

**SAVED BY SILENCE:
CLIMATE CHANGE, TREATY LACUNAE, AND THE
U.S.-MEXICO-CANADA AGREEMENT**

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INTRODUCTION

Like a gap-tooth smile, the United States-Mexico-Canada Agreement (USMCA) pointedly lacks any explicit provision on—or even mention of—climate change.¹ The absence of such a prominent

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¹ See generally *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REP., art. 24, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico->

concern in one of the world's largest free-trade agreements might seem odd, but this omission did not arise from neglect or simple oversight by the negotiating teams. Given the Trump Administration's high-profile opposition to significant regulatory action on climate change,² Prime Minister Justin Trudeau's commitment to a vigorous climate policy by Canada,³ and the shifting flows of Mexico's climate policies due to presidential election outcomes, the lack of language on climate in the USMCA was not a surprise. The more salient question is whether the Parties' conscious and deliberate choice to exclude discussion of anthropogenic climate change hobbles the USMCA's power to govern trade issues affected by climate change policies or effects.

In the political storm provoked by its negotiation and passage, the USMCA drew consistent and harsh criticism for numerous features, including its failure to make deep and substantive changes to the framework established by its predecessor, the North American Free Trade Agreement (NAFTA),⁴ and its dilution of direct dispute-resolution procedures to protect international investors.⁵ When it came to addressing climate change, however, its critics primarily characterized the USMCA as a misfire.⁶ Given the Trump Administration's distaste for regulating activities that contribute to anthropogenic climate change, the USMCA notably fails

canada-agreement [hereinafter USMCA] (last visited Dec. 21, 2021).

² See, e.g., Samantha Gross, *What is the Trump Administration's Track Record on the Environment?*, BROOKINGS: POL'Y 2020 (Aug. 4, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-trump-administrations-track-record-on-the-environment/> (describing the Trump Administration's adoption of a deregulatory agenda aimed at limiting progressive environmental regulations of climate change mitigation and resource management).

³ See, e.g., Press Release, Justin Trudeau, *Prime Minister Trudeau Announces Increased Climate Ambition*, PRIME MINISTER OF CAN. (Apr. 22, 2021), <https://pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition> (explaining that Canada is "taking bold climate action" because "[c]limate change is the greatest long-term threat that we face as a global community").

⁴ See generally North American Free Trade Agreement, 1992, 32 I.L.M. 612, 612–799 [hereinafter NAFTA].

⁵ *Id.* art. 1115.

⁶ See, e.g., Jeffery Schott, *Five Flaws in the USMCA and How to Fix Them*, PETERSON INST. FOR INT'L ECONS. (Aug. 26, 2019), <https://www.piie.com/blogs/trade-and-investment-policy-watch/five-flaws-usmca-and-how-fix-them>.

to include any express language on the three nations' commitments to mitigate climate change causes and to adapt to its impacts. As a result, the USMCA—despite its expanded and detailed environmental provisions and its recommitment to the environmental enforcement submissions process—was labeled by environmental advocates as “a huge missed opportunity to act on climate.”⁷

However, this label offers a misleadingly narrow and simplistic view of the USMCA's scope and power when it comes to climate change. This Article explores the final text and genesis of the USMCA and its implementation by the Parties to trace their careful excision of climate change. The negotiators' painstaking climate change navigation, upon close examination, does not suggest an intent to bar application of the USMCA to climate change concerns. The agreement's deliberate *lacunae* instead seem to mark a careful preservation of the issue for future consideration under other, more general, provisions of the agreement. This approach accords with long-standing international legal precedents on the interpretation of treaties and the interpretive value of deliberate omissions from treaty language. If this view of the USMCA holds true, it offers important opportunities for the Parties to raise climate change concerns and coordinated actions that affect trade and adequate enforcement of environmental standards by the Parties.

I. DECIDING NOT TO DECIDE: THE USMCA'S EXPANDED ENVIRONMENTAL FRAMEWORK AND ITS EXCLUSION OF CLIMATE CHANGE

The environmental roots and context of the USMCA reach back to, of course, NAFTA. As the iconic agreement underlying the creation of one of the world's largest free-market zones for nearly a

⁷ Amanda Maxwell & Dan West, *USMCA Is a Huge Missed Opportunity to Act on Climate*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Dec. 19, 2019), <https://www.nrdc.org/experts/amanda-maxwell/usmca-huge-missed-opportunity-act-climate>; see SIERRA CLUB, *Members of Congress Take a Stand: For Climate, Against Trump's NAFTA 2.0*, <https://www.sierraclub.org/trade/members-congress-take-stand-for-climate-against-trumps-nafta-20> (last visited Nov. 30, 2021) (listing objections from numerous U.S. Senators and Representatives to the USMCA's failure to include any mention of climate change).

quarter-century, NAFTA laid the foundation for expanded trade and investment between Canada, Mexico, and the United States.⁸ It also spurred criticisms that the agreement undermined domestic labor and environmental protections. As a result, its three signatory nations (Parties) negotiated a parallel agreement on environmental protection and enforcement. The North American Agreement on Environmental Cooperation (NAAEC) created the Commission on Environmental Cooperation (CEC) to: (1) help the Parties coordinate their environmental policies; (2) set general environmental goals and commitments; and (3) lay out an innovative process for the Parties to submit their concerns if one of the Parties might have gained an unfair trade advantage by not enforcing their domestic environmental laws.⁹ This Submissions on Enforcement Matters (SEM) process included important innovations (such as the right for private citizens to initiate a submittal), but it lacked a mechanism to conclude that a Party had violated its commitments or to enforce shortfalls.¹⁰

The NAAEC played an important role in assuring that the NAFTA Parties met their environmental commitments and supported coordinated efforts by the Parties via the CEC on matters of shared interests (such as transboundary shipments of hazardous wastes, international air quality, and blue carbon accounting). Over time, however, critics of the NAAEC pointed out its accumulating weaknesses.¹¹ The environmental critiques of NAFTA and the NAAEC are exhaustively detailed in prior scholarship, but in essence both agreements suffered from a handful of key defects. First, the NAAEC arose from NAFTA's lack of express environmental assurances and mechanisms. The NAAEC, as a result, did not enjoy the same institutional, financial, and legal heft as NAFTA's substantive trade provisions and dispute-resolution mechanisms. Second, the Parties did

⁸ See generally NAFTA, *supra* note 4.

