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Spurring Climate Change Action Beyond External Borders

*A study of legal measures available to the EU to exert pressure on
Canada to pursue climate change action in times of international
institutional failure*

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*"We are what is wrong, and we must make it right."*¹

¹ Al Gore, "Nobel Lecture", delivered at the Oslo City Hall, December 10, 2007, online: Nobelprize.org <http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html>, accessed February 16, 2014.

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Abstract

Climate change is one of today's major challenges; a challenge with significant consequences that will affect all countries in different ways if a way to combat global warming by stabilizing greenhouse gas emissions cannot be agreed on. A global problem calls for an international response; however, the international climate regime has failed to deliver adequate results. Currently, states representing a mere 15 percent of global emissions have committed to legally binding emission targets under the second compliance period of the Kyoto Protocol, and the future of international cooperation under the United Nations Framework Convention on Climate Change remains undecided.

This thesis recognizes that it is critical that more states take more stringent action to reduce emissions of greenhouse gases in order to stabilize the climate. The EU has come a long way with its climate change mitigation action and has, in essence, been working to substitute for other states' inaction on these urgent issues. Canada is an example of a country that has shown poor climate performance in recent years, and its government has clearly stated that mitigation efforts cannot come at the expense of the Canadian economy. This investigation therefore focuses on *what legal measures that are available to the EU to exert pressure on Canada to pursue climate change action*, in the light of an international climate regime that has failed to provide sufficient incentives and efficient mechanisms to ensure compliance with legally binding climate targets.

Three different legal measures that the EU has implemented in order to spur climate change action beyond its external borders are examined in the thesis. First, *secondary legislation with external implications* has been used to impose requirements for access to the EU's internal market, thus making all companies, regardless of nationality, subject to the EU's high environmental protection standards. Second, *CJEU case law* in the form of the high-profile *ATA* case confirmed the legality of the criticized Aviation Directive, and legitimized the EU's leadership role in climate change mitigation. Hence, if third countries want access to the EU market, they will have to accept the conditions that the EU sets up. Ultimately, the EU uses the size and importance of its internal market to make third countries take action that they would not otherwise have devoted resources to.

The third measure explored is the possibility to *condition bilateral and multilateral agreements on climate change action*. By using conditionality or cooperation clauses, the EU can integrate climate change concerns into its external relations in a more flexible way, and tailor demands for specific action to selected countries. For this to work, it is crucial that the agreement is of high importance to the contracting state. In the newly concluded free trade agreement between the EU and Canada, Canada has for the first time agreed to include provisions related to trade and sustainable development, as

well as on trade and the environment, which is a step forward for a government otherwise reluctant to prioritize environmental protection.

In times of institutional failure of the international climate regime, a range of alternative legal measures can be used by the EU to make third countries take climate action. Secondary legislation supported by CJEU case law can target a larger group, whereas conditionality and cooperation clauses can constitute tools for achieving political goals by negotiation, such as agreeing on more stringent climate change mitigation action. All measures should, however, be complemented with effective compliance mechanisms, as it seems that environmental benefits are not great enough incentives for profit-driven companies to reduce greenhouse gas emissions.

Sammanfattning

Klimatförändringar är en av dagens stora utmaningar; en utmaning med betydande konsekvenser som kommer att påverka alla länder på olika sätt om vi inte kan komma överens om ett sätt att motverka den globala uppvärmningen genom att stabilisera utsläppen av växthusgaser. Ett globalt problem kräver internationell respons, men den internationella klimatregimen har misslyckats med att leverera tillräckliga resultat. Under Kyoto-protokollets andra åtagandeperiod har stater som totalt står för bara 15 procent av globala utsläpp förpliktat sig till att uppfylla juridiskt bindande utsläppsmål, och hur framtida internationellt samarbete under FN:s klimatkonvention ska se ut är oklart.

Den här uppsatsen konstaterar att det är avgörande att fler stater vidtar strängare klimatåtgärder för att minska utsläppen av växthusgaser så att klimatet kan stabiliseras. EU har kommit långt i sina klimatåtgärdsprogram och har arbetat för att de ska fungera som substitut i brist på andra staters agerande i dessa brådskande frågor. Kanada är ett exempel på ett land som på senare år har presterat väsentligt sämre i sitt klimatarbete och dess regering har tydligt uttalat att åtgärder för att stoppa klimatförändringar kan inte vidtas på bekostnad av den kanadensiska ekonomin. Den här utredningen fokuserar därför på *vilka juridiska redskap som EU kan använda sig av för att utöva påtryckningar på Kanada att vidta klimatåtgärder*. EU:s agerande måste ses mot bakgrund av en internationell klimatregim som har misslyckats med att skapa tillräckliga incitament och effektiva mekanismer för att säkerställa att de juridiskt bindande åtaganden som har gjorts faktiskt följs.

Tre olika juridiska verktyg som EU har implementerat för att sporra klimatåtgärder utanför dess externa gränser undersöks i uppsatsen. För det första har *sekundärlagstiftning med externa effekter* använts för att införa villkor för tillgång till EU:s inre marknad. På så sätt har alla företag, oavsett nationalitet, tvingats rätta sig efter EU:s höga miljöstandarder. För det andra har *rättspraxis från EU-domstolen* bekräftat det kritiserade flygdirektivets lagenlighet i det uppmärksammade ATA-fallet och därmed legitimerat EU:s ledarroll inom klimatfrågor. Om tredje länder vill verka i EU:s inre marknad måste de följaktligen acceptera de villkor som EU ställer upp. EU använder alltså sin inre marknads storlek och betydelse för att tvinga tredje länder att vidta åtgärder som de annars inte skulle ha avsatt resurser till.

Det tredje metoden som undersöks är möjligheten att *villkora bilaterala och multilaterala avtal av att klimatåtgärder vidtas*. Genom att använda villkors- eller samarbetsklausuler kan EU integrera klimatangelägenheter i sina externa relationer på ett mer flexibelt sätt och anpassa krav på specifika åtgärder till utvalda länder. För att denna metod ska fungera krävs dock att avtalet är av stor betydelse för avtalsstaten. I det nya frihandelsavtalet mellan EU och Kanada har Kanada för första gången gått med på att inkludera klausuler som rör handel och hållbar utveckling samt handel och

miljön, vilket måste ses som ett framsteg för en regering som annars varit motvillig att prioritera miljöskydd.

I en tid av misslyckande för den internationella klimatregimen, finns ett antal juridiska verktyg som EU kan använda för att tvinga tredje länder att vidta klimatåtgärder. Sekundärlagstiftning, upprätthållen av EU-domstolens praxis, kan ta sikte på en större grupp medan villkors- och samarbetsklausuler kan utgöra verktyg för att uppnå politiska mål genom förhandling, som till exempel överenskommelser om strängare klimatåtgärder. Alla metoder måste dock kompletteras med effektiva efterlevnadsmekanismer, eftersom miljöförbättringar i sig inte förefaller utgöra tillräckliga incitament för att få vinstdrivande företag att minska sina utsläpp av växthusgaser.

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Almost six years have gone by since I first walked through the doors of Juridicum, and after nine semesters in Lund and three semesters in Canada it is time for me to leave the university.

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Any remaining errors are solely my own.

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"Isn't it funny how day by day nothing changes, but when you look back everything is different."

– C.S. Lewis

List of Abbreviations

ATA	Air Transport Association of America
CCPI	Climate Change Performance Index
CCS	Carbon capture and storage
CDM	Clean Development Mechanism
CEPA	<i>Canadian Environmental Protection Act</i>
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CO ₂	Carbon dioxide
CO ₂ eq	Carbon dioxide equivalent
COP	Conference of the Parties
ETS	Emissions Trading Scheme
EU	European Union
FQD	Fuel Quality Directive
FTA	Free trade agreement
GDP	Gross domestic product
GHG	Greenhouse gas
GSP	Generalised Scheme of Preferences
ICAO	International Civil Aviation Organization
IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
KPIA	<i>Kyoto Protocol Implementation Act</i>
Mt	Megatonne
NACC	National Airlines Council of Canada
NRTEE	National Round Table on the Environment and the Economy
SCC	Supreme Court of Canada
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
U.S.	United States
WTO	World Trade Organization

1 Introduction

1.1 Background and Context

“First, I worry about climate change. [...] It is the only thing that I believe has the power to fundamentally end the march of civilization as we know it, and make a lot of the other efforts we’re making irrelevant and impossible.”²

These words were spoken by former United States President Bill Clinton at the World Economic Forum in Davos in January of 2006, and they are still important. Climate change is one of today’s greatest challenges, and one of the most, if not *the* most important environmental issue that the world is facing right now. One which has the power to completely change the world as we know it today. One with global consequences including flooding, reduced water supplies, declining crop yields, and millions of environmental refugees^{3,4}. A global problem calls for an international response, and it is critical that all countries take stringent action to limit the deleterious impacts of climate change.

