nieto and President Obama had already established in 2013 a U.S.-Mexico High Level Economic Dialogue to advance strategic economic priorities.[113] The Trump Administration seems to have an anti-regulatory position, given recent executive orders impacting several agencies.[114] However, it seems to be more focused on diminishing funding and staff and on reducing the enforcement of regulations, rather than on repealing them.[115]

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110. *See, e.g.,* Sarah McGregor, Josh Wingrove & Eric Martin, *Trump Swings into Action on Trade, Adds Edge to NAFTA Talks,* BLOOMBERG POL. (Jan. 23, 2018, 1:35 PM), https://www.bloomberg.com/news/articles/2018-01-23/trump-swings-into-action-on-trade-adding-edge-to-nafta-talks; Josh Wingrove, *NAFTA Trio to Gather in Davos as Negotiations Resume in Canada*, BLOOMBERG POL. (Jan. 15, 2018, 11:25 AM) https://www.bloomberg.com/news/articles/2018-01-15/nafta-trio-to-gather-in-davos-as-negotiations-resume-in-canada.

111. *See Statement by the Canadian American Business Council on Canada/US Trade and Border Relations*, CISION (Jan. 25, 2017), http://www.newswire.ca/en/releases/archive/January2017/25/c6195.html (last visited Dec. 13, 2017).

112. The second work plan was also referenced in a February 25, 2016 White House press release, see Office of the Vice President, *Joint Statement: 2016 U.S.-Mexico High-Level Dialogue*, OBAMAWHITEHOUSE.ARCHIVES.GOV (Feb. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/joint-statement-2016-us-mexico-high-level-economic-dialogue.

113. *See High Level Economic Dialogue: Fact Sheet*, INT'L TRADE ADMIN., https://www.trade.gov/hled/ (last visited Dec. 13, 2017).

114. *See* Tal Kopan, *Here's What Trump's Budget Proposes to Cut*, CNN (Mar. 16, 2017, 1:21 PM), http://www.cnn.com/2017/03/16/politics/trump-budget-cuts/ (discussing executive orders significantly reducing the budgets of over ten agencies, with the environmental protection agency having the steepest cut of 31.4%).

115. *See* Rachel Augustine Potter, *Why Trump Can't Undo the Regulatory State So Easily*, BROOKINGS INSTITUTION (Feb. 6, 2017), https://www.brookings.edu/research/why-trump-cant-undo-the-regulatory-state-so-easily/ (stating, "an alternative to repealing regulations will be for the administration simply to decline to enforce those rules that are already on the books. Feeble enforcement is harder for courts and other actors to counter than formal deregulation.").

2. "Formal" Collaboration: Transnational Regulatory Cooperation after 2010

Aside from recent U.S. shifts in trade and regulatory policies, the less formal nature of transnational regulatory cooperation continues and is becoming more formalized through preferential trade agreements, as has been demonstrated in sustainable development agenda for EU states as well as in the CETA.[116] These create more structured means of transnational dialogue with regard to regulatory convergence and harmonization.

Similarly, in this era of plurilateral agreements, the TPP and TTIP are models of the ways in which trade agreements can have intense regulatory impact not only on the countries involved but also for nonparticipating countries. As has been observed above, there are differences in the TPP and CETA provisions, especially regarding the rigor of sustainable development, environment, and labor provisions. But it is also interesting to note that the participants in these agreements are different. Though there may be a general assumption that the United States is more deferential to private interests and, therefore, less willing to invoke stricter environmental standards, the TPP contains less stringent provisions regarding sustainable development and the environment than the EU draft for the TTIP. This is because of the large number of parties coming from the developing world, which are reluctant to embrace stricter environmental standards for fear that they will impede their economic development.

a. TPP

Despite this concern, as compared to earlier U.S. free trade agreements with developing countries, the TPP contemplates areas of public concern more generously than in the past.[117] For example, the labor chapter adheres to ILO standards and condemns the use of unhealthy working standards.[118] It prohibits derogation from these obligations, even for the sake of trade and investment.[119] Both the environmental and labor chapters contain provisions regarding corporate social responsibility.[120] As compared to CETA, it is notable that the TPP contains weaker provisions around sustainable development and is ambiguous in incorporating the precautionary

116. *See, e.g.*, THE GERMAN COUNCIL FOR SUSTAINABLE DEV., *supra* note 94.
117. *See* references cited *supra* note 2.
118. *See* TPP, *supra* note 45, arts. 19.2, 19.3, 19.6.
119. *See id*. art. 19.4.
120. *See id*. arts. 19.7 (labor), 20.10 (environment).

principle or in clarifying a position on process production methods. Furthermore, much like other recent U.S. free trade agreements, voluntary mechanisms to enhance environmental performance are specifically encouraged.[121] Joint cooperation on setting regulatory standards will be part of the TPP as well.[122] The omission of the precautionary principle is not only consistent with the U.S. preference for the "substantial equivalence" standard, but also reflects a hesitancy on the side of developing countries, including Mexico, to incorporate such provisions. One need only look to the reports from the negotiations of the Havana Charter to be reminded that developing countries, like Mexico, did not want to include specific environmental issues, such as the conservation of fisheries as part of the exceptions allowed under Article XX of the GATT.[123] The fact that the TPP mentions the protection of the marine environment from ship pollution is a step toward convergence with environmental concerns for the trade community, even for the developing countries participating in the agreement.[124] Interestingly, Article 20.13 of the TPP recognizes the parties' commitment to biodiversity, including the "sustainable use of biodiversity." However, it also reiterates a commitment to "facilitating access to genetic resources within their respective national jurisdictions."[125] The current TTIP draft, on the other hand, encourages mutual recognition of each region's regulations, which, in theory, would allow the U.S. and the EU to maintain their respective regulatory preferences, even in the area of food safety.

The weak jurisprudence by the WTO on the precautionary principle[126] also reflects this tension between the developing and

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121. *See id.* art. 20.11.

122. *See id.* art. 20.12(2) ("Taking account of their national priorities and circumstances, and available resources, the Parties shall cooperate to address matters of joint or common interest among the participating Parties related to the implementation of this Chapter, when there is mutual benefit from that cooperation.").