⁹ North American Agreement on Environmental Cooperation, art. 10, Sept. 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

¹⁰ See *Filing a Submission*, COMM'N FOR ENV'T COOP., <http://www.cec.org/submissions-on-enforcement/filing-a-submission/> (last visited Nov. 30, 2021).

¹¹ See, e.g., Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 202, 225–26 (2008) (articulating the government's apprehension to implementing trade and environmental policies).

not clarify specific obligations or performance measures for their environmental commitments. The NAAEC included numerous procedural mechanisms to assure coordination and information sharing between them, but it did not include goals, limits, or enforceable obligations in specific trade sectors.¹²

Third, while the NAAEC included a novel mechanism to assure transparency and focus on alleged shortfalls in enforcement of environmental laws that resulted in unfair trade advantages, the SEM process by design did not yield concrete declarations on whether a Party had failed to meet its obligations under the NAAEC and NAFTA. The conclusions and factual records resulting from the SEM process also did not trigger compulsory duties that the other Parties (much less third parties or citizens) could enforce against the violating Party.¹³

To ameliorate these shortfalls, the USMCA makes fundamental changes to the environmental obligations between the Parties. Most important, the USMCA includes a new Environmental chapter in the principal agreement itself.¹⁴ Unlike NAFTA, the Parties will no longer primarily rely on a side agreement to address environmental issues. This detailed new chapter spells out explicit obligations for the Parties in numerous specific environmental arenas, including fishing, forestry, endangered species, and others.¹⁵ These concrete obligations give the USMCA measurable teeth to identify violations by the Parties.

The Agreement also makes important changes to the enforceability of the Parties' environmental commitments. While the USMCA removed some classes of claims from the international dispute-resolution system (in particular, trade complaints against Canada now must traverse the Canadian domestic court system), the Agreement explicitly provides for direct enforcement against Parties whose failure to enforce domestic environmental laws results in a prohibited trade practice or subsidy.¹⁶

Alongside its specific environmental sectoral obligations, the

¹² NAAEC, *supra* note 9, art. 20.

¹³ *See id.* arts. 14–15 (detailing the procedures for the SEM process, which notably does not include enforceable compulsory duties).

¹⁴ *See* USMCA, *supra* note 1, ch. 24.

¹⁵ *See generally id.* art. 24.1 (expanding on the environmental arenas within Chapter 24).

¹⁶ *Id.* art. 24.4.

USMCA includes more general commitments to coordination and information-sharing among the Parties. Notably, it now incorporates the enforcement submittal process directly into the principal Agreement.¹⁷ Thus, this grafting of the SEM process directly into the organic provisions of the USMCA gives it a central role and tangible commitment that it arguably lacked as a creature of the prior side agreement.

The USMCA's retention of the SEM mechanism bolsters the process in important aspects.¹⁸ Aside from directly incorporating many administrative reforms of the SEM process into the new Agreement, the USMCA also imposes obligations on the three Parties to meet timelines to comply with the SEM process as well as additional transparency and disclosure requirements.¹⁹ The USMCA also commits the Parties to provide adequate funding for the CEC to carry out its mandate, thereby hopefully solving the perennial underfunding of the Commission.²⁰

Like NAFTA's NAAEC, the USMCA also has its own parallel Environmental Cooperation Agreement (ECA) to confirm many of the Parties' commitments in the USMCA as well as provide supplemental instructions on funding and operations.²¹ But the USMCA ECA differs from the NAAEC in a fundamental way: it clarifies environmental commitments made by the Parties in the core USMCA itself, rather

¹⁷ *Id.* art. 24.6.

¹⁸ The USMCA's renewed commitment to the SEM process is especially surprising because the United States had previously sought a weaker version of the process in more recent multilateral trade agreements, including the Trans-Pacific Partnership (TPP). CHRIS WOLD, *EMPTY PROMISES AND MISSED OPPORTUNITIES: AN ASSESSMENT OF THE ENVIRONMENTAL CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP* 18 (Jan. 4, 2016). While the United States withdrew from the TPP during the Trump Administration, Canada and Mexico remain as parties, and their obligations under the USMCA must accord with their commitments under the TPP. The Biden Administration has not yet formally announced whether it will seek to have the United States join the TPP. USMCA, *supra* note 1, art. 24.6.

¹⁹ USMCA, *supra* note 1, arts. 24.27–24.28, 24.5.

²⁰ *See* NAAEC, *supra* note 9, art. 37 (describing the USMCA's requirement to provide funding for the CEC by the member Parties).

²¹ *See* Agreement on Environmental Cooperation Among the Governments of the United States of America, the United Mexican States, and Canada, art. 1, Dec. 18, 2018, Hein's No. KAV 10483 [hereinafter ECA].

than serving as a supplemental side-agreement to redress gaps in the principal instrument.²²

Despite this focus on shared environmental concerns and priorities, one of the largest challenges facing the three Parties—global climate change—is dramatically absent from the USMCA and its ECA. In a trilateral agreement resulting from painstaking negotiations that covered numerous key environmental sectors, including fishing, forestry, and endangered species, the words “climate change” (or any of their analogs) simply do not appear once in the entire Agreement. When faced with the task of construing the USMCA’s role in addressing climate change, the Parties face an unenviable task as a result: giving meaning to the absence of language. As discussed below, the USMCA’s gap on climate change does not necessarily bar its application to climate change actions and policies.

II. THE LEGAL IMPORT OF INTENTIONAL TREATY LACUNAE

The development and final terms of the USMCA clearly show that the Parties did not include any specific or explicit reference to climate change or the ways that the Agreement might account for trade practices that might affect (or be affected) by it. If the Parties chose to exclude it, does the treaty consequently lack the power to spur or constrain responses by any of the three nations to climate change?