The first steps towards international cooperation were taken in 1992, when countries took action to cooperate in order to limit the average global temperature by joining the first international treaty on climate change, the United Nations Framework Convention on Climate Change⁵ (UNFCCC). The parties to the UNFCCC have since agreed that the increase in global average temperature should be limited to 2°C in comparison to pre-industrial levels. A report from the United Nations (UN) Intergovernmental Panel on Climate Change (IPCC) from 2013 states that “substantial and sustained reductions” of greenhouse gases (GHGs) are required in order to limit climate change.⁶ As GHG emissions continue to increase, climate stabilization and meeting the agreed 2°C target will become more costly, risky, and difficult.⁷

It has become increasingly apparent that international climate negotiations have not produced desired results, with respect to countries come agreeing

² Bill Clinton, at the World Economic Forum in Davos, 30 January 2006. The interview is available online, see “Davos Annual Meeting 2006 – Bill Clinton”, online: YouTube <<http://www.youtube.com/watch?v=tdn5rH-643Y>>, accessed February 16, 2014.

³ An environmental refugee is a person who has been forced to leave his or her traditional habitat, temporarily or permanently, because of environmental disruption.

⁴ Nicholas Stern, *Stern Review: The Economics of Climate Change* (Cambridge: Cambridge University Press, 2007) at 56.

⁵ *United Nations Framework Convention on Climate Change*, 9 May 1992, FCCC/INFORMAL/84, (entered into force 21 March 1994), [UNFCCC].

⁶ IPCC, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge: Cambridge University Press, 2013) at 17, [IPCC (2013)]; A brief introduction to climate change processes will be offered below, see *infra*, subsection 1.1.1.

⁷ United Nations Environment Programme (UNEP), *The Emissions Gap Report 2013: A UNEP Synthesis Report* (Nairobi: UNEP, 2013) at x, [*The Emissions Gap Report 2013*].

on mitigation issues. The attempt of getting states to commit to internationally binding targets under the Kyoto Protocol⁸ has resulted in only 25 percent of global carbon dioxide (CO₂) emissions being covered for the first commitment period,⁹ and states representing a mere 15 percent of global emissions committing to the Protocol's second commitment period.¹⁰ In these times of international institutional failure, when international cooperation on climate change under the UNFCCC remains undecided, both regarding its legal shape and the details of its design,¹¹ it is critical to find other solutions to climate change. Such alternative legal measures are what this thesis aims to explore.

The European Union (EU) has in recent years shown great leadership in the issue of climate change, with ambitious emissions reductions goals and the introduction of an emissions trading scheme. This thesis will highlight climate change action that the EU, as the assumed leader on climate change mitigation, has taken, with a view to show different strategies that the Union has used in achieving its goals and its leadership role in climate change action. The thesis will have a specific focus on EU–Canada relations and will emphasize EU climate measures that have had implications for Canada. Canada will, for the purpose of this thesis, represent an industrialized country that has shown inadequate climate change performance in recent years, with respect to meeting its agreed emissions targets. In the 2014 Climate Change Performance Index (CCPI), Canada was, for the second year in a row, ranked as the worst performer of all industrialized countries because of its lack of interest in developing its poor climate change policy.¹² Furthermore, in 2011, Canada became the first, and so far the only, signatory to withdraw from the Kyoto Protocol, meaning that Canada is no longer part of an international climate regime with binding climate targets.¹³ The Kyoto Protocol has thus failed in creating incentives for its Parties to comply, not to mention even to remain, with the Protocol.

The EU and Canada are in very different positions when it comes to mitigating climate change, and may have different incentives for implementing more or less stringent climate regulations. In 2011, Canada was the world's sixth largest energy producer.¹⁴ The country is a net

⁸ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162, (entered into force 16 February 2005), [Kyoto Protocol].

⁹ International Energy Agency, *CO₂ Emissions from Fuel Combustion – Highlights*, 2013 Edition, at 15.

¹⁰ EurActiv, “Fatih Birol: Energy Efficiency Is One of the Last Options after Kyoto”, December 2012, <<http://www.euractiv.com/energy-efficiency/fatih-birol-energy-efficiency-op-news-516441>>, accessed May 5, 2014.

¹¹ Kati Kulovsei, Elisa Morgera & Miquel Muñoz, “Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU’s 2009 Climate and Energy Package” (2011) 48 *Common Market Law Review* 829, at 841, [Kulovesi, Morgera & Muñoz].

¹² Jan Burck, Franziska Marten & Christoph Bals, *The Climate Change Performance Index: Results 2014*, (Germanwatch & Climate Action Network Europe, 2013) at 6, [CCPI 2014].

¹³ “Status of Ratification of the Kyoto Protocol, online: UNFCCC <https://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php>, accessed March 7, 2014.

¹⁴ “Energy Production (kt of oil equivalent)”, online: The World Bank <<http://data.worldbank.org/indicator/EG.EGY.PROD.KT.OE/countries>>, accessed February 17, 2014.

exporter of energy, exporting about two thirds of its production,¹⁵ while the EU, on the other hand, is a net importer of energy, and depends on imports to supply more than half of the energy consumed within the Union.¹⁶ Being a major energy exporter, Canada's economy is dependent on emissions-intensive resource extraction, and a significant increase in emissions, especially from the oil and gas sector, is projected for future years.¹⁷ Consequently, a reduction of GHG emissions would affect Canada's energy production and, in turn, the Canadian economy. So is there something that can be done, in the absence of a binding international treaty, to give non-committed industrialized countries incentives to act on climate change? What legal measures can the EU use to make Canada pursue more stringent climate change action?

1.1.1 An Introduction to Climate Change

Environmental problems are collective in nature; climate change is not the result of one individual's actions or choices. Decision-making concerning the environment has to be carried out keeping this in mind, as it is usually not enough if legislation targets one isolated area.¹⁸ When studying and practicing environmental law, it is inherently imperative to have extensive knowledge of the legal framework and concepts that make up environmental law, but it is also essential to understand the environmental problems that give rise to the need for legislation.¹⁹ It is critical to appreciate how environmental problems and environmental law and practice interact,²⁰ because without environmental knowledge, the effects of environmental legislation cannot be accurately evaluated.²¹ Scientific uncertainty must always be considered, relating to either the cause of environmental harm, in this case the causes of global warming, or the assessment of what adverse effects a specific action, such as the emission of GHGs, has had on the environment.²² In order to get a better comprehension of climate change action, a brief description of the scientific phenomenon of climate change will therefore follow.

Climate change can be caused by both natural processes and human activities. The Earth's atmosphere causes a greenhouse effect that warms up the planet. This effect occurs naturally as not all of the sun's thermal

¹⁵ "Energy Imports, net (% of energy use), online: The World Bank <<http://data.worldbank.org/indicator/EG.IMP.CON.S.ZS/countries>>, accessed February 17, 2014.

¹⁶ "Energy Statistics", online: Eurostat <http://epp.eurostat.ec.europa.eu/portal/page/portal/energy/data/main_tables>, accessed February 17, 2014.

¹⁷ Government of Canada, *Canada's Sixth National Report on Climate Change, 2014: Actions to Meet Commitments under the United Nations Framework Convention on Climate Change* (Ottawa: Government of Canada, 2013) at 8, [*Canada's Sixth National Report on Climate Change*].

¹⁸ Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2013) at 24-25, [Fisher, Lange & Scotford)].

¹⁹ *Ibid* at 18-19.

²⁰ *Ibid* at 24-25.

²¹ *Ibid* at 45.