123. *See* U.N. Conference on Trade and Employment, *Reports of Committees and Principal Sub-Committees*, U.N. Doc. ICITO I/8, at 84–85, ¶¶ 18, 21 (Sept. 1948) [hereinafter Havana Reports].

124. *See* TPP, *supra* note 45, art. 20.6 (Protection of the Marine Environment from Ship Pollution). The CETA has broader provisions on the protection of marine life and fisheries. *See* Comprehensive Economic and Trade Agreement arts. 7.3, 7.4, 24.11, Oct. 30, 2016, [hereinafter CETA], http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

125. *See* TPP, *supra* note 45, art. 20.13(4). This provision also recognizes the importance of respecting the practices of indigenous communities. *See id.* art. 20.13(3).

126. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 83 (stating that the WTO cannot rule on the EU's use of the precautionary principle because it is not a recognized rule of international customary law).

developed world when it comes to the environment and international trade relationship: Stricter environmental standards, especially regarding the ways in which goods are produced, translate into more expensive levels of production and more obstacles for economic development. This old tug of war, first reflected in *US-Tuna I* between the United States and Mexico, continues into today's discussions around an Agreement on Environmental Goods and Services and development. It is not so surprising that a trade agreement between Canada and the European Union would have more rigorous provisions in this regard than the TPP.

b. CETA and TTIP

The Canadian-European Union Trade Agreement's (CETA) chapter on the environment does not contain a precautionary principle *per se*,[127] but it does recognize that the "lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[128] It also has a separate chapter on trade and sustainable development, as well as separate chapters on trade and labor and trade and environment.[129] In recognizing the relevance of the 1992 Rio Declaration on Environment and Development and other relevant agreements, CETA's Chapter on Sustainable Development states "that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development" and that trade should promote sustainable development.[130] One of the challenges for sustainable development is finding international consensus on defining it.[131] The CETA attempts to do so, at least in the context of trade, when it states that part of the parties' understanding about what constitutes the

127. *See generally* CETA, *supra* note 124, art. 24.8(2) ("The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.").

128. *Id.*

129. *See id.* chs. 23–24. Prior drafts of CETA contained a precautionary principle as well as sub-chapters on trade and labor and trade and environment, as part of the larger chapter on trade and sustainable development. The EU has given up on the precautionary principle, despite it being part of the EU policy, in other free trade agreements, such as with South Korea, Peru, and Colombia.

130. *See id.* ch. 22.

131. The Brundtland Report defines sustainability as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Secretary General, *Report of the World Commission on Environment and Development*, U.N. Doc. A/42/427, annex, at 41 (Aug. 4, 1987) [hereinafter Brundtland Report].

objective of sustainable development, is that it is "for the welfare of present and future generations."[132] It also states: "The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[133] Furthermore, the chapters on environment and on labor recognize the parties' right to regulate the environment and to strive to improve environmental regulation,[134] and that they shall not derogate from environmental protection for the sake of encouraging trade and investment.[135]

The Sustainable Development chapter also recognizes the value for international coordination and "the integration at the international level of economic, social and environmental development and protection initiatives, actions and measure."[136] The parties also assert that "trade should promote sustainable development,"[137] which is a leap for international trade agreements when it comes to the intersection of the two camps.

The means for achieving this are varied, but the use of voluntary mechanisms for regulation are encouraged in CETA.[138] The TBT chapter in the CETA incorporates parts of the WTO TBT Agreement (as the SPS chapter also incorporates parts of the WTO SPS Agreement) and forms a committee for enhanced coordination among regulatory bodies between the EU and Canada with respect to TBT measures, which can impact environmental regulation especially if labeling mechanisms are used as tools for such voluntary regulation.[139]

A Committee on Sustainable Development is formed under Chapter 22:4, consisting of representatives of the parties responsible for matters

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132. *See* CETA, *supra* note 124, art. 22.1. It further states: "[Recalling] the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development of 2002 and the Plan of Implementation of the World Summit on Sustainable Development of 2002, the Ministerial Declaration of the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, and the ILO Declaration on Social Justice for a Fair Globalisation of 2008."

133. *See id.* art. 24.8(2).

134. *See id.* chs. 23–24 (discussing trade and labor and trade and environment in the context of CETA).

135. *See id.* chs. 8 (9), 24 (5).

136. *Id.* art. 22.3(1).

137. *Id.* art. 22.3(2).

138. *Id.*

139. *See id.* arts. 6.3 (release of goods), 6.4 (customs valuation), 6.6 (fees and charges), 6.8 (automation).

under the environment and labor chapters. Interestingly, this committee will oversee the implementation of those chapters, "including cooperative activities," and "address in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection."[140] The Environment chapter establishes a Panel of Experts that can be convened when disagreement cannot be resolved through consultations.[141] CETA also emphasizes that trade should not undermine the environment, but rather promote it through the recognition, for example, of environmental goods and services.[142] It has special provisions concerning climate change and renewable energy and the need for domestic strategies to promote the mitigation of climate change.[143] Furthermore, it recognizes "promotion of life-cycle management of goods, including carbon accounting and end-of-life management, extended producer-responsibility, recycling and reduction of waste, and other best practice."[144] This is the first time a trade agreement is this explicit regarding these issues as being part of the international trade legal framework.

Though the negotiation of the TTIP has been put on hold indefinitely, the textual proposal of the "Horizontal Chapter" provides some information for the role of the Regulatory Cooperation Body.[145] Furthermore, a look at the CETA chapter on regulatory cooperation, which also recognizes the right of nations to regulate, gives insight into the European Union and Canadian positions on such type of cooperation for future EU trade agreements and, in the case of Canada, for the NAFTA renegotiations.[146] Considering the public concern around such trade agreements' lower regulatory standards, it is also helpful to consider such a regulatory cooperation board in the context of other chapters on sustainable development, the environment, and even the TBT and SPS chapters. These latter chapters also create coordinating bodies around technical regulations, phytosanitary measures, and environmental regulations. By establishing a Sustainable Development

140. *Id.* art. 22.4(1).
141. *See id.* art. 24.15.
142. *See id.* art. 24.9.
143. *See id.* art. 24.12(d)–(f).
144. *Id.* art. 24.12(h).
145. *See* Transatlantic Trade and Investment Partnership, E.U.-U.S., art. 5, *made public* May 4, 2015, [hereinafter TTIP] http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf.
146. *See* CETA, *supra* note 124, at ch. 21. Canada is more likely to ask for right to regulate provisions in the revised NAFTA as well as more concessions regarding climate change mitigation efforts, since it remains a member of the Paris Climate Agreement, and on hydropower trade with the Unites States.