A. Public International Law’s Approach to Treaty Lacunae

Treaty interpretation is one of the most important, and deeply rooted, areas of public international law. While centuries of international disputes and diplomacy have generated a complex and voluminous body of prior decisions, the touchstone document for modern public international law on treaty interpretation is the Vienna Convention on Treaties.²³ The Vienna Convention, which entered into

²² *Id.* at pmb1. (recognizing “the unique environmental, economic, and social links” among the Parties, which was included “under the *Agreement between the United States of America, the United Mexican States, and Canada* (the USMCA) and its environmental goals and objectives”).

²³ See generally Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (creating a legally binding system of

force in 1980, sets out the broadly accepted rules for interpretation of treaties generally.²⁴ The Convention's approach, as spelled out by the International Law Commission's accompanying commentary, emphasizes that interpretation should seek the Parties' intentions as authentically expressed in the treaty's text as a starting point.²⁵ The Convention then lays out the core principles of treaty interpretation in articles 31 through 33, and it defines the lodestar of interpretation in Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁶

The Vienna Convention, of course, does not capture the entire body of legal authority on treaty interpretation. Prior to the Convention, public international law was replete with hundreds of interpretive canons and precedents of treaty interpretation by State parties, international entities, and scholastic authorities. International courts and tribunals continue to look to these supplemental sources even though they recognize the fundamental primacy of the Vienna Convention in treaty interpretation.

The Convention, unfortunately, does not squarely and explicitly address the best pathway to interpret a treaty's failure to include a term or concept. The challenge of construing treaty silence or absent terms is one of the *most* difficult areas of treaty interpretation.²⁷ The most logical path looks to the nature of the treaty and its interaction with the excluded item.²⁸ Under this approach, a generalized international agreement or constitution might more readily support implied terms, while a treaty rooted in precision or

obligations for signing parties to any multilateral treaty adopted within an international organization).

²⁴ *See id.* art. 31 (requiring consideration of the "ordinary meaning" of the treaty's text, any additional agreements and instruments between parties relating to the treaty, and any subsequent agreements and applications of the treaty).

²⁵ U.N. Conference on the Law of Treaties, *Documents of the Conference*, ¶ 11, U.N. Doc. A/CONF.39/11/Add2 (Mar. 26, 1968); *Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly*, Y.B. Int'l L. Comm'n 1966, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

²⁶ Vienna Convention, *supra* note 23, art. 31(1).

²⁷ Richard Gardiner, TREATY INTERPRETATION 165 (2d ed. 2015).

²⁸ *Id.*

comprehensive determination (such as a treaty fixing a boundary) might more readily imply that a term's absence reflects its intentional exclusion from coverage under the treaty.²⁹ This approach can ascribe significance to a treaty's failure to include qualifying or descriptive terms, and the choice of one word instead of another can reflect a meaningful exclusion of that other term.³⁰ This approach, of course, relies heavily on the underlying assumption of good faith on the parties' behalf as a limit to implying terms in a treaty.³¹

This inverse correlation between a treaty's level of generality and its capacity to include implied terms is not absolute. For example, if a treaty includes a list of items that it covers, the failure to explicitly include an item may still allow a flexible interpretation under the traditional *ejusdem generis* rule.³² The imputation of the term will depend on how the treaty's nature interacts with the numerous elements of the Vienna Convention.

Given this backdrop of the Convention and traditional public international law on treaty interpretation, the nature and structure of the USMCA offers contradictory signals on climate change. If the flexibility to impute terms or implied powers lies in the level of generality of the underlying treaty, the USMCA's environmental provisions are effectively both broadly general and highly specific. As noted earlier, Chapter 24 of the Agreement includes a host of extremely detailed commitments in specified trade areas. For example, the USMCA includes specific articles on protection of the marine environment from ship pollution,³³ air quality,³⁴ marine litter,³⁵ invasive alien species,³⁶ and marine fisheries management.³⁷ It also contains very general provisions setting out the duties of the Parties to coordinate their actions to protect the environment³⁸ and submit their

²⁹ *Id.* at 165–66.

³⁰ *Id.* at 67.

³¹ *Id.*

³² *Id.* at 165.

³³ USMCA, *supra* note 1, art. 24.10.

³⁴ *Id.* art. 24.11.

³⁵ *Id.* art. 24.12.

³⁶ *Id.* art. 24.16.

³⁷ *Id.* arts. 24.17–24.21.

³⁸ *Id.* art. 24.25.

disputes to an amicable consultation and settlement process.³⁹ The USMCA's willingness to include both highly specific obligations and broadly general commitments seems, at first review, to undermine the usefulness of looking to a treaty's specificity and precision to find out the Parties' intent regarding an excluded term or concept.

B. Domestic Law and the Meaning of Treaty Gaps

Treaty interpretation straddles the international and domestic spheres. It occurs both at the public international law level as treaty signatories attempt to resolve their interpretation of terms, and on the domestic level as each party translates those treaty obligations into their own binding local laws. Each of the USMCA's Parties has its own legal framework to interpret treaty terms applied via their domestic laws. As a result, these national interpretive rules set out their own approach to interpreting gaps and silences in treaties and statutes that, theoretically, synchronizes with their commitments under the Vienna Convention on Treaties.

Domestic legal principles in the United States illustrate the interplay between public international legal concepts on treaty interpretation and the implementation (and interpretation) of those treaties under U.S. law. In the United States, federal law governs treaty interpretation and implementation.⁴⁰ While the U.S. Supreme Court has not typically invoked the Vienna Convention directly when it interprets treaties, it has generally used principles that accord with the Convention.⁴¹ Consequently, as distilled by § 306 of the Restatement (Fourth) of the Foreign Relations Law of the United States (Restatement), U.S. domestic law requires that “[a] treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and

³⁹ *Id.* arts. 24.31–24.32.