²² *Ibid* at 40-41.

radiation that reaches the Earth gets reflected back out into space. The atmosphere traps some of it on Earth, which warms up the planet and keeps it at about 43°C warmer than it would have been without this natural greenhouse effect.²³ A number of gases, referred to as greenhouse gases, have the ability to raise the temperature near the Earth's surface, because they absorb and trap thermal radiation.²⁴ A higher concentration of GHGs in the atmosphere leads to more thermal radiation being trapped on Earth, which in turn contributes to and enhances global warming.²⁵

Human activities, such as emissions of GHGs due to combustion of fossil fuels, or changes in land use, for example in the form of agricultural practices or deforestation, enhance the Earth's naturally occurring greenhouse effect as they contribute to an increase of GHG concentrations in the atmosphere, directly or indirectly. The IPCC's latest assessment report on climate change concludes that it is *extremely likely* that human activities have been the dominant cause of the increase of GHG concentrations in the atmosphere since the 1950's, and the main reason for recent global warming.²⁶ Climate change caused by human action is usually referred to as anthropogenic (human-induced) climate change.²⁷

Many anthropogenic GHGs have significant lifetimes, thus resulting in continuously high atmospheric concentrations of these gases. As a consequence, we would continue to see the effects of climate change for a long time even if emissions ceased today.²⁸ Prompt and immediate action to limit emissions is therefore imperative if global warming is to be kept under 2°C. For that to happen, a few countries' commitment will not suffice. A global effort is needed where all actors contribute and take stringent action in the battle against climate change.

1.1.2 The International Climate Regime

The EU and Canada are both part of the international climate regime in the sense that they have both signed and ratified the main international treaty on climate change, the UNFCCC. The Convention was adopted in 1992, following the first IPCC scientific assessment report on climate change²⁹, which presented scientific evidence underlining the importance of an international response to the climate change challenge.³⁰

²³ Jonathan Cowie, *Climate Change: Biological and Human Aspects*, 2nd ed (Cambridge: Cambridge University Press, 2013) at 6, [Cowie].

²⁴ IPCC, *Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001) at 87-88.

²⁵ Cowie, *supra* note 23, at 6.

²⁶ IPCC (2013), *supra* note 6, at 17.

²⁷ *Ibid* at 127.

²⁸ *Ibid* at 1106.

²⁹ IPCC, *Climate Change: The IPCC Scientific Assessment* (Cambridge: Cambridge University Press, 1990).

³⁰ "History", online: IPCC <http://www.ipcc.ch/organization/organization_history.shtml>, accessed May 5, 2014.

In the preamble to the UNFCCC, the parties acknowledge their concern that human activities have contributed to a substantial increase of the atmospheric concentrations of GHGs and that this increase has enhanced the natural greenhouse effect. Moreover, the parties acknowledge that, since climate change is a global issue, it is critical that all countries cooperate and participate in an effective and appropriate manner, and that developed countries have to take immediate action.³¹ Consequently, these are standards that both the EU and Canada have agreed to uphold.

While the UNFCCC only *encourages* stabilization of GHG emissions, by merely establishing broad principles and overall goals for combating climate change, more precise mitigation obligations were negotiated in the Kyoto Protocol, which was adopted in 1997 and *requires* action by imposing binding reduction obligations on developed countries.³² The Protocol entered into force in 2005, and currently has 192 parties, including the EU. Canada, as previously mentioned, withdrew from the Kyoto Protocol in 2011, meaning that it no longer has a binding international climate target that it is obliged to meet. Institutional failure at the international level is evident, and no details for future action under the UNFCCC have been established. It is clear that other ways of making reluctant countries, such as Canada, take action must be found.

1.2 Purpose and Objectives

In the light of the facts that have been presented above, it can be established that the participation of all actors is needed in order to regulate climate change effectively. Climate change is something that is and will keep affecting all countries if emissions are not reduced. Still, it seems that climate issues are not prioritized by the Canadian federal government, and I am therefore interested in whether something can be done to make Canada take more action to mitigate climate change.

The purpose of this thesis is to examine whether the EU, as the assumed leader on climate change issues, can use legal means to exert pressure on Canada to pursue climate change action. In order to achieve this purpose, I will use the following question as a basis for my research:

What legal measures are available to the EU to exert pressure on Canada to pursue climate change action in times of international institutional failure?

This question is significant to analyze as international institutional failure seems to be here to stay. In the absence of a functioning and efficient international climate regime, it is essential to find other ways to work through, as climate change is a global challenge and, due to its collective nature, a problem that cannot be solved by one nation alone. This thesis will

³¹ UNFCCC, *supra* note 5, Preamble.

³² Fisher, Lange & Scotford, *supra* note 18, at 639.

focus on finding the legal measures that will assist in achieving this objective.

1.3 Methods and Materials

In order to answer my research question, I will mainly be using traditional legal analysis, which is explained below; however, my thesis will also include a comparative aspect. When conducting research using a comparative method, different features and provisions in selected legal systems are compared in order to ascertain similarities and differences.³³ The findings can then be analyzed and evaluated with the purpose of getting a new perspective of the legal systems compared, hence leading to a better understanding and an unprejudiced point of view of different legal solutions. Consequently, comparative law is useful when working *de lege ferenda*, for example when working with law reforms.³⁴ For the purpose of my thesis, the comparative element will illustrate Canada's and the EU's two different approaches to mitigating climate change, as well as possible shortcomings and areas of improvement in their respective climate change legislations. For this part, my approach will be positive, and describe the current state of the climate change policy and performance of Canada and the EU.

To be able to conduct a comparative analysis, one must first establish the objects of comparison, and these must have a common denominator in order to carry out a meaningful comparison.³⁵ In this case, the common feature is climate change policy, and I will hence research the federal Canadian laws as well as the EU laws on climate change.³⁶ For that purpose I will be using traditional legal analysis, the so-called "black-letter" legal research method, in order to establish the two jurisdictions' different approaches in combating climate change.

Traditional legal analysis comprises the study of legal texts, hence the research of statutes, case law and secondary materials in the form of the relevant scholarship. My research will focus on three different legal measures that the EU can work through to exert pressure on Canada: EU legislation with external impact, case law, and bilateral agreements. More specifically, for the EU section, I will look into the EU's climate laws, including an analysis of the legal framework of the EU's emissions trading scheme (EU ETS) and documents from the European Commission, as well as the scholarship on EU climate change policy. I will also analyze the high-profile case *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*³⁷ (the ATA case) from the Court of

³³ Michael Bogdan, *Concise Introduction to Comparative Law* (Groningen: Europa Law Publishing, 2013) at 5, [Bogdan].

³⁴ *Ibid* at 16.

³⁵ *Ibid* at 46.

³⁶ Cf. *ibid* at 8.

³⁷ Case C-366/10 *Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v Secretary of State for Energy and Climate Change* [2011], OJ, C 260/9, [ATA].

Justice of the European Union (CJEU), as my investigation demands an examination of the EU's current policies and its stance on to what extent it can implement legislation with external impact.

For the Canadian part, I will look into the Canadian Constitution³⁸ to determine federal jurisdiction over the environment, in addition to a few cases from the Supreme Court of Canada (SCC), which are used to clarify any ambiguities in the Constitution. Several federal acts on environmental issues will also be used in order to exemplify what type of climate action that the Canadian federal government has taken.

Furthermore, I will use a number of policy documents and reports on climate change performance, as well as climate change assessments and statistics from different organizations and institutes, such as the UN, the IPCC, the World Bank and the non-profit, non-governmental environmental organization Germanwatch, which publishes the CCPI every year.³⁹ I will use the reports to provide the thesis with independent, accurate and current data on climate change and climate change performance. The data will show whether or not the EU and Canada are on track to meet their climate targets, thus illustrating the need for more aggressive action on climate change.

Finally, in an attempt to answer my research question, I will analyze the wording and examine the effect of conditionality clauses in place in current bilateral and multilateral agreements that the EU has drafted and signed. The technical summary of the final negotiated outcomes of the new free trade agreement (FTA) between the EU and Canada, the Comprehensive Economic and Trade Agreement (CETA), will be studied, as the final legal text has not yet been finished. I will conduct a normative analysis with a focus on how this FTA has dealt with environmental issues, and whether it has done so in an effective and stringent enough manner, or if additional conditions could have been included, against a background of the EU's full legal ability to influence Canada to pursue climate change action.