Committee that oversees the environment and labor chapters, the CETA explicitly links the sustainable development chapter to the environment and labor one and requires that the relevant committees work with one another, creating a transnational "shared regulatory space." Chapter Twenty-Five creates a less formal cooperative platform to encourage bilateral dialogue dealing exclusively with fisheries, forestries, raw materials, and biotechnology. It will consist of co-chairs who will report to the CETA joint committee established under Chapter Twenty-Six.[147] The CETA joint committee consists of representatives from Canada and the European Union, and the chairs shall be the Minister of International Trade of Canada and a Member of the European Commission responsible for trade. There is no explicit provision linking the CETA Joint Committee in Chapter Twenty-Six of ETA to the other regulatory committees; however, the scope section of this chapter authorizes the CETA Joint Committee to delegate issues to more specialized committees created in the other chapters (i.e., Sustainable Development) and communicate with all interested parties, "including private sector and civil society organizations."[148] CETA also establishes a number of specialized agencies, including a regulatory cooperation forum, which addresses matters of regulatory cooperation.[149] Decisions of the CETA Joint Committee shall be binding on the parties.[150]

The Regulatory Cooperation Board in the negotiated TPP does not make this textual and substantive leap. It does create a Board that will be influential in coordinating regulatory measures across sectors and member countries, but remains elusive as to its relative authority to deal with specific regulatory measures regarding phytosanitary measures and food products, for example. Furthermore, the TPP does not have a separate chapter on sustainable development and is not as explicit as to what it means by this term, as is found in the CETA. The

147. The Regulatory Cooperation Board is no longer used as in earlier versions. Instead, a CETA joint committee is established; however, regulatory cooperation is discussed in various chapters with respect to having bilateral cooperation and dialogue on various regulations. *See* CETA, *supra* note 124, art. 26.1.

148. *See id*. art. 26.5. It is also important to note that the TBT and phytosanitary measures chapters in CETA both incorporate the WTO, TBT, and SPS agreements as the guiding agreement relevant to the CETA treatment of TBT and SPS measures. The TPP does not do this. Rather, it recognizes the commitments of the Parties to the SPS Agreement, and specifically incorporates certain sections of the TBT Agreement into the TPP. *See, e.g.*, CETA, *supra* note 124, arts. 5.1–5.14; TPP, *supra* note 45, arts. 7.2, 7.4 (SPS), 8.4 (TBT).

149. *See* CETA, *supra* note 124, art. 26.2(1)(h).

150. *See id.* art. 26.3.

CETA's chapter on environment recognizes commitments under several multilateral environmental agreements.[151]

Whereas the TPP is consistent with NAFTA and subsequent U.S. free trade agreements regarding the TBT and SPS chapters, though the TPP arguably goes a little further in some aspects like clarifying the role of science and risk, the CETA goes farther in dealing with issues not addressed explicitly in prior trade agreements. If in fact TTIP negotiations were to recommence, it is unclear whether it will contain the more rigorous provisions on these issues concerning sustainable development and the environment of CETA or whether it will have weaker provisions as are found in the TPP. Given that the European Union has concluded the CETA and is in the process of concluding other preferential trade agreements that contain similar provisions,[152] it is likely that sustainable development, regulatory coordination, and the right to regulate provisions will become the "new norm" and leave the U.S. position on these issues behind. The question will remain as to the balance of trade liberalization and environmental issues—whether the future of economic relations will continue to contain the same discourse, with the scales tipping toward free trade, or whether regulatory coordination, as we see in the CETA, will lead to more allowances by the trade community for enhanced regulation, whether public or private, even if this implicates restraints on trade. Though this paper does not focus on the ways that these trends in trade impact the role of executive authority in Europe, the transnational nature of regulatory cooperation in trade clearly does play an important role in expanding the authority of the European Commission on its Member States.[153]

3. Closer Look at Regulatory Cooperation for Environmental Regulation and Sustainable Development

Though regulatory cooperation and sustainable development provisions in the TPP did not go as far as in the CETA or TTIP, the TPP demonstrated an important step by the U.S. government to broaden the scope of trade in this context. In the Environment chapter of the TPP, Article 20.11 recognized that voluntary mechanisms, and the "voluntary

151. *See id.* art. 24.4.

152. For a list of current negotiations on EU trade agreements, including modifications to its agreements with Mexico and MERCOSUR and new agreements with Japan, China, and other countries in Asia, see *Overview of FTA and Other Trade Negotiations*, EUR. COMMISSION, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last updated Nov. 2017).

153. *See, e.g.*, Elliot Posner, *Making Rules for Global Finance: Transatlantic Regulatory Cooperation at the Turn of the Millennium*, 63 INT'L ORG. 665 (2009).

sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures."[154] It encouraged the TPP member states (the Parties) to use voluntary standards for the protection of natural resources and environment in the territory. This trend is consistent with its other recent U.S. free trade agreements, such as U.S.-Peru and U.S.-Columbia, which also contain provisions encouraging the use of free-market principles for environmental regulation.[155] Chapter Twenty of the TPP went even further. It also asked that authorities, the private sector, civil society, and other stakeholders already involved in the development of such standards continue.[156] It encouraged parties to ensure that such standards were developed truthfully, taking into account scientific and technical expertise; were based on international standards; allowed for competition and innovation; and did not discriminate on the basis of origin.[157] Furthermore, cooperation among stakeholders was required and a Committee on the Environment was created to ensure such cooperation.[158] This was a separate committee from the Regulatory Coherence Committee set up in Chapter Twenty-Five of the TPP.[159]

The CETA chapter on sustainable development also promotes the use of voluntary schemes for production, such as in areas like eco-labeling and fair practices. However, it asks the parties to consider sustainability "in private and public consumption decisions."[160] This CETA chapter also goes one step further. It encourages parties, in addressing sustainable development issues, to conduct assessments, domestically but also jointly, around the "potential economic, social and environmental impacts of possible actions, taking account of the views of stakeholders."[161]

There were reports of the TTIP claiming that the TTIP would contain a chapter on sustainable development, as well as on energy and raw materials.[162] The TPP contained provisions on sustainable

154. *See* TPP, *supra* note 45, art. 20.11(1).