⁴⁰ U.S. CONST. art. VI, § 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”); 28 U.S.C. § 1331 (providing that federal district court original jurisdiction includes “all civil actions arising under . . . treaties of the United States”).

⁴¹ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 306 (Am. L. Inst. 2018) [hereinafter RESTATEMENT] (outlining the general recommendations for interpretation of treaties in the U.S. legal system).

purpose.”⁴²

Finding the “context” and “ordinary meaning” of terms, however, is obviously problematic when they are used to interpret *lacunae*: by definition, the treaty lacks the very terms at issue. The Restatement and U.S. caselaw do not directly address the topic. But U.S. law does offer other strategies to discern the ordinary meaning of the USMCA’s other terms that could shed light on its object and purpose in regard to climate change. In particular, U.S. courts can turn to other international agreements, subsequent agreements, and subsequent practice of the parties to assess the context that informs the ordinary meaning of pertinent terms.⁴³ In addition, while the federal courts retain final authority to interpret in a judicial setting the legal import of treaty terms, they will also ordinarily give great weight to interpretations of treaty terms offered by the executive branch.⁴⁴ The federal judiciary’s willingness to consider contextual documents outside the text of the treaty itself, however, is leavened by its limitation on the use of supplemental materials to cases of “ambiguity” or “absurdity” arising from interpretations relying solely on the textual terms themselves.⁴⁵

Given this framework, the interpretation of treaty terms by U.S. courts parallels in many respects the approaches that they use in statutory interpretation.⁴⁶ Despite continuing debate over the proper roles of purpose and context in statutory interpretation, recent U.S. federal court decisions have predominantly relied on textualist approaches that limit the use of secondary materials such as legislative

⁴² *Id.* § 306(1) (Interpretation of Treaties); *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006). Notably, the Restatement’s definition of *treaty* includes both Article II treaties that have received Senatorial advice and consent, and other binding international agreements that fall outside this strict definition (e.g., executive agreements). The USMCA, having received senatorial approval, falls within the scope of the Restatement’s use of the term. RESTATEMENT, *supra* note 41 § 306(1).

⁴³ RESTATEMENT, *supra* note 41 §§ 306(2)–(3) (noting that context for interpretation of a treaty includes any agreements or instruments relating to the treaty or any subsequent agreements, practices, or relevant rules).

⁴⁴ *Id.* § 306(6).

⁴⁵ *Id.* § 306(5).

⁴⁶ David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 979 (1994).

history or contemporary statements outside the legislative process.⁴⁷ This textualist approach relies on canons of construction with a murky jurisprudential provenance, especially when those treaty interpretations may raise separation-of-powers concerns that a regular statute would lack.⁴⁸

In this framing, federal courts interpreting the USMCA will likely turn first to the ordinary meaning of *environment* and *climate*.⁴⁹ This textualist approach may lead them to rely on traditional statutory canons of construction. As discussed below, some of these canons, such as *expressio unius*,⁵⁰ will explicitly guide the courts on how to interpret gaps or *lacunae* in legal language. Other canons likely place special constraints on interpretations of U.S. domestic laws (such as statutes to implement treaty obligations) whose ambiguous statutory terms can support applications outside the United States. In these cases, the U.S. Supreme Court has increasingly emphasized the canon against extraterritorial application.⁵¹

The domestic interpretation of the USMCA's obligations on the United States will also turn on the terms of the USMCA Implementation Act, which Congress enacted to express its advice and consent to the Agreement and to specify its expectations and concerns

⁴⁷ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15–28 (1st ed. 2012).

⁴⁸ See, e.g., John Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 768–71 (2001) (discussing the lack of support in congressional-executive agreements); see also Joshua Weiss, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEORGE WASH. L. REV. 1592, 1603–07 (2011) (applying the principles of *Chevron* deference to treaty interpretation); see generally Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 717–26 (1998) (describing the history and corollaries of new textualism); Bederman, *supra* note 46, at 964–66.

⁴⁹ See Gardiner, *supra* note 27, at 183 (explaining that the first step of construction is to look to plain or ordinary meaning of the text).

⁵⁰ *Id.* at 262 (explaining the *expressio unius* rule of construction); see *infra* notes 40–48 and accompanying text (asserting that treaty interpretation relies on express terms in the language of the treaty and implicit terms in other relevant actions).

⁵¹ See, e.g., *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 115–16 (2013) (“That canon provides that when a statute gives no clear indication of an extraterritorial application, it has none . . . and reflects the presumption that United States law governs domestically but does not rule the world . . .”) (citations and alterations omitted).

about it.⁵² Like the USMCA, the Implementation Act contains no express language on how the Agreement should apply (if at all) to climate change concerns.⁵³ Like the USMCA's structure and language, the Act also adopts broad commitments of environmental principle amid a mix of industry-sector-specific directives.⁵⁴ As a federal statute, however, the USMCA Implementation Act will evoke the federal courts to use the same interpretive strategies, canons of construction, and recourse to contextualize and supplement sources that they would turn on the USMCA itself.

This framework suggests that U.S. federal courts, when faced with interpreting statutes to implement obligations under the USMCA (either self-executing obligations under the treaty itself or their domestic doppelgänger under the USMCA Implementation Act), will follow several important interpretive touchstones.⁵⁵ The courts will first look to the plain meaning of the treaty's provisions, typically as indicated by the ordinary meaning of the terms. If that approach fails to yield an unambiguous reading or results in an absurd interpretation, the U.S. courts will turn to supplemental sources such as statutory canons, subsequent and contemporaneous actions by the USMCA Parties, and other indicia of context. This framework includes a willingness to defer to executive interpretations of treaties, even though the judiciary retains its authority to make the final authoritative construction.

⁵² United States-Mexico-Canada Agreement Implementation Act, 19 U.S.C.S. §§ 4501–4732 (2021) [hereinafter Implementation Act].

⁵³ See generally *id.* (noting the lack of express language in the Act).