1.4 Delimitations and Scope of the Study

This thesis discusses how the EU has used, and possibly can use, its leadership to influence other actors to pursue climate change action. While implications third countries⁴⁰ will be mentioned, Canada will represent a concrete illustration of an industrialized country that has shown inadequate climate change performance, in relation to reducing GHG emissions, in recent years. It can therefore serve as a contrast to the EU, the assumed leader on climate change action, and as an actor that is in need of pressure to step up its climate game if emissions are to be stabilized. I have chosen the EU and Canada since both are Western, industrialized jurisdictions that are on different sides of the climate change performance spectrum.

³⁸ *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, [*Constitution Act, 1867*].

³⁹ "Mission Statement", online: Germanwatch <<http://germanwatch.org/en/mission-statement>>, accessed February 25, 2014.

⁴⁰ "Third countries" refers to states which are not part of the EU.

Consequently, it makes an interesting study to examine whether the better performer can influence, or even force, the poorer performer to take climate change action, in absence of a binding international document.

To date, the climate change discussions have mainly concerned *mitigation*, which refers to taking preventive action in order to reduce emissions and prevent future climate change. This is also the aspect I will be focusing on for the purpose of this thesis. There is, however, another aspect of climate change policy, namely *adaptation* policies, which cover actions taken to adapt to the consequences of climate change.⁴¹ I have chosen to focus on climate change mitigation, as I am interested in the preventive part of climate change action. I see the mitigation aspect as of greater importance for the global community, as one country's emissions affect and contribute to *global* warming, while adaptation measures are more of *local* relevance and deal with how a single country adapts after climate change consequences have occurred.⁴² Climate change adaptation will hence not be dealt with, due to the scope of the thesis.

The thesis does not aim to be an exhaustive study of all of the EU's and Canada's climate policies. Rather, it serves to highlight in which ways the EU is working to become a leader in combating climate change and points to measures that exemplify how this objective has been carried out. It should also be noted that the study will focus on regulations at the federal level in Canada. Some of the provinces have shown more commitment and implemented more stringent measures to reduce GHG emissions, but the scope of this thesis does not allow for an in-depth investigation of these topics.

1.5 Structure of the Thesis

The thesis is divided into six chapters. The four chapters following the introductory chapter each end with a subsection summarizing and commenting on the findings of that chapter. My own reflections are primarily kept to these, as well as to the concluding analysis in chapter six, however, they can occasionally be found elsewhere in the text.

Chapter two starts off by setting the scene and offers an overview of challenges in regulating climate change and explains the current state of international institutional failure of the climate regime. To exemplify this statement, climate change action in Canada is examined. Its climate targets and performance are presented, and a brief introduction to federal jurisdiction over the environment in Canada is provided, in order to serve as a basis for understanding its current climate legislation. Chapter two

⁴¹ Andrew Jordan *et al*, eds, *Climate Change Policy in the European Union: Confronting the Dilemmas of Mitigation and Adaptation?* (Cambridge: Cambridge University Press, 2010) at 20.

⁴² This view is, however, quite narrow, as a lack of effective adaptation policies also can affect other countries, for example if climate change makes a country uninhabitable, and hence results in environmental refugees.

concludes with a study of how international climate change law is changing and what possibilities that change may provide.

The third chapter focuses on the EU and its directional leadership through secondary legislation on climate change, and expands on the internal climate action that the EU has taken. The chapter aims to explain how the EU has been setting ambitious targets and how it has been demonstrating its commitment to combating climate change by implementing effective mitigation measures to tackle the global challenge while inspiring other actors to do the same. The most recent EU climate change policies and regulations in the form of the 2009 Climate and Energy Package are also mapped out.

Chapter four moves to examine how the EU is taking its climate change action one step further, as it no longer seems enough to try to *inspire* other actors. Rather, a shift to structural leadership can be identified in the EU's actions, which is exemplified by two measures through which the EU is working to exert pressure on third countries: EU secondary legislation that has had implications for external actors, and CJEU case law. The chapter includes an explanation of how the EU has used its internal market and its ETS as tools for making other states act on climate change, and discusses the external effects of two EU directives: the Aviation Directive, regulating the inclusion of the aviation sector in the EU ETS, and the Fuel Quality Directive, in which unprecedented sustainability criteria for biofuels have been introduced, and which has caused much controversy in Canada due to the way the EU has chosen to classify crude oil from the oil sands. Furthermore, the controversial *ATA* case, in which the validity of the Aviation Directive was upheld by the CJEU, is analyzed and its implications are discussed.

In the fifth chapter, the third way of exerting pressure on third countries is explored: the possibility of conditioning bilateral (trade) agreements on climate change action. The current use of conditionality clauses in the EU's external agreements is explored, as well as whether these types of clauses could be used for additional purposes. CETA is used as an example of an agreement that perhaps could have expanded more extensively on environmental issues.

The concluding analysis, in the final and sixth chapter, summarizes the facts and observations presented in chapters two through five. The three different measures discussed are analyzed, and my conclusion on their effects is presented.

2 Setting the Scene: International Institutional Failure

2.1 Challenges in Regulating Climate Change

Climate change is an example of a collective-action problem, which has many different causes,⁴³ and the world's major emitters must cooperate if it is to be resolved. This is an important reason why individual states in general are reluctant to act unilaterally. Such action would be costly with minimal environmental benefits for that individual state.⁴⁴ In the latest IPCC report on mitigation of climate change, the collective action aspect of climate protection is emphasized as a reason why international cooperation is necessary.⁴⁵ This phenomenon corresponds with the idea of the *tragedy of the commons*, which Garrett Hardin discusses in his essay from 1968.⁴⁶ Hardin argues that any common resource, that is, a resource of free access, will be overused as the population increases – “freedom in a commons brings ruin to all”⁴⁷. Accordingly, Hardin applies his theory to modern phenomena such as air pollution, arguing that a rational man realizes that it will cost him more to purify his wastes before releasing them, than to simply discharge the waste into the commons, thereby sharing the damage with everyone else.⁴⁸ This reasoning can translate into the conclusion that incentives additional to long-term environmental benefits are needed to make states take more stringent climate change action.

As the causes of climate change cannot be attributed to any specific state or actor, assumption of responsibility is another challenge.⁴⁹ Who should pay the monetary price for the deterioration of the Earth? Traditionally, industrialized countries have been ascribed more *historical responsibility*, as their historical emissions have contributed significantly to the stock of current GHGs in the atmosphere. However, this standpoint has been subject to extensive criticism, where critics have argued *inter alia* that currently living people should not be held responsible for their ancestors' actions. They have also argued that the adverse consequences of the emissions of

⁴³ Fisher, Lange & Scotford, *supra* note 18, at 24-25.

⁴⁴ William Hare *et al*, “The Architecture of the Global Climate Regime: A Top-Down Perspective”, 10 *Climate Policy* 600, at 602, [Hare *et al*].

⁴⁵ IPCC, *Climate Change 2014: Mitigation of Climate Change. Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Final Draft of Chapter 13, at 74, available at <<https://www.ipcc.ch/report/ar5/wg3/>>, accessed May 5, 2014, [IPCC (2014)].

⁴⁶ Garrett Hardin, “The Tragedy of the Commons” (1968) 162 *Science* 1243.

⁴⁷ *Ibid* at 1244.

⁴⁸ *Ibid* at 1245.

⁴⁹ Fisher, Lange & Scotford, *supra* note 18, at 31.

GHGs were unknown for a long time,⁵⁰ hence that scientific ignorance or uncertainty of past times should not be a factor in today's battle against climate change. The idea of historical responsibility is, however, reflected in the UNFCCC, which recognizes the common but differentiated responsibilities and capabilities of the parties and calls upon developed countries to take the lead in protecting the climate system.⁵¹

Against this background, the international climate change regime can serve the purpose of ensuring reciprocity of effort, by setting legally binding commitments for all parties, and by providing a compliance mechanism.⁵² This is, however, an area where the international regime has failed. Even though many states, including Canada and the EU countries, show an interest in climate change issues and claim to consider climate change as a threat of high importance, the fact is that there are still no signs that current climate policies have stabilized GHG emissions on a global level. Further delay in effective mitigation policies will make it difficult to keep global warming below 2°C.⁵³ Global institutional failure is indisputable when no comprehensive international institutional framework has been produced,⁵⁴ and confidence in the international climate change regime is low.⁵⁵

Non-compliers such as Canada have not been dealt with effectively, and where compliance cannot be assured, incentives for cooperating will be weak. Canada is also an example of a country which, in addition to having withdrawn from the Kyoto Protocol and abandoned its internationally binding climate targets, has shown poor performance in the climate change area in recent years.⁵⁶ Its climate change regulations and actions will therefore be explored in the following subsections to illustrate what an industrialized country without binding commitments does to mitigate climate change and what has led to its decision to abandon its Kyoto target. The subsections furthermore serve to provide an overview and an understanding of the federal government's approach to climate change and how it has chosen to deal with it by implementing different measures to reduce GHG emissions.