155. *See, e.g.*, United States-Colombia Trade Promotion Agreement, *supra* note 90; United States-Peru Trade Promotion Agreement, *supra* note 90.

156. *See* TPP, *supra* note 45, arts. 20.1–.23.

157. *See* TPP, *supra* note 45, art. 20.11(2)–(3).

158. *See id.* art. 20.12.

159. *See id.* art. 25.6.

160. CETA, *supra* note 124, art. 22.3(2)(c).

161. *Id.*

162. Note the 2015 Guardian report with leaked text that said that environment took on a lesser role. The old version was scrapped and a November 6th report after the Miami meeting stated that more vigorous provisions would be in the draft. *See* Arthur Neslen,

development in the general commitments and objectives sections of the Environment chapter, as well as provisions on natural resources and carbon emissions. However, the EU draft seemed to define sustainable development more broadly than the TPP, including not only environmental concerns but also those of labor and climate change. It focused on the right of governments to continue to regulate in areas of environmental protection and labor, with adherence to international agreements like the ILO in the case of labor. It is unclear whether there would be mention of voluntary mechanisms for regulation, but it is clear that the European Union is concerned about the ability of Member states to continue to regulate.[163]

As EU trade negotiations evolve and the rise in voluntary forms of regulation on them continues, albeit to different degrees on either side of the Atlantic, different understandings of what constitutes regulation, the right to regulate, and risk assessment emerge. This divergence is at the core of the regulatory differences between the United States and the European Union. For purposes of trade and the WTO, it is state action that must be disciplined in order to avoid protectionism that can impede free trade. The WTO's scope is not to oversee private action of corporate actors, but rather to discipline government behavior.

IV. CHALLENGES AHEAD

A. The U.S./EU Regulatory Divide and Its Impact on the Developing World

Where government oversight is involved, especially if mandatory, there is an increased likelihood of such measures being construed as trade barriers for the WTO dispute settlement body. The *EC-Biotech* case, involving EU regulations on imports of "biotech products," which also contained intricate administrative procedures for approval of such products before entering the European Union as well as labeling requirements as part of their marketing,[164] raised this issue of

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TTIP: EU Negotiators Appear to Break Environment Pledge in Leaked Draft, THE GUARDIAN (Oct. 23, 2015, 12:16 PM), http://www.theguardian.com/business/2015/oct/23/ttip-eu-negotiators-appear-to-break-environmental-pledge-in-leaked-draft.

163. *See* Andrew Walker, *TTIP: Why the EU-US Trade Deal Matters*, BBC NEWS (May 13, 2015), http://www.bbc.com/news/business-32691589; *see also* Jennifer Rankin, *Doubts Rise Over TTIP as France Threatens to Block EU-US Deal,* THE GUARDIAN (May 3, 2016, 11:26 AM), https://www.theguardian.com/business/2016/may/03/doubts-rise-over-ttip-as-france-threatens-to-block-eu-us-deal.

164. *See* Council Directive 2001/18/EC, 2001 O.J. (L 106) 1 (EC) (repealing Council Directive 90/200/EEC); Council Regulation 258/97, 1997 O.J. (L 43) 1 (EC) (repealing

mandatory government oversight. In 2009, the United States began consultations regarding EU restrictions on the import of poultry treated with any substance other than water without EU approval.[165] These regulations also included measures for marketing the poultry, requiring that the poultry indicate that it has not undergone any other chemical treatment. Because of the inherent differences in the ways the United States and the European Union perceive the role of government in overseeing the implementation of labels and their different views of the need to protect the consumer from genetically modified organisms or other chemical treatments to foods, the United States and European Union have achieved little in coming to an agreement on trade of these products.[166] Furthermore, WTO litigation around these issues has only exacerbated the conflict and resulted in the European Union and the United States not finding a bilateral solution. In this context, normative conflict has not resulted in convergence, at least not in the short-term. Rather, the two regions have expanded their differing standards into the developing world.[167]

Developing countries in trading relationships with either the United States or the European Union are compelled to follow one or the other's GMO position or else lose a potential market for their agricultural products.[168] In this way, the European Union and the United States have influenced food standards in other countries, especially developing countries. Argentina, for example, is the third largest grower of biotech products and user of GMOs in their food products, after Brazil and the United States.[169] Mexico has restrictions on the use of GMO products, but has been slowly loosening these, as a result of (1) cross-pollination coming from U.S. agricultural imports containing GMOs;[170] and (2)

Council Directive 90/200/EEC); *see also* Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 83.

165. *See* Request for Consultations by the United States, *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WTO Doc. WT/DS389/1 (Jan. 20, 2009).

166. For general overview of the difference in regulatory processes for the US and EU, see generally RICHARD PARKER & ALBERTO ALEMANNO, TOWARDS EFFECTIVE REGULATORY COOPERATION UNDER TTIP: A COMPARATIVE OVERVIEW OF THE EU AND US LEGISLATIVE AND REGULATORY SYSTEMS (2014), http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf.

167. *See* DREZNER, *supra* note 72, at 149–75.

168. *See id.* at 169.

169. GLOB. LEGAL RESEARCH CTR., LAW LIBRARY OF CONG., RESTRICTIONS ON GENETICALLY MODIFIED ORGANISMS 1 (2014), http://www.loc.gov/law/help/restrictions-on-gmos/restrictions-on-gmos.pdf.