⁵⁴ See generally USMCA, *supra* note 1 (implementing environmental considerations in trade and commercial activity); Implementation Act, *supra* note 52 (documenting environmental principles expressed in the USMCA to mandate obligations on a domestic level).

⁵⁵ See *supra* notes 46–54 and accompanying text.

III. APPLYING THE USMCA TO CLIMATE CHANGE CONCERNS AND DISPUTES

Given the USMCA's backdrop of broadening and strengthening environmental commitments, its lack of any express mention of climate change concerns is striking. The lack of the words "climate change," however, does not necessarily imply that the Agreement cannot address the corollary impacts and causes of climate disruption. Interpretive principles under both public international law and domestic laws (here, U.S. federal law) can support broad readings of the treaty's terms to allow the Parties to act on climate change concerns.

A. Climate and the USMCA Under Public International Law

The USMCA's breadth of coverage begins with its broad general environmental provisions that facially could apply to climate concerns. For example, the Agreement adopts a sweeping definition of *environmental law* that incorporates any statute (including multilateral environmental agreements) "the primary purpose of which is the protection of the environment . . . through . . . the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants."⁵⁶ The ordinary meaning of the terms *pollutants* or *environmental contaminants* can readily encompass greenhouse gases whose emission causes damaging effects on the environment.⁵⁷

Other provisions of the USMCA contain similarly sweeping environmental provisions that could include climate change and greenhouse gas emissions, even if they do not explicitly name them. The Agreement's article on air quality notes that "the Parties recognize the importance of reducing both domestic and transboundary air pollution"—terminology easily broad enough to encompass

⁵⁶ USMCA, *supra* note 1, art. 24.1(a).

⁵⁷ The U.S. Supreme Court has given a similarly broad reading to the ordinary meaning of these terms in other statutory contexts. *See Massachusetts v. EPA*, 549 U.S. 497, 500 (2007) (concluding that the definition of *pollutant* in the federal Clean Air Act encompasses carbon dioxide and other greenhouse gases that contribute to climate change).

greenhouse gas emissions—and commit themselves to harmonizing their planning, modeling, and monitoring efforts.⁵⁸ Similarly, the Parties agree “to undertak[e] cooperative environmental activities” under the ECA,⁵⁹ and the ECA sets out broad categorical environmental commitments that could readily encompass climate-change planning, mitigation, and adaptation activities.⁶⁰

Beyond its categorical commitments, the USMCA’s subject-specific environmental provisions address ecological topics that unavoidably invoke climate change risks. Even without a specific exhortation on climate change commitments, the USCMA’s commitments on coordinated activities to protect the ozone layer provide a strong platform to address climate change caused by chlorinated fluorocarbons (CFCs) and other highly potent greenhouse gases.⁶¹ Similarly, the USCMA’s numerous provisions on management and protection of fisheries could provide a sturdy platform for coordinated action by the Parties to mitigate or adapt to climate change impacts on the marine environment and ocean acidification.⁶² And

⁵⁸ USMCA, *supra* note 1, arts. 24.11(2), 24.11(4).

⁵⁹ *Id.* art. 24.25(3).

⁶⁰ ECA, *supra* note 21, arts. 1(c)–(d); *see also* arts. 10(2)(j), (m) (regarding the scope of the Council’s Work Program to accomplish the larger goals of USMCA).

⁶¹ USMCA, *supra* note 1, art. 24.9(1)–(2). International efforts to protect stratospheric ozone under the Montreal Protocol to the Vienna Convention on Protection of the Ozone Layer to Control have already provided a powerful legal basis to coordinate controls of especially potent greenhouse gas emissions. The parties to the Montreal Protocol have agreed to an amendment that expands their efforts to reduce greenhouse gas emissions under the convention. *See* U.N. *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer—Adoption of Amendment*, art. 1, U.N. Doc. C.N.872.2016.TREATIES-XXVII.2.f, Oct. 15, 2016. As of 2021, 126 parties had ratified, accepted, or approved the Kigali Amendments, and they have officially entered into force. UNITED NATIONS, *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer* (Oct. 15, 2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en. The United States has not yet accepted or adopted the Kigali Amendments, but President Biden has issued an executive order directing his administration to prepare to send the Kigali Amendments to the U.S. Senate for its advice and consent to U.S. ratification. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021).

⁶² *See* USMCA, *supra* note 1, arts. 24.17–24.21 (outlining regulations for wild capture fisheries, sustainable fisheries, conservation, subsidies, and illegal fishing).

while the USMCA lacks any explicit mention of climate change, its sole reference to “carbon” lies in its subject-specific terms on forest stewardship.⁶³ This Article could potentially supply a legal foundation for coordinated action on afforestation and reforestation that includes carbon tracking and crediting.⁶⁴

The expanded environmental provisions of the USMCA do not uniformly support a framework that broadens possible support for climate action. Notably, the USMCA’s definition of *statute or regulation* under Chapter 24’s environmental provisions includes, for the United States, only “an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government.”⁶⁵ This definition excludes application of the USMCA’s environmental provisions to U.S. state laws that support more aggressive action in response to climate change, where much legislative and regulatory action shifted during the Trump Administration.⁶⁶

Beyond its broad general language on environmental coordination and its detailed sector-specific commitments, the USMCA offers a third basis for climate action without naming the concept: implementation of multilateral environmental agreements. Article 24.8 of the USMCA generally affirms each Party’s commitment to implement the multilateral agreements which it has accepted,⁶⁷ albeit with the obligation to consult and coordinate as appropriate on environmental issues of mutual interest.⁶⁸ While Article 24.8 does not name any specific multilateral environmental

⁶³ *Id.* art. 24.23(2)(b) (“The Parties acknowledge the importance of . . . the critical role of forests in providing numerous ecosystem services, *including carbon storage*, maintaining water quantity and quality, stabilizing soils, and providing habitat for wild fauna and flora” (emphasis added)).

⁶⁴ *Id.*

⁶⁵ *Id.* art. 24.1(c).