⁵⁰ IPCC (2014), *supra* note 45, Final Draft of Chapter 3, at 14.

⁵¹ UNFCCC, *supra* note 5, Article 3.

⁵² Daniel Bodansky, "A Tale of Two Architectures. The Once and Future U.N. Climate Change Regime", 43:3 *Arizona State Law Journal* 697, at 709.

⁵³ Glen P. Peters *et al.*, "The Challenge to Keep Global Warming Below 2°C" (2013) 3 *Nature Climate Change* 4, at 4.

⁵⁴ See for example Daniel C. Esty & Anthony L.I. Moffa, "Why Climate Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime" (2012) 15:3 *Journal of International Economic Law* 777, at 781.

⁵⁵ Cf. Harro van Asselt, Michael Mehling & Clarisse Kehler Siebert, "The Changing Architecture of International Climate Change Law", forthcoming in Geert Van Calster, Wim Vanderberghe & Leonie Reins, eds, *Research Handbook on Climate Change Mitigation Law* (Cheltenham: Edward Elgar, 2014) at 2, [van Asselt, Mehling & Kehler Siebert].

⁵⁶ Cf. *infra*, subsection 2.2.1.

2.2 Canada and Climate Change: Inadequate Performance?

2.2.1 Climate Targets and Performance

The Government of Canada has had a number of different approaches to how climate change should be combatted and has revised its emissions targets several times in the past 25 years. In the 1980's, Canada had a progressive approach to climate change, and earned somewhat of a reputation of being a leader on the issue, after hosting the first global conference on climate change in 1988⁵⁷, which marked the beginning of federal climate policy in Canada. At the 1988 conference, the Prime Minister at the time, Brian Mulroney (the Conservative Party), committed Canada to a 20-percent cut in GHG emissions by 2005, a pledge that was followed by the implementation of Canada's first Green Plan which focused on energy efficiency and alternative energy sources.⁵⁸ Canada then supported and ratified the UNFCCC, and its emissions target was revised and set to a return to 1990 levels by the year 2000, in alignment with the commitments of other developed countries in the UNFCCC.⁵⁹

The federal government's commitment to combating climate change continued under Prime Minister Jean Chrétien (the Liberal Party) and the Kyoto Protocol was signed and ratified. After much consultation, Canada's Kyoto target was set to a 6-percent reduction from 1990 levels by 2012.⁶⁰ The government made sure to follow up on its set target by introducing an action plan that was designed to get Canada on track to fulfill its obligations.⁶¹ This action plan was never put in place, as a change of government stayed its implementation when the Conservatives regained power in 2006. At that time, Canada's GHG emissions were 27 percent higher than in 1990, and the nation was nowhere close to meeting its Kyoto commitment. The Conservative government quashed the climate action plan introduced by the former Liberal government, and a new target was set at reducing emissions to 20 percent below 2006 levels by 2020.⁶²

With no action plan in place to reduce GHGs, and emission levels increasing, the federal government decided, in 2011, to withdraw from the Kyoto Protocol. Canada then became the first, and so far the only, signatory to withdraw from the Protocol. At the time of the announcement of the withdrawal, the government stated that the Kyoto Protocol had not been

⁵⁷ "The Changing Atmosphere: Implications for Global Security", Conference, June 27-30, 1988, Toronto, Ontario, Canada.

⁵⁸ Government of Canada, *Canada's Green Plan for a Healthy Environment* (Ottawa: Supply and Services Canada, 1990).

⁵⁹ National Round Table on the Environment and the Economy (NRTEE), *Reality Check: The State of Climate Progress in Canada* (Ottawa: NRTEE, 2010) at 28, [NRTEE].

⁶⁰ Annex B to the *Kyoto Protocol*, *supra* note 8.

⁶¹ Government of Canada, *Project Green: Moving Forward on Climate Change: A Plan for Honouring our Kyoto Commitment* (Ottawa: Government of Canada, 2005).

⁶² NRTEE, *supra* note 59, at 29.

able to deal with the climate change issue in an effective way, as larger emitters such as the United States were not covered by the Protocol. Furthermore, Canada was facing large costs as it would have to purchase a significant amount of international credits in order to make up for not fulfilling its Kyoto obligations, and the government reasoned that these funds could be better used for investments within Canada.⁶³

Finally, the current (non-binding) target of reducing emissions to 17 percent below 2005 levels by 2020 was set following the Conference of the Parties (COP) to the UNFCCC in Copenhagen, in alignment with the target set by the United States.⁶⁴ Canada has chosen to do so as the United States is its main trading partner and the two countries have a very close energy relationship.⁶⁵

What Canada's Copenhagen target means in practice is cutting emissions to 612 Megatonnes (Mt) CO₂ equivalent⁶⁶ (CO₂eq) per year. In 2011, Canada emitted 702 Mt CO₂eq, which is 19 percent more than in 1990. During the same time period, Canada's economy grew rapidly with a 65 percent increase of gross domestic product (GDP), resulting in an improvement in emission intensity (GHG emissions per dollar of GDP). Between 2005 and 2011, Canadian GHG emissions decreased by 4.8 percent,⁶⁷ but projections indicate that they will rise to 734 Mt CO₂eq per year in 2020, with current measures in place. This is very close to the emissions level that Canada had in 2005 (737 Mt).⁶⁸ In fact, emissions are projected to have decreased – in 2020 compared to 2005 levels – in the electricity sector *only*. Emissions from all other economic sectors are projected to rise during this time period.⁶⁹ This means that efforts actually made to mitigate climate change and reduce emissions within the electricity and transportation sectors will be neutralized by the lack of efforts in other sectors, resulting in total national GHG levels that do not change. This shows the importance of a comprehensive approach to mitigating climate change, on the national and the international level.

⁶³ “Canada’s Withdrawal from the Kyoto Protocol”, online: Environment Canada <<http://www.ec.gc.ca/Publications/default.asp?lang=En&n=EE4F06AE-1&xml=EE4F06AE-13EF-453B-B633-FCB3BAECEB4F&offset=3&toc=hide>>, accessed February 24, 2014.

⁶⁴ UNFCCC Decision 2/CP.15, Copenhagen Accord, UN Climate Change Conference 2009, Copenhagen, FCCC/CP/2009/11/Add.1, Appendix I [Copenhagen Accord].

⁶⁵ “United States–Canada Clean Energy Dialogue”, online: Government of Canada <<http://www.climatechange.gc.ca/dialogue/default.asp?lang=En&n=C3D58516-1>>, accessed April 9, 2014.

⁶⁶ Each greenhouse gas has a different *global warming potential*, that is, they do not contribute equally to the warming of the Earth. To be able to compare the different gases more easily, they can be standardized into CO₂ equivalent. CO₂-equivalent emission then refers to the amount of carbon dioxide emission that would cause the same warming over a given period of time, see Cowie, *supra* note 23, at 10-11.

⁶⁷ *Canada’s Sixth National Report on Climate Change*, *supra* note 17, at 4-5.

⁶⁸ Environment Canada, *Canada’s Emissions Trends*, October 2013, Figure ES 1 at 4.

⁶⁹ *Canada’s Sixth National Report on Climate Change*, *supra* note 17, Table 1.1 at 8.

2.2.2 Federal Jurisdiction over the Environment

In order to investigate Canada's current climate change action, the legal basis for federal climate legislation will first be examined, to see whether the problem lies at the legislative level, or if the Canadian legal system actually allows for stringent climate change laws.