170. *See id.* at 126.

recent pressure from its close northern neighbor, due to the U.S.-run corn intensive high fructose syrup industry in Mexico.[171]

A Mexican case, involving Monsanto and other U.S. food producers, reflects this tension over GMOs. In 2013, a federal judge in Mexico City decided to temporarily halt new GMO corn permits in an effort to protect biodiversity and the variety of native Mexican maize species, many of which have been contaminated as a result of the introduction of GMO corn from the United States.[172] This decision was overturned by Mexico's XII District Court.[173] This decision came after two years of ninety-three appeals by primarily U.S. biotech companies following the 2013 ban by the Twelfth Federal District Court for Civil Matters. Most African nations, on the other hand, have stricter policies on GMO agricultural products due to their dependence on the European Union as a primary food supplier.[174] No consensus has been achieved as to whether the better food standard includes GMOs or not. Clearly for the European Union, food safety should exclude GMOs. Yet at the heart of the WTO *Biotech* case was not only the different regulatory values regarding food safety and the use of GMOs, but also the distinct approaches to risk and risk assessment processes at the domestic or regional level between the two continents. The United States adheres to a "sufficient scientific evidence" standard, whereas the European Union holds fast to the "precautionary principle," reflecting a strong "divergence of preferences" at the regulatory level of both continents,

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171. *See* Tim Johnson, *Sugar War Between Mexico, U.S. Threatens Broader Trade Relations*, MCCLATCHY DC BUREAU (Apr. 28, 2014, 12:07 PM), http://www.mcclatchydc.com/news/nation-world/world/article24766822.html.

172. David Alire Garcia, *Past and Future Collide as Mexico Fights Over GMO Corn*, REUTERS (Nov. 12, 2013, 3:31 PM), http://www.reuters.com/article/us-mexico-corn/past-and-future-collide-as-mexico-fights-over-gmo-corn-idUSBRE9AB11Q20131112; *see also Tribunal Federal Suspende Toda la Siembra de Maíz Fransgénico*, SEMILLAS DE VIDA (Oct. 10, 2013), http://www.semillasdevida.org.mx/index.php/documentos/articulos/93-boletines-de-prensa/86-articulo-2-muestra; David Alire Garcia, *Monsanto Sees Prolonged Delay on GMO Corn Permits in Mexico*, REUTERS NEWS (Jan. 30, 2017, 8:07 AM), https://www.reuters.com/article/us-mexico-monsanto/monsanto-sees-prolonged-delay-on-gmo-corn-permits-in-mexico-idUSKBN15E1DJ.

173. Alfredo Acedo, *Mexico's GMO Corn Ban and the Glyphosate Cancer Findings*, ORGANIC CONSUMERS ASS'N (Jul. 20, 2015), https://www.organicconsumers.org/news/mexico%E2%80%99s-gmo-corn-ban-and-glyphosate-cancer-findings; *Judge Overturns Mexico GMO Maize Ban in Tragic Ruling*, SUSTAINABLE PULSE (Aug. 20, 2015), http://sustainablepulse.com/2015/08/20/judge-overturns-mexico-gmo-maize-ban-in-tragic-ruling/#.VmWV9byC3ww.

174. Ademola A. Adenle, *Are Transgenic Crops Safe? GM Agriculture in Africa*, UNITED NATIONS UNIVERSITY (Jan. 19, 2012), https://unu.edu/publications/articles/are-transgenic-crops-safe-gm-agriculture-in-africa.html. South Africa, though, is a major producer of GMO products. *See* GLOB. LEGAL RESEARCH CTR., *supra* note 169, at 175.

which is not easily overcome, even with cooperation.[175] On the other hand, having such a divergence of preferences allows for experimentation in regulation and no one model of handling risk to dominate. Though it fosters regulatory fragmentation, making it more difficult to achieve harmonization, it arguably allows for regulatory structures to emerge locally and is better suited to address local and regional problems.

B. Transnational Executive Authority and the Geopolitical Context of Transnational Regulatory Standards

In either scenario, one thing remains clear: future trade negotiations will give more weight to regulatory coherence than ever before through the establishment of formal coordinating bodies. This emphasis will increase opportunities for the U.S. executive power to expand its scope in specific ways concerning social policy making, while responding to specific calls to further trade liberalization and free market liberalization. This trend will, in turn, impact the ways in which the BRIC countries and lesser developed countries will develop their own regulatory structures and standards. As Daniel Drezner has so eloquently observed, while globalization has weakened the ability of states to regulate domestically, the primary actors setting the rules for regulatory coherence have been the great powers—namely, the United States and the European Union.[176] And yet, they have not always agreed on the ways in which to regulate. Though global power has been recalibrated with the emergence of the BRICs and China more specifically as a strong economic force, when it comes to regulatory standards, the United States and the European Union continue to lead the world when it comes to setting regulatory standards. Therefore, to the extent that the TTIP provides an opportunity for the two regions to reach consensus of the areas that need regulation for the twenty-first century and of the ways of ensuring heightened protection of the items concerning natural resources, climate change, and public health, then the TTIP, if completed, could have a positive impact globally. The direction of global regulatory standards and the tolerance of regulation, as set by the TTIP, will depend to a large extent on the stakeholders participating in the discourse of those regulatory coordination boards. Though non-state actors can certainly influence the outcomes and as Drezner states, "jump-start regulatory agendas to advance their

175. DREZNER, *supra* note 72, at 162–64.
176. *Id.* at 149–75.

issues,"[177] the states, especially those with most global influence, are still relevant. Therefore, ensuring that regulatory cooperation boards have not only the participation of representatives of the product supply chain networks and the private sector[178] but also that of civil society and citizens is important. Interestingly, the CETA encourages the participation of civil society in dialoguing with the states on sustainable development standards.[179] Sustainability impact assessments that include qualitative as well as quantitative data, as is encouraged in CETA and in the current TTIP draft, will play a larger role as well, especially for risk assessment processes.[180] Since the TTIP negotiations have been put on hold and the United States has withdrawn from the TPP, the European model for regulatory cooperation, demonstrated through its current trade negotiations with various countries, will likely dominate for now.

Despite Europe's continued influence, the rise of the Chinese economy and its need for natural resources cannot be ignored. China is also a key player on the world political scene. Besides the strategic role it plays in Asian geopolitics and its status as a nuclear nation, it is a member of the U.N. Security Council, the World Trade Organization, the Group of seventy-seven Developing Nations, the Asia Pacific Economic Cooperation Group, and the Inter-American Development Bank. It has been a major player in Africa, contributing to the development of many infrastructure projects in exchange for access to natural resources.[181] Similarly, it has an increasing role in Latin America. China has observer status in the Organization of American States (OAS) and keeps a peacekeeping mission in Haiti. In 2009, China Development Bank announced it would lend $10 billion to Petrobras, the state-owned Brazilian oil company, in exchange for a guaranteed

177. *Id.* at 9.