⁶⁶ *See, e.g.*, Global Warming Solutions Act of 2006, AB 32, CAL. HEALTH & SAFETY CODE div. 25.5 § 38562 (West 2017) (providing a basis under California state law to require greenhouse gas emissions reductions, trading, and permitting); *see also* New York State Climate Leadership and Community Protection Act, S.B. S.6599 (N.Y. 2019) (implementing greenhouse gas emissions reductions of 40% by 2030 to combat the threat of climate change).

⁶⁷ USMCA, *supra* note 1, art. 24.8(2).

⁶⁸ *Id.* art. 24.8(3).

agreement that addresses climate change, such as the U.N. Framework Convention on Climate Change, or its implementing protocols, such as the Paris Agreement, its open-ended terms and commitments allow enough flexibility for the USMCA Parties to include climate commitments undertaken as part of these other multilateral agreements.

The Parties confirmed the sweeping breadth of this provision by including the Montreal Protocol (and, by implication, the Kigali Amendments) as one of the seven multilateral environmental agreements explicitly listed in the Protocol of Amendment to the USMCA.⁶⁹ The Protocol of Amendment also clarifies the limited scope of dispute resolution options under the USMCA if a Party undertakes a conflicting trade action as part of its obligations under a multilateral environmental agreement.⁷⁰ Finally, the USCMA and its Protocol of Amendment expressly allow the Parties to expand their agreement to encompass future multilateral environmental agreements,⁷¹ which presumably would include any future climate change conventions or treaties.

B. Climate and the USMCA Under Domestic Law

In parallel with the interpretive framework for treaties under public international law, each Party's domestic laws will govern the construction of the USMCA's terms as applied within their jurisdictions. As a result, Canadian, Mexican, and U.S. judiciaries will need to supply their own interpretations of the Agreement and the domestic legislation enacted to implement its terms (as well as its accompanying ECA).

As noted earlier, federal law in the United States will govern the domestic construction of the USMCA, and federal courts will

⁶⁹ Protocol of Amendment to the Agreement Between the United States of America, Mexico, and Canada, art. 5.B(ii)(4), Nov. 30, 2018, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf>.

⁷⁰ *Id.* art. 5.B(i).

⁷¹ *Id.* art. 5.B(ii)(5) ("Pursuant to Article 34.3 (Amendments), the Parties may agree in writing to modify paragraph 4 to include any amendment to an agreement referred to therein, and any other environmental or conservation agreement.").

likely turn to methods of interpretation that closely track statutory interpretive doctrines. As a result, U.S. courts will likely begin by parsing the text of the USMCA to determine its plain meaning most likely through the ordinary meaning of its terms.⁷² To the extent that the Agreement lacks a clear plain meaning, the courts would then turn to supplemental sources of information, longstanding judicial doctrines and canons of construction, and any interpretation or guidance supplied by the executive branch.⁷³

This interpretive strategy under U.S. law would likely lead to a broad construction of the USMCA that would allow the Parties to address climate change challenges under the new Agreement. As noted earlier, the ordinary meaning of the USMCA's terms immediately faces the notable gap of any language that explicitly addresses climate change.⁷⁴ As a result, using the *ordinary meaning* lens will turn to the remaining terms of the Agreement that set out broader general commitments or other specific environmental sectors. To the extent that other judicial doctrines allow the U.S. courts to interpolate implied authorizations within more general terms to encompass climate change action, those courts will look to canons of construction and additional information outside the four corners of the USMCA to construe its general terms.⁷⁵

As a point of departure, the broad terms of the Parties' environmental commitments in Chapter 24 could easily include climate change as an aspect of other areas that the USMCA specifically addresses. As noted earlier, the Agreement's provisions on air quality, ozone protection, transboundary pollution, and marine fisheries protection easily could include actions that deal with aspects of climate change that affect these subjects.⁷⁶ More generally, the USMCA's

⁷² See Gardiner, *supra* note 27, at 183 (explaining that the first step of construction is to look at the plain or ordinary meaning of the text).

⁷³ See RESTATEMENT, *supra* note 41, § 306(5); *supra* notes 47–51 and accompanying text (discussing common canons of interpretation).

⁷⁴ See *supra* Part B (explaining USMCA standards' implementation into domestic climate change mitigation strategies).

⁷⁵ See *supra* notes 48–51 and accompanying text (discussing common canons of interpretation).

⁷⁶ See *supra* notes 56–71, and accompanying text (referencing provisions of the USMCA that may include actions that address climate change).

broad goals for the scope and objectives of promoting mutually supportive trade and environmental policies, providing high levels of environmental protection, and effective enforcement of environmental laws would also potentially support a broad reading that included climate change action.⁷⁷ The Agreement's sweeping definition of "environmental law" also could include climate change because it expressly includes "a statute or regulation" of a Party whose "primary purpose" is "the protection of the environment, or the prevention of a danger to human life or health," through emissions controls, environmentally hazardous substance controls, and the protection or conservation of wild flora or fauna.⁷⁸

This interpretation would nonetheless face challenges. Most notably, a court would likely observe that the lack of climate change terms in the USMCA results from congressional direction that trade accords should not include provisions that regulate greenhouse gas emissions.⁷⁹ In particular, U.S. canons of construction emphasize judicial constraint and prudence when faced with statutory silence or lack of clear statements. For example, the longstanding canon of *expressio unius* would typically construe the absence of an item from a delineated statutory list of covered topics as a sign of legislative intent to exclude the omitted item from coverage under the statute.⁸⁰ Under this light, the Parties' failure to include climate change among the constellation of other detailed environmental articles arguably reflects their desire to exclude climate concerns from coverage under the USMCA.

In addition, other canons—including the canon of extraterritorial application—could lead federal courts to reject

⁷⁷ See USMCA, *supra* note 1, arts. 24.2–24.4 (recognizing the importance of the environment in sustainable trade practices, sovereignty in domestic protection of environment, and protection of domestic environmental laws in the context of sustainable trade agreements).

⁷⁸ *Id.* art. 24.1.