Canada is a federal state consisting of ten provinces and three territories. Legislative authority lies with the Parliament of Canada at the federal level and with the provincial legislatures at the provincial level. The legislative powers are distributed as listed in the *Constitution Act* of 1867⁷⁰ (the Constitution), where the powers of the federal legislature are established in Section 91 and the exclusive powers of the provincial legislatures in Sections 92 and 92A, under enumerated *heads of powers*. At the time of the first drafting of the Constitution, in the late 1800's, the environment was not something that was widely discussed. Consequently, the environment is not listed in Sections 91, 92 or 92A. The SCC has clarified that the federal and the provincial parliaments have concurrent jurisdiction over the environment,⁷¹ but where there is a conflict between overlapping (constitutionally valid) federal and provincial laws, the federal one prevails, according to the doctrine of paramountcy.⁷²

Statutes are the most important source of law. However, as the Canadian legal system – with the exception of the province of Québec⁷³ – is characterized as a common-law system, judge-made law or case law is a major source of law in Canada.⁷⁴ The courts play another important role in the Canadian legal system, in the form of judicial review, which in essence concerns the accountability for governmental action, and the upholding of the rule of law. Judicial review proceedings can, for example, be used to force a government to regulate on a specific matter. One example is the case *Friends of the Earth v Canada* from 2008, in which the applicants sought relief on the grounds that the federal government allegedly had failed to comply with its duties under the *Kyoto Protocol Implementation Act*⁷⁵ (KPIA), by declaring that it would not attempt to meet its emissions targets; thus essentially claiming that the government had violated federal climate change law.⁷⁶ Canada then became the first country to be taken to court for

⁷⁰ *Constitution Act, 1867*, *supra* note 38.

⁷¹ *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3.

⁷² See for example Judge Major's analysis in *Rothmans, Benson & Hedges Inc. (Trustee of) v Saskatchewan* [2005] 1 SCR 188, at paras 11-14.

⁷³ The province of Québec is characterized as a civil law jurisdiction, as it is not based on the British tradition of common law, but rather on the French and Roman tradition of codification of law, see more in Gerald Gall, *The Canadian Legal System*, 5th ed (Scarborough, Ontario: Thomson Carswell, 2004) at 263-265, [Gall].

⁷⁴ *Ibid* at 40-41.

⁷⁵ *Kyoto Protocol Implementation Act*, SC 2007, c 30, [KPIA]. The KPIA was enacted to ensure that Canada meet its obligations under the Kyoto Protocol. It was repealed on June 29, 2012.

⁷⁶ *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183.

not complying with its legal commitments to mitigate climate change.⁷⁷ The applications were, however, dismissed, as the Court concluded that the KPIA “must be interpreted as excluding judicial review over issues of substantive Kyoto compliance” and consequently that it was not up to the Court to review whether the government had acted reasonably or not in its response to Canada’s Kyoto commitments.⁷⁸

Canada was brought to court again regarding the Kyoto Protocol, in 2012. In *Turp v Canada*⁷⁹, judicial review of the government’s decision to withdraw from the Kyoto Protocol was sought on the grounds that Canada’s withdrawal from the Protocol was illegal, null and void as it was allegedly in violation of *inter alia* the KPIA. The application was, however, dismissed in Federal Court, as the Court concluded that the option to withdraw is provided by Article 27 of the Protocol and not removed by the KPIA, as the KPIA contained “no provision, condition or restriction that would limit the royal prerogative of the government to withdraw from the Protocol”.⁸⁰

These two cases are examples that show that there is an interest for climate change issues in Canada, and that there is no unanimity among the decision to withdraw from internationally legally binding climate commitments. An investigation of Canada’s past and current climate change action will point to the same conclusion – that political unwillingness is a major factor in Canada’s poor climate performance. As climate change can be regulated both at the federal and the provincial level, there are potentially plenty of opportunities for how Canada could tackle climate issues. The following subsections will now take a look at how the federal government has chosen to regulate on climate change.

2.2.3 Current Climate Change Action

The current federal government’s approach is that climate change action should be taken while keeping the Canadian economy strong; environmental benefits should not be acquired at the expense of the economy.⁸¹ At COP-19 in Warsaw in 2013, the Canadian Minister of the Environment, Leona Aglukkaq stated that the Government of Canada supports the establishment of a climate change agreement, which includes commitments by all major emitters, however, stressing that such an agreement must “balance environmental protection and economic prosperity”.⁸²

⁷⁷ Ecojustice Media Release, “Canada in court for violating federal climate change law”, June 18, 2008, online: Ecojustice <<http://www.ecojustice.ca/media-centre/press-releases/canada-in-court-for-violating-federal-climate-change-law>>, accessed April 9, 2014.

⁷⁸ *Friends of the Earth v Canada*, *supra* note 76, at paras 44-46.

⁷⁹ *Turp v Canada (Attorney General)*, 2012 FC 893.

⁸⁰ *Ibid* at paras 25-26.

⁸¹ *Canada’s Sixth National Report on Climate Change*, *supra* note 17, at 5.

⁸² Leona Aglukkaq, “Canada’s National Statement at the 19th Conference of the Parties to the United Nations Framework Convention on Climate Change”, delivered at COP-19 in Warsaw, Poland, November 20, 2013.

The Canadian government's emphasis on the strength of the economy has led to the initiation of a "sector-by-sector" approach to combating climate change, instead of implementing nation-wide reforms, such as a carbon tax or a national emissions trading system. GHG emissions are thus regulated in one economic sector at a time.⁸³ This way, regulations can be designed in a way that accommodates circumstances specific to individual sectors, which will result in long-term emissions reductions while maintaining economic competitiveness.⁸⁴ So far, regulations have been implemented for the transportation and electricity sectors, which are two sectors with some of the highest emissions levels – 24 and 12 percent, respectively, of Canada's total GHG emissions.⁸⁵ For the highest-emitting sector, the oil and gas sector, which accounts for one quarter of Canada's total GHG emissions,⁸⁶ there are still no regulations in place.

The main federal statute on the environment is the *Canadian Environmental Protection Act*⁸⁷ (CEPA), which regulates environmental activities that fall under federal jurisdiction. These include cross-border air pollution⁸⁸ and environmental activities that take place on land owned by federal agencies⁸⁹. Furthermore, CEPA gives authority to make regulations on GHG emissions, for example regulations related to the allowed quantity or concentration of substances released into the environment.⁹⁰

The federal government has not, however, taken this opportunity to set a national limit on the total amount of GHG-emissions level allowed. Instead, it is working through selected and isolated measures, according to its sector-by-sector approach. In the transportation sector, regulations for light-duty vehicles were published under CEPA in 2010.⁹¹ These impose annual GHG emission standards to passenger automobiles and light trucks made between 2011 and 2016. Amendments have since been proposed, for the inclusion of vehicles of later model years, beyond 2016.⁹² The vehicle regulations are aligned with U.S. Environment Protection Agency standards. Since the beginning of 2013, regulations are also in place for heavy-duty vehicles and

⁸³ *Canada's Sixth National Report on Climate Change*, *supra* note 17, at 5.

⁸⁴ *Ibid* at 57.

⁸⁵ "Greenhouse Gas Emissions by Economic Sector", online: Environment Canada, <<http://ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=F60DB708-1>>, accessed May 6, 2014.

⁸⁶ *Ibid*.

⁸⁷ *Canadian Environmental Protection Act*, SC 1999, c 33, [CEPA].

⁸⁸ *Ibid*, Sections 166-174.

⁸⁹ *Ibid*, Section 207(1).

⁹⁰ *Ibid*, Section 209(2)(a).

⁹¹ *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, SOR/2010-201.