178. *See* Bernard Hoekman, *Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization*, 18 J. INT'L ECON. L. 609, 613, 617 (2015) (stating that "[b]ringing together stakeholders from the countries involved in supply chains with the aim of focusing attention on how various policy areas—tariffs, border management procedures and requirements, product standards, regulatory agencies, access to transport and distribution (logistics) services and so forth—jointly affect international production, trade and investment could help achieve [mechanisms for sharing information on current and needed regulatory policies].").

179. *See* CETA, *supra* note 124, art. 22.5.

180. *See generally* Sheila Jasanoff, *Bridging the Two Cultures of Risk Analysis*, 13 RISK ANALYSIS 123 (1993) (recommending the need for qualitative analysis of risk to better account for cultural and political factors that affect the way people and regulatory experts assess risk).

181. *See* DEBORAH BRAUTIGAM, THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA 146 (2009).

supply of oil over the next decade.[182] In 2005, China's oil and gas giant Sinopec Corp. signed an agreement with Cuba's state-run Cubapetroleo (Cupet) to jointly produce oil on the Caribbean island. China's state-owned Minmetals is investing $500 million in a joint venture to produce 68,000 tonnes a year of ferro-nickel in eastern Cuba.[183]

Similarly, many of the WTO cases today concern more regular areas of natural resource extraction and domestic clean energy strategies like FIT schemes and biofuel policies.[184] As trade expands so does economic growth, which in turn, leads to increased energy demand. For many countries, developed and developing, natural resource extraction has been at the center of economic growth policies. Shale gas production in the United States is projected to account for two-thirds of U.S. natural gas production by 2040.[185] The United States and Canada are the world's top producers of shale gas production, having accounted for 39 percent of U.S. natural gas production in 2012 and 15 percent of Canada's according to a 2013 report from the U.S. Energy Information Administration.[186] However, there is little federal regulation in the United States of shale gas, so this is one area where federal agency power, at least for the initial exploratory and extractive components of shale gas production, is perhaps less relevant.[187] Most of the current

182. *China to Lend Petrobras $10 Bln for Oil–Report*, REUTERS (Feb. 18, 2009, 9:58 AM) https://www.reuters.com/article/petrobras-china-financing-idAFN1842749720090218.

183. *See* REUTERS, *Timeline-Chinese Investments in Latin America* (Mar. 15, 2010, 11:29 AM), https://in.reuters.com/article/cnooc-latinamerica-ma/timeline-chinese-investments-in-latin-america-idINLDE62E1QQ20100315; *see also* CUBA BUSINESS NEWS, *Cuba Oil Cubapetroleo Signs Deal with China Oil Sinopec* (Feb. 1, 2001), http://havanajournal.com/business/entry/cuba_oil_cubapetroleo_signs_deal_with_china_oil_sinopec/

184. *See, e.g.,* Appellate Body Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R, (adopted Sept. 16, 2016); Request for Consultations by Japan, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS412/1 (Sept. 16, 2010); Request for Consultations by European Union, *Canada - Certain Measures Relating to the Feed-In Tariff Program*, WTO Doc. WT/DS426/1 (Aug. 16, 2011) [hereinafter Canada – *Feed-in Tariff program*]. The latter two were subsequently consolidated and modified by Appellate Body Report, *Canada - Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS412/AB/R (adopted May 6, 2013) and Appellate Body Report, *Canada - Measures Relating to the Feed-In Tariff Program*, WT/DS426/AB/R (adopted May 6, 2013).

185. *See* U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2017 (2017) (discussing projections of domestic energy markets through the year 2050), https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf.

186. *See* U.S. ENERGY INFO. ADMIN., NORTH AMERICA LEADS THE WORLD IN PRODUCTION OF SHALE GAS (OCT. 23, 2013), https://www.eia.gov/todayinenergy/detail.php?id=13491; *see also* Matt Egan, *Oil Milestone: Fracking Fuels Half of U.S. Output*, CNN MONEY NEWS, (Mar. 24, 2016, 12:40 PM), http://money.cnn.com/2016/03/24/investing/fracking-shale-oil-boom/index.html

187. Neither fracking nor water used for fracking is regulated under the U.S. Safe Water Drinking Act due to the Halliburton exception. *See* Safe Water Drinking Act, 42

regulation is at the state level, and it is being done piece-meal and issue-based, with much heterogeneity among the states.[188] For example, in the last five years, U.S. states have taken differing approaches to developing disclosure requirements regarding the chemicals being used for hydraulic fracturing, which requires a large amount of fresh water.[189] Some states, like New York, have taken a precautionary approach, placing a temporary moratorium on the hydraulic fracturing until further environmental impact assessments are done and state disclosure requirements are completed.[190] Some states, like Colorado, Michigan, and Pennsylvania regulate with relative stringency in specific aspects of fracturing, and others like Virginia and California, with minimal stringency.[191]

Europe, on the other hand, has mostly taken a precautionary approach when it comes to hydraulic fracturing. It has been up to each Member State to decide its position on the issue. For the most part, most EU countries have placed moratoria on hydraulic fracturing until more studies and environmental impact assessments are done.[192] In 2011, a report commissioned by the European Parliament noted the various health and environmental risks associated with hydraulic

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U.S.C. § 300f to 300j-27 (2016); Keith B. Hall, *Regulation of Hydraulic Fracturing Under the Safe Water Drinking Act*, 19 BUFF. ENVTL. L.J. 1, 41 (2011).