⁷⁹ Bipartisan Congressional Trade Priorities and Accountability, 19 U.S.C. § 4201(a)(15); TRADE AND ENV'T POL'Y ADVISORY COMM., *North American Free Trade Agreement 2018* 1, 11 (Sept. 27, 2018) <https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/Trade%20and%20Environment%20Policy%20Advisory%20Committee%20%28TEPAC%29.pdf>.

⁸⁰ Gardiner, *supra* note 27, at 262 (explaining the *expressio unius* rule of construction).

application of U.S. laws outside the United States or in a manner that implicates foreign interests or jurisdictions without a clear directive from Congress.⁸¹ For example, in its recent ruling in *Nestle USA, Inc. v. Doe*, the U.S. Supreme Court interpreted the Alien Torts Act narrowly to exclude from its coverage foreign litigant claims of alleged violations of international law that took place outside the United States.⁸² Under this framing, a U.S. court might find a special need for judicial prudence and deference when proffered a treaty interpretation that expands its scope through the interpolation of implied subjects and terms.

Even so, other context surrounding the USMCA and its implementing statute could support a broad judicial construction under U.S. law that could encompass climate change. These indicia of context could take several forms. First, a U.S. court could look to the terms of the USMCA Implementation Act and its accompanying legislative history.⁸³ The Implementation Act contains no express prohibition of climate change considerations; like the USMCA itself, its broad language offers similar pathways to address climate change through general clauses and sector-specific commitments.⁸⁴ As several congressional members noted during its passage, the USMCA and its domestic Implementation Act provide a *floor*, not a ceiling, on the ability of the Parties to address environmental concerns, including climate change.⁸⁵ During the debate and passage of the Implementation Act, President Trump's written commitment and support, as well as his statement upon signing the legislation, also emphasized the enhanced

⁸¹ *See id.*

⁸² *Nestle USA, Inc. v. Doe*, 141 S. Ct 1931, 1940 (2021).

⁸³ *See generally* Implementation Act, *supra* note 52, at §§ 4501–4732. “The purpose of this Act is to approve and implement the Agreement between the United States of America, the United Mexican States, and Canada entered into under the authority of section 103(b) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4202(b)).”

⁸⁴ *See* Implementation Act, *supra* note 52, §§ 4701–4717 (describing environmental monitoring and enforcement requirements in the United States to comply with USMCA).

⁸⁵ House Report; floor statements. United States-Mexico-Canada Agreement Implementation Act: Hearing before House of Representatives, 117 Cong. (2019) (statement of Jimmy Panetta) <https://www.congress.gov/116/crec/2019/12/19/CREC-2019-12-19-pt1-PgH12221.pdf>.

environmental protections offered by the USMCA without noting any exclusion for climate change issues.⁸⁶

The judiciary may also extend the breadth of the USMCA Implementation Act's terms if the Biden Administration advocates a broad reading in future litigation. As noted earlier, the federal courts have generally deferred to executive interpretation of international commitments and treaties. While this deference does not automatically extend to domestic legislation that implements international commitments, the courts have noted factors such as comity and foreign relations separation-of-powers concerns when interpreting domestic statutes that incorporate customary international law norms. While the executive and legislative branches may dispute which branch should command primary deference from the judiciary, both branches concur that their interpretations should command at least some degree of judicial respect.⁸⁷ Under this framework, if the Biden Administration urged a federal court to adopt a broad interpretation of the USMCA Implementation Act that would allow coordinated actions by the Parties on climate change concerns (or provided some protection against trade challenges to Party action combatting climate change), a federal court might grant the request on grounds of separation of powers and judicial competence.

As a final note, interpretation of the USMCA, the ECA, and the USMCA Implementation Act might reflect a quirk of timing. At the time of its entry into the USMCA, the United States remained a Party

⁸⁶ Gerhard Peters & John T. Woolley, *Statement of Administration Policy: H.R. 5430 – United States-Mexico-Canada Agreement Implementation Act*, THE AM. PRESIDENCY PROJECT (Dec. 18, 2019), <https://www.presidency.ucsb.edu/document/s/statement-administration-policy-hr-5430-united-states-mexico-canada-agreement> (noting only that the USMCA “substantially enhances protections for workers and the environment and includes strong new mechanisms to ensure those provisions are enforced”).

⁸⁷ For example, when the executive branch has changed its legal interpretation of the terms in an executive-congressional agreement, Congress has contended that the reinterpretation should require updated congressional assent. This stance, urged by then-Senator Biden in response to reinterpretations of arms control treaty terms, is now known as the Biden Doctrine. Despite this dispute over the primary between Congress and the White House on interpreting terms in international commitments, notably both branches would insist that the judiciary should defer to the prevailing construction.

to the Paris Agreement under the U.N. Framework Convention on Climate Change (UNFCCC). While President Trump had previously notified the UNFCCC that the United States intended to withdraw from the Paris Agreement, that notification only triggered a one-year waiting period prior to the withdrawal.⁸⁸ As a result, when President Biden assumed office in 2021, one of his first actions revoked the prior attempt to withdraw from the Paris Agreement.⁸⁹ As a result, at the time the United States ratified the USMCA, it remained a party to the Paris Agreement and its commitments to reduce climate disruptions. While the USMCA pointedly did not include the Paris Agreement in its list of multilateral environmental agreements (MEAs), the express commitment by the United States to comply with its obligations under other MEAs and harmonize those commitments with the USMCA provides important context in support of a broad interpretation of both the USMCA and its domestic implementation within the United States.