⁹² *Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations* (Proposal), see "Backgrounder: Regulating Greenhouse Gas Emissions from Light-Duty Vehicles (2017-2025)", online: Environment Canada <<http://www.ec.gc.ca/default.asp?lang=En&n=56D4043B-1&news=1F13DA8A-EB01-4202-AA6B-9E1E49BBD11E>>, accessed March 5, 2014.

engines, aiming to reduce emissions from vehicles such as trucks and buses, as well as vocational vehicles.⁹³

In the electricity sector, the federal government has taken steps to permanently shift to lower or non-emitting types of electricity generation.⁹⁴ A performance standard for coal-fired electricity generation has been introduced through regulations under CEPA and will come into force in 2015.⁹⁵ The adoption of these regulations makes Canada the first major coal user to ban construction of traditional coal-fired electricity generation units.⁹⁶

The federal regulatory approach is complemented by clean technology investments as well as provincial and territorial climate action,⁹⁷ and there are several examples of provinces taking more stringent climate action than the federal government. Three ambitious provincial measures are worth mentioning, starting with British Columbia's carbon tax⁹⁸, implemented in 2008 and still the only one of its kind in North America. The tax has been very successful with British Columbia reporting a decrease in fuel consumption by over 17 percent between 2008 and 2012.⁹⁹ Second, the province of Québec has a cap-and-trade system¹⁰⁰ for GHG emission allowances, which requires participation from any enterprise emitting more than 25,000 tonnes CO₂eq per year,¹⁰¹ and third, the province of Ontario has decided to have all coal units in the province closed by the end of 2014,¹⁰² thereby phasing out coal-fired electricity generation. This measure has contributed significantly to the reduction of total GHG emissions from Canada's electricity sector,¹⁰³ which shows the significance of moving towards a low-carbon economy in order to mitigate climate change.

2.3 Alternative Possibilities: The Changing Nature of International Climate Change Law

Canada and the EU have cooperated on environmental policies for almost 40 years through the Canada–EU High-Level Dialogue on Environment,

⁹³ *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*, SOR/2013-24.

⁹⁴ *Canada's Sixth National Report on Climate Change*, *supra* note 17, at 7 and 58.

⁹⁵ *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167.

⁹⁶ *Canada's Sixth National Report on Climate Change*, *supra* note 17, at 87.

⁹⁷ *Ibid* at 5.

⁹⁸ *Carbon Tax Act* [SBC 2008] c 40.

⁹⁹ Stewart Elgie & Jessica McClay, *BC's Carbon Tax Shift after Five Years: Results. An Environmental (and Economic) Success Story* (Ottawa: Sustainable Prosperity, 2013) at 3.

¹⁰⁰ *Regulation Respecting a Cap-and-Trade System for Greenhouse Gas Emission Allowances*, RRQ, c Q-2, r 46.1.

¹⁰¹ *Ibid*, Article 2.

¹⁰² Ontario Ministry of Energy, *Achieving Balance – Ontario's Long-Term Energy Plan* (Toronto: Queen's Printer for Ontario, 2013) at 8.

¹⁰³ *Canada's Sixth National Report on Climate Change*, *supra* note 17, at 78.

under which experts from both Canada and the EU meet roughly once every eighteen months to discuss environmental issues and review policy and progress.¹⁰⁴ At the Canada–EU Summit in 2010, adaptation to and mitigation of climate change were identified as key areas,¹⁰⁵ and leaders from both sides emphasized that it was of great importance that a high level of ambition to tackle climate change was upheld.¹⁰⁶ In a report from the 2011 Summit, Canada and the EU confirmed that they both want to see a legally binding international agreement on climate change, which would be based on the commitments made at the COPs in Copenhagen and Cancun.¹⁰⁷

However, as a consequence of the current global institutional failure, the international legal climate change regime is now changing. It is no longer only up to the state and/or intergovernmental negotiations to set standards and conditions.¹⁰⁸ International climate change law is gradually changing and in recent years an increasing support for regional as opposed to multilateral initiatives can be determined. Moreover, internationally binding commitments are replaced or supplemented by voluntary pledges.¹⁰⁹ In times of institutional failure, this is an opportunity that the EU can use in an attempt to inspire other actors, such as Canada to take climate change action in other ways and for other reasons than for the sake of complying with international treaties in order to avoid heavy penalties.

The UNFCCC was adopted more than 20 years ago, and annual meetings in the form of COPs have been held since 1995. Despite these international efforts, the results have been inadequate in terms of mitigating and stabilizing climate change. Currently, it is not very likely that the emissions gap, that is the difference between pledged emission reductions and the actual expected emission levels in 2020, will be closed by 2020.¹¹⁰ The Kyoto Protocol has 192 parties, but only establishes emissions targets for 36 countries and the EU,¹¹¹ and these do not include the major emitters such as the United States, China and India.¹¹² For its participants, the Protocol's compliance mechanisms are insufficient, clearly confirmed by Canada's withdrawal. As a consequence, confidence in the international climate regime is low and international climate change law and policy is perceived

¹⁰⁴ “Environment”, online: Canada–EU Relations, Government of Canada <<http://www.canadainternational.gc.ca/eu-ue/policies-politiques/environnement-environnement.aspx?lang=eng>>, accessed April 22, 2014.

¹⁰⁵ “Canada”, online: European Union External Action <http://eeas.europa.eu/canada/sector_en.htm>, accessed March 31, 2014.

¹⁰⁶ “EU–Canada Summit Joint Press Statement”, online: Government of Canada <http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2010_05_05_statement-declaration.aspx?lang=eng>, accessed March 31, 2014.

¹⁰⁷ “2011 Report to the Canada–European Union Joint Cooperation Committee”, online: Government of Canada <http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2011jcc-cmc.aspx>, accessed March 31, 2014.

¹⁰⁸ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 3.

¹⁰⁹ *Ibid* at 5.

¹¹⁰ *The Emissions Gap Report 2013*, *supra* note 7, at xi.

¹¹¹ Annex B to the *Kyoto Protocol*, *supra* note 8. Annex B also establishes an emissions target for the United States; however, the United States has not ratified the Protocol.

¹¹² Cf. “CO₂ Emissions (kt)”, online: The World Bank <<http://data.worldbank.org/indicator/EN.ATM.CO2E.KT/countries>>, accessed May 10, 2014.

as ineffective.¹¹³ Steve Raynor identifies the problem as lying in the “top-down” approach. This approach consists of policies and measures being defined by politicians, which has been the dominating strategy for dealing with climate change. Raynor argues that politicians are not always in the position to prioritize climate change issues over matters of more importance to their voters, and that a “bottom-up” approach, which originates from a national level, as opposed to the international climate regime’s supranational approach, would be better suited for developing climate policy. The bottom-up approach would instead be based on a nation’s own capacities, in terms of institutions, technology, economy and politics,¹¹⁴ and supports a more voluntary approach to international climate policy, for example in the form of target pledges.¹¹⁵ The Copenhagen Accord is an example of the bottom-up approach, as it allows each party to unilaterally specify its own targets and measures to achieve that set target. The Kyoto Protocol, on the other hand, represents the top-down architecture by defining emissions targets through international negotiations.¹¹⁶ William Hare, Claire Stockwell, Christian Flachsland, and Sebastian Oberthür, however, stress that because of the collective-action nature of the climate change challenge, there is a need for coordination of actions and approaches by countries, and a top-down approach is the only way of effectively making countries commit to setting ambitious emissions-reduction targets.¹¹⁷

At COP-17 in Durban in 2011, the parties to the UNFCCC agreed to negotiate a new agreement by 2015 that would be legally enforceable and applicable to all parties to the UNFCCC.¹¹⁸ Harro van Asselt, Michael Mehling and Clarisse Kehler Siebert stress the importance of the need of flexible and dynamic negotiations that can take into account changes in scientific insights as well as socio-economic and political conditions, and that it is essential that a balance is maintained between a top-down and a bottom-up approach to international climate policy.¹¹⁹ A balance resulting in national actions achievements of internationally agreed upon goals.¹²⁰ Another consideration is that climate change cannot be regulated in isolation, as climate change considerations permeate other areas additional to environmental law, such as international trade law and human rights law. The role of the UNFCCC in international climate change law needs to be reconsidered, according to van Asselt, Mehling and Kehler Siebert, as some issue areas might be better regulated by other institutions.¹²¹ The UN climate regime is, however, still important as it brings different countries

¹¹³ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 2.

¹¹⁴ Steve Raynor, “How to Eat an Elephant: A Bottom-up Approach to Climate Policy”, 10:6 *Climate Policy* 615, at 616-617.

¹¹⁵ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 9.

¹¹⁶ Daniel Bodansky, “A Tale of Two Architectures. The Once and Future U.N. Climate Change Regime”, 43:3 *Arizona State Law Journal* 697, at 705.

¹¹⁷ Hare *et al*, *supra* note 44, at 603-605.

¹¹⁸ UNFCCC, Decision 1/CP.17, “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action”, UN Climate Change Conference 2011, Durban, FCCC/CP/2011/9Add.1, at para 4.