188. *See* NATHAN RICHARDSON ET AL., THE STATE OF STATE SHALE GAS REGULATION, RFF REPORT 21–22 (2013), http://www.rff.org/files/sharepoint/WorkImages/Download/ RFF-Rpt-StateofStateRegs_Report.pdf

189. The U.S. Safe Water Drinking Act does not regulate the use of water for hydraulic fracturing due to the so-called Halliburton exception. *See* Mary Tiemann & Adam Vann, *Hydrolic Fracturing and Safe Drinking Water Act Regulatory Issues*, CONG. RES. SERV. 20 (Jan. 10, 2013); William J. Brady & James P. Crannell, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, 14 VT. J. ENVTL. L. 39 (2012); *see also* Keith B. Hall, *Hydraulic Fracturing: Trade Secrets and the Mandatory Disclosure of Fracturing Water Composition*, 49 IDAHO L. REV. 399 (2013) (discussing the differences in state mandatory disclosure requirements regarding fracturing, especially as it relates to the protection of industry trade secrets).

190. *See* NATHAN RICHARDSON ET AL., *supra* note 188, at 73 (2013). Vermont was one of the first states to place a complete moratorium on hydraulic fracturing.

191. *See id.* at 8–21 (also noting on page twelve that it should not be assumed that states that regulate more aspects of fracturing necessarily regulate the development of the industry more tightly or more effectively).

192. Neither England nor Poland have adopted this approach. The EU Commission filed a case with the European Court of Justice, alleging that Poland failed to comply with EU regulations regarding the exploration of hydrocarbons. *See Case C-569/10: European Commission v. Republic of Poland*, INFOCURIA (Nov. 20, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=130121&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=891755.

fracturing.[193] France, Germany, and Bulgaria have all taken firm stances against hydraulic fracturing and EU researchers and leaders have chosen to halt projects until further data becomes available regarding environmental and water contamination.[194] Many European countries have gone so far as enacting bans and moratoriums on fracking.[195] In January of 2012, Bulgaria indicated that it is preparing for a "full ban on shale gas drilling due to environmental concerns that hydraulic fracturing may contaminate water."[196] Within the European Union, stringent regulations are imposed on private entities in order to eliminate harmful effects on the environment. Another difference between the U.S. and EU approaches to hydraulic fracturing is in the character of property rights attributed to natural resources. Private property rights in the majority of European countries only extend to the surface.[197] Below the surface the soil and minerals are publicly owned.[198] In contrast, in the United States, soil and minerals below the surface are private property allowing for the private sale of minerals for extraction. Individual property owners may sell the rights, making a profit from royalty rights, to energy companies to extract underground minerals on their property. In this way, individuals are incentivized to enter into private contracts with these companies in ways that are not present in Europe.

So far, the United States leads the world in this industry, but there are a substantial number of shale reserves all over the world, especially in Latin America. Recently, Columbia approved hydraulic fracturing in specific areas of the northern part of the country, as did Argentina.[199]

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193. AEA Technology, *Support to the Identification of Potential Risks for the Environment and Human Health Arising from Hydrocarbons Operations Involving Hydraulic Fracturing in Europe*, Doc. No. AEA/R/ED57281 (2012), http://ec.europa.eu/environment/integra tion/energy/pdf/fracking%20study.pdf.

194. *See* Ryan S. Pigg, *Poland's Request for Shale Gas and Energy Independence: An Examination of Domestic and International Hurdles*, 35 HOUS. J. INT'L L. 735, 738 (2013).

195. *See* SIMON MOORE, GAS WORKS? SHALE GAS AND ITS POLICY IMPLICATIONS 52 (Simon Less ed., 2012).

196. Tsvetelia Tsolova, *Bulgaria Cancels Chevron Shale Gas Permit*, REUTERS (Jan. 17, 2012, 10:20 AM), http://www.reuters.com/article/2012/01/17us-bulgaria-shalegas-chevron-idUSTRE80G18J20120117.

197. *See generally* Justin P. Atkins, *Hydraulic Fracturing in Poland: A Regulatory Analysis*, 12 WASH. U. GLOBAL STUD. L. REV. 339 (2013) (discussing the regulations of hydraulic fracturing in Poland and surrounding areas).

198. *Id.*

199. *See El fracking llegó a Colombia*, SEMANA SOSTENIBLE (Aug. 8, 2014), http://soste nibilidad.semana.com/medio-ambiente/articulo/fracking-llego-colombia/31672; Francisco Peregil, *YPF y Chevron firman un acuerdo para explotar el yacimiento de Vaca Muerta*, EL PAÍS (July 17, 2013, 1:37 PM), http://economia.elpais.com/economia/2013/07/17/actualidad /1374017376_300532.html. Natural resources in Argentina are managed by the provinces and not the federal government.

Mexico too is working on legislation to open up its energy industry, traditionally constitutionally protected, to private investment. It already has in place legislation for shale gas production in the Gulf of Mexico.[200] As this industry expands and grows, so will the environmental impact.[201] The ways in which the United States regulates (or not) this industry will have effects on the manner in which other regulatory bodies decide to regulate the industry. Despite the United States retreating from the global stage in other areas, it remains an important energy market player.[202] It continues to increase its export market of liquefied gas to Japan.[203] However, forty percent of the global liquefied gas trade goes through the South China Sea.[204] Yet, much like in the GMO context, the United States and the European Union have very different approaches to how to manage the risk associated with energy development, which can further divide the developing world as, it too, cultivates its natural resources as part of their development strategies. Including regulatory cooperation regarding energy production and energy trade in trade agreements is yet another way in which the executive branch can influence the harmonization of regulations in this context.

Energy production has also been closely tied to the political rhetoric around job creation in a time when the global economy is undergoing challenges it has not seen since the Great Depression in 1929. Clean energy strategies are framed as achieving two primarily goals: (1) to provide much needed alternative energy sources as production increases and the developing world develops at faster rates than in the past, and (2) to mitigate climate change consequences by shifting the emphasis toward "clean" strategies of production and supply. This emphasis on energy and natural resource extraction as part of economic development is front and center for international trade and investment today, and it

200. *See* Boris Otto et al., *Issuance of the Mexican Secondary Laws in Connection with the Constitutional Energy Reform*, HOLLAND & KNIGHT (Aug. 13, 2014), http://www.hklaw.com/Publications/Issuance-of-the-Mexican-Secondary-Laws-in-Connection-with-the-Constitutional-Energy-Reform-08-13-2014/; *see also Mexico Energy Reform: Secondary Legislation Enacted*, MORGAN LEWIS (Aug. 12, 2014), https://www.morganlewis.com/pubs/energy_lf_mexicoenergyreform-secondarylegislationenacted_12aug14.