IV. PRACTICAL CONSEQUENCES FOR ADDRESSING CLIMATE CHANGE CLAIMS UNDER THE USMCA

A broad construction of the USMCA to allow climate action would have several practical consequences. The most important implication lies in its flexibility to allow individual action by one of the Parties to address climate change without allegations of unfair trade practice. This risk is not illusory; similar domestic efforts to reduce greenhouse gas emissions have led to allegations of discriminatory trade practices and expropriations. A broader interpretation of the USMCA that allowed Parties to raise climate change concerns might enable permit actions without fear of invoking the USMCA's dispute-resolution processes. Efforts to spur collective action would not raise objections that the Agreement excludes climate concerns.⁹⁰

⁸⁸ Emily Holden, *Trump Begins Year-Long Process to Formally Exit Paris Climate Agreement*, THE GUARDIAN (Nov. 4, 2019), <https://www.theguardian.com/us-news/2019/nov/04/donald-trump-climate-crisis-exit-paris-agreement>.

⁸⁹ The United States formally rejoined the Paris Agreement on Feb. 19, 2021. Anthony J. Blinken, *Press Statement: The United States Officially Rejoins the Paris Agreement*, U.S. DEP'T OF STATE (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/>.

⁹⁰ James McBride et al., *WHAT'S NEXT FOR THE TRANS-PACIFIC PARTNERSHIP (TPP)?*,

A climate-friendly construction of the USMCA would also grant broader flexibility for unilateral action by one of the Parties to expand their commitments under the Agreement. For example, if one of the Parties sought to add the Paris Agreement to their list of MEAs, that would trigger concurrent obligations to comply under the USMCA. An open construction of the USMCA would forestall challenges to expanding its coverage of MEAs to include current and future climate accords. Under this approach, for example, the United States could simply notify the other Parties that it had added the Paris Agreement to its MEA annex list because of its re-entry into the climate agreement.

This broad interpretation of the USMCA and the new ECA also accords with the CEC's past proactive approach to climate issues under the NAAEC. Despite NAFTA's and the NAAEC's lack of express language on climate change commitments (unsurprisingly, given their vintage), the CEC has explicitly tackled climate change issues in its planning and research efforts. The CEC Council's session in 2021 focused on climate change and environmental justice solutions for North America,⁹¹ and its 2021 Operational Plan commits the CEC to "becoming an even stronger international model to address environmental concerns in the context of liberalized trade in North America"⁹² In earlier efforts, the CEC undertook a long-term assessment of the use of marine and estuarine carbon sinks as a strategy to aid adaptation in marine protected areas and to reduce climate change impacts.⁹³ Climate change has also figured prominently in petitions to develop factual records before the CEC's SEM Unit. While many of these petitions did not ultimately lead to the development of

Council on Foreign Relations: Backgrounder (Sept. 20, 2021, 4:22 PM), <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp>.

⁹¹ Climate Change and Environmental Justice Solutions for North America: Commission for Environmental Cooperation Council Session Chair Summary, (Sept. 9–10, 2021) <http://www.cec.org/files/documents/chair-summary-of-the-twenty-eighth-regular-session-of-the-cec-council.pdf>.

⁹² Commission for Environmental Cooperation, *2021 Operational Plan 2*, http://www.cec.org/files/documents/operational_plans/operational-plan_2021.pdf.

⁹³ *North American Blue Carbon, 2021*, COMM'N FOR ENV'T COOP., <http://www.cec.org/north-american-environmental-atlas/north-american-blue-carbon-2021/> (last visited Dec. 13, 2021).

full factual records, they have allowed the SEM Unit to address climate change concerns in a variety of procedural and jurisdictional statements in the form of a “shadow docket.”⁹⁴

A broad interpretation would also confirm that the SEM process can address alleged failures by Parties to enforce their environmental laws on issues related to climate change. Under this approach, a Party or private citizen could invoke the revitalized SEM process under the USMCA to claim that a Party’s inaction on enforcing its environmental laws to address climate change violates the Party’s commitments under the USMCA and the new ECA. While this tactic cannot, by definition, result in an affirmative finding by the SEM Unit that a Party has failed to enforce its own environmental laws, it could generate an official factual record which could provide important legal and political momentum towards a more protective environmental policy.

A final, and most important, practical implication of a climate-friendly reading of the USMCA lies in the possible rare conjunction of climate policies among all three Parties. Because of shifting electoral politics among each nation, the USMCA parties have rarely, if ever, enjoyed a period where all three national administrations sought to aggressively pursue climate change goals. For example, while the current administrations in Canada and the United States have adopted active climate change policies, Mexico’s President Andres Manuel López Obrador has pursued populist policies that place a lower priority on climate actions that might impose costs on the lower and middle economic classes of Mexico.⁹⁵ If the USMCA’s existing terms can include climate concerns, however, the three Parties could easily agree to formalize their climate commitments either

⁹⁴ CTR. FOR BIOLOGICAL DIVERSITY, *Protection of Polar Bears*, COMM’N FOR ENV’T COOP. (June 5, 2014), <http://www5.cec.org/sem-submissions/protection-polar-bears>; ENV’T DEFENCE CAN. ET AL., *Alberta Tailings Ponds II*, COMM’N FOR ENV’T COOP (June 6, 2020), <http://www5.cec.org/sem-submissions/alberta-tailings-ponds-ii>; FRIENDS OF THE EARTH ET AL., *Coal-Fired Power Plants*, COMM’N FOR ENV’T COOP (June 26, 2014), <http://www5.cec.org/sem-submissions/coal-fired-power-plants>.

⁹⁵ Amy Stillman & Max De Haldevang, *Energy Protectionism in Mexico Has Made Climate the Victim*, BLOOMBERG GREEN (Jan. 9, 2021) <https://www.bloomberg.com/news/articles/2021-01-09/energy-protectionism-in-mexico-has-made-climate-the-victim>.

through expansion of their MEA obligations or a written amendment to the USMCA or ECA themselves.

CONCLUSION

Given the growing importance of climate action in light of accelerating disruption and damage caused by existing climate change effects, the USMCA Parties will likely turn their attention to coordinated actions within North America to supplement their efforts under global compacts and bilateral commitments. While the USMCA lacks any express language on climate change, it nevertheless offers a convenient and ready platform to coordinate action, and the Parties at least can take proactive steps now to assure that the USMCA cannot serve as a hobble to future climate efforts through ill-founded trade challenges.