201. Note increased seismic activity as a result of fracking as well as drinking water contamination.

202. *See, e.g.*, Robert McManmon & Michael Ford, *Energy Trade is a Key Part of Overall U.S. Trade Flows*, U.S. ENERGY INFO. ADMIN. (Feb. 24, 2014), https://www.eia.gov/todayinenergy/detail.php?id=15131.

203. *See Liquified U.S. Natural Gas Exports to Japan*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/ng/hist/n9133ja2m.htm (last updated Nov. 30, 2017).

204. *See* Justine Barden et al., *Almost 40% of Global Liquefied Natural Gas Trade Moves Through the South China Sea*, U.S. ENERGY INFO. ADMIN. (Nov. 2, 2017), https://www.eia.gov/todayinenergy/detail.php?id=33592.

reshapes the relationship between the developing and developed world. Provisions concerning clean energy are found in the TPP, drafts of the TTIP, and in the CETA, but they are not the primary focus of these agreements. And yet, natural resource extraction and renewable energy strategies are very much at the forefront of domestic policies for economic development and job creation.

For developing countries like Latin America, natural resource extraction is a *janus-faced* phenomenon, in that it is connected to economic development but also resurrects a colonial past in which industrialized countries used their natural resources for their own economic development.[205] For this reason, many Latin American countries, for example, maintain that natural resources are constitutionally protected and have legal doctrines like the Calvo Doctrine.[206] In negotiating new trade agreements, it is important to reframe the trade and environment relationship in a manner that better incorporates this new landscape of economic development through natural resource extraction as well as climate change concerns. It will create new implications for the relationships between the developed and developing world as it relates to free trade and the environment, accounting for the current geopolitical climate, which includes the relevance of the BRICs in this respect. But it will also impact transnational regulatory processes, especially as environmental regulation increasingly moves toward market-driven mechanisms of governance. Transnational regulatory cooperation is important in the management of natural resources and climate change strategies as well as in the development of greener forms of energy. However, the oversight and management of these areas will remain intensely domestic and under the purview of agencies. A multi-dimensional framework for the trade and sustainable development relationship that incorporates this complexity is necessary.

CONCLUSION: TRADE AND REGULATORY CONVERGENCE: IS THE FOX IN THE HENHOUSE?

While formalizing transnational regulatory coherence in trade agreements provides opportunities to streamline regulations, coordinate

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205. *See* Mark Carey, *Latin American Environmental History: Current Trends, Interdisciplinary Insights, and Future Directions*, 14 ENVTL. HIST. 221 (2009); Ewout Frankema, *The Colonial Roots of Land Inequality: Geography, Factor Endowments, or Institutions?*, 63 ECON. HIST. REV. 418 (2010).

206. *See* Patrick Juillard, *Calvo Doctrine/Calvo Clause*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1086 (2012).

licensing standards, and reach shared goals that benefit both business and the public sector, it also raises concerns regarding the stakeholders at play and whether the public interest is best served. It arguably allows for more public participation by various stakeholders, public and private, in the negotiation of these trade agreements, but it also has the potential of diminishing the role of public comment on new regulations and runs the risk that some regulations that benefit trade may be at cross purposes with the public interest, unless the agreement specifically allows some rebalancing in cases of environmental goods, for example, and climate change mitigation (as in CETA). From a governance perspective, though, regulatory cooperation bodies and specialized committees within these trade agreements can be an important step toward global governance, with the "transfer[ring] [of] authority from the national to the supranational."[207] This will require increased technical expertise and allow for more efficient regulatory decision-making, and potentially more inter-agency coordination at the domestic level that takes into account the need to reduce the potential for trade protectionism.

However, without some recognition that regulation essentially protects the public good and therefore directly implicates the citizen, these treaties with formalized regulatory cooperation bodies and specialized committees also provide a means to circumvent the democratic process.[208] Furthermore, as knowledge and political decision-making become more technocratic domestically and opportunities for more transnational decision-making are in place, the executive authority who is responsible for negotiating these agreements also becomes embedded in a regulatory bargaining process, shifting the traditional role of the executive branch in the trade agreement process. In addition, with U.S. fast-track authority, legislative involvement is arguably reduced, contributing to an increased democratic deficit and essentially leaving it up to regulators, interest groups, and other stakeholders most interested in the regulatory outcomes as having the greatest influence on the final trade agreement. Despite these challenges, though, regulatory coordination is more likely to occur regionally than globally because of the difficulty of reaching political

207. DREZNER, *supra* note 72, at 9.

208. *See* Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements Without Rights and Remedies of Citizens?*, 18 J. INT'L ECON. L. 579, 579 (2015) (insisting that international treaties with "'legislative functions' for protecting transnational public goods must be governed democratically and protect transnational rights and remedies of citizens so as to enable the 'democratic principals' to hold governance agents and their limited 'constituted powers' more accountable for the ubiquity of 'market failures' and 'governance failures' that continue to distort transatlantic relations, rule of law, and consumer welfare.").

consensus on a global scale. Negotiating preferential trade agreements that increase the role of transnational regulatory boards allows for important dialogues to take place, and for trade interests and regulatory ones to find common ground. At the same time, it allows executive authority and the concentration of expertise in technocrats to pave the direction of the areas that are regulated and the method of regulation.

Expansion of the transnational executive has important implications for domestic regulation, especially in the United States' current climate of feeble regulatory enforcement. If instead of the TPP, the United States decides to enter into bilateral trade agreements, especially with Asian countries, regulatory coherence and reduction will likely continue to be front and center of those negotiations. Using international trade agreements to formalize regulatory standards, or lessen the use of these standards, requires full participation of all interests for these standards to be effective in protecting the public interest. Participation should include representatives from civil society and developing countries, where natural resources are robust. The formalizing of regulatory standards in these ways, especially if the U.S. and the EU lead the charge, will have external impacts on how regulatory standards develop in other countries as well. A transfer of regulatory authority to the executive branch, especially coupled with executive power to negotiate trade agreements, not only increases the role of the specialized expertise, but it also can potentially create perverse effects on democracy itself.