¹¹⁹ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 7.

¹²⁰ *Ibid* at 10-11.

¹²¹ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 9.

together in working towards a mutual goal while serving as a forum to keep climate change issues on the international policy agenda. In addition, it provides transparency through its monitoring, reporting and verification system as well as by allowing non-governmental observers to participate in negotiations.¹²²

Another aspect of the changing international climate change law is that courts are playing an increasingly important role. The emergence of climate change litigation can potentially be explained by global institutional failure and the slow progress under the UNFCCC; courts are thus used to fill a governance gap.¹²³ There are different types of litigation related to climate change, and the concept can be defined as to relate to various aspects of climate change. Much of the international climate litigation concerns emissions trading schemes established to regulate GHG emissions,¹²⁴ one example being the *ATA* case.¹²⁵ This type of litigation is clearly a result of the limitations of the Kyoto Protocol's compliance mechanisms, where national courts have to step in to substitute the shortcomings of the international climate regime.

2.4 Reflections

To summarize this chapter, it can be established that the international climate regime has been ineffective in recent years. There are no comprehensive international agreements imposing legally binding climate targets, and this fact is sometimes seen as proof of institutional failure. As explained, climate change is a transboundary challenge and collective action is needed. Developing countries have been reluctant to taking action as they do not see themselves as responsible for the problem occurring in the first place, and among these are emerging economies such as China and India, responsible for a significant share of global GHG emissions. In order to combat climate change, this type of reasoning is unsustainable. Reducing the emissions from a limited number of countries will not suffice. This reluctance to contribute to limiting atmospheric GHG concentrations lies not only with developing countries and emerging economies, but several industrialized countries have shown unwillingness to participate in global efforts to combat climate change. Among them is Canada, whose climate performance has been anything but desirable in recent years.

Although Canada is no longer a party to the Kyoto Protocol, it does not mean that it has taken no climate action at all. It is still a party to the UNFCCC and hence subject to the Convention's aspirational goals. Canada has expressed a willingness to act on climate change, most recently

¹²² Antto Vihma & Harro van Asselt, "Great Expectations – Understanding Why the UN Climate Talks Seem to Fail", Finnish Institute of International Affairs Briefing Paper 109, June 14, 2012, at 6-7.

¹²³ Hari M. Osofsky, "The Continuing Importance of Climate Change Litigation" (2010) 1:1 *Climate Law* 3, at 5.

¹²⁴ van Asselt, Mehling & Kehler Siebert, *supra* note 55, at 15-16.

¹²⁵ See *infra*, subsection 4.4.2.

confirmed by Minister Aglukkaq's statement at the COP-19, and some measures have been implemented, among them emission standards for some automobiles and the banning of the construction of new coal-fired power plants, which is definitely a step in the right direction. However, it must be noted that the current government has made it clear that environmental protection cannot come at the expense of the economy. This standpoint materializes in the government's decision to reduce emissions using a sectoral, as opposed to a nation-wide approach. The sector-by-sector approach allows for more flexibility in "customizing" climate change measures to target selected industries for emissions reductions. Furthermore, Canada has made sure to align any climate commitments with those of its main trading partner, the United States, so as to not put its industries at a competitive disadvantage.

Canada still has a long way to go, and immediate, more aggressive, action is required if Canada is to reach its climate target. The Canadian government has through CEPA explicitly been given the competence to regulate with respect to limiting GHG emissions. In addition to this federal act, the Canadian Constitution authorizes the federal government to legislate on the environment. Consequently, the problem lies not in a lack of competence, but rather in a lack of political will. The federal government should take the opportunity to be inspired by provincial climate action, as there are several examples of successful progress on reducing GHG emission at the provincial level.

Currently, Canada is looking at a 0-percent reduction of its GHG emissions by 2020, rather than the 17-percent cut that it has committed to under the Copenhagen Accord. All commitments under that agreement are, however, non-binding, and the current Conservative government has already proved, by withdrawing from the Kyoto Protocol, that fulfilling Canada's climate commitments is not a priority. Moreover, Canada does not seem to have a problem in adjusting its climate targets or its international agreements, if efforts to limit GHG emissions are not enough. When the government realized that it was nowhere near reaching its Kyoto Protocol in the years leading up to 2012, it decided to withdraw from its commitments, rather than to pay the fines, or, even better, to step up its climate game and implement more stringent measures.

Even though global action is needed in order to conquer a global problem, international agreements may not be the only solution. It can be questioned whether a legally binding climate target would make any difference to Canada's climate performance. As presented in this chapter, new ways of regulating climate change are emerging, and it is suggested that working with voluntary pledges rather than with legally binding commitments is feasible. Judging by Canada's actions, and drawing from the analogy of the *tragedy of the commons*, it seems that additional incentives are needed for individual actors to see beyond immediate economic profit. The Canadian federal government has the legal competence needed to legislate on GHG emissions in an efficient manner, but the sector-by-sector is not a progressive one that will inspire other states, but rather, it is a strategy for

not having to deal with emissions from the heavily emitting, yet very profitable, oil and gas sector. This strategy will allow this sector to stay unregulated for a little longer, as the government can point to measures implemented in the transportation and energy sectors. Regulating emissions from these sectors is most definitely of high importance, but one cannot ignore that it also gives the government an excuse to divert attention from the fact that the industry responsible for 25 percent of Canadian emissions is still free to emit heavily with no consequences at the federal level.

The Canadian cases *Friends of the Earth v Canada* and *Turp v Canada* show that there are forces in Canada which are ready to fight for the climate, but the courts appear reluctant to get involved in the issue, and seem to want to leave the challenge to be tackled on a political level.

As one of the world's biggest energy producers, Canada would prove an important point and show other producers the significance of sustainable energy production by stepping up and taking responsibility for its GHG emissions. Its current approach may even de-motivate others to adopt a progressive climate change policy.¹²⁶ These observations leave us with the conclusion that much of the challenge in combating climate change lies in political unwillingness to act, plausibly because this type of regulations will be costly and not necessarily immediately economically rewarding. The new possibilities that the changing architecture of international climate law brings, where alternatives to top-down approaches are emerging, should be further explored to find alternative solutions. Having set the scene for this thesis, the next chapter will examine the EU's leadership in climate change action, and what legal measures the Union has implemented to mitigate climate change and how it has taken advantage of these times of change in international climate law to inspire other countries to take similarly stringent climate action.

¹²⁶ Cf. Canadian Press: "Canada's climate change stance 'de-motivating'", online: CBC News <<http://www.cbc.ca/news/technology/canada-s-climate-change-stance-de-motivating-1.2433224>>, accessed March 9, 2014.

3 The EU and Climate Change: Leading by Example

3.1 Promoting Climate Change Action through Directional Leadership and Secondary Legislation

Ever since the beginning of the 1990's, when negotiations leading up to the UNFCCC were initiated, the EU has positioned itself as an international leader in climate change action. The Union has shown strong support for and promoted the adoption of a new international comprehensive agreement on climate change including binding international commitments.¹²⁷ The EU has high ambitions for combating climate change and it is and has been trying to inspire other actors to take action by implementing stringent domestic measures and setting ambitious climate targets, which I will exemplify in the following subsections. In its long-term objective to carry out a transition to a low-carbon economy, the EU has already introduced a GHG target for 2050, set to cutting emissions by 80-95 percent compared to 1990 levels. This target is considered necessary if climate change is to be kept below 2°C.¹²⁸

The climate change measures addressed are not an exhaustive enumeration of all climate change action that the EU has taken, but are intended to highlight the important parts in the EU's *directional* leadership. Directional leadership is a term used in international relations scholarship,¹²⁹ and refers to taking unilateral action and implementing domestic measures in order to demonstrate one's own commitment as well as the feasibility of proposed policy solutions – essentially leading by example. This is the primary approach that the EU has taken when aspiring to assume leadership in climate change policy.¹³⁰

One important aspect of the EU's directional leadership, which will be expanded on in the following subsections, is that the EU has continuously set tougher targets and implemented more stringent measures for its climate change policy than what has been suggested in the international climate

¹²⁷ Sebastian Oberthür & Claire Roche Kelly, "EU Leadership in International Climate Policy: Achievements and Challenges" (2008) 43:3 *The International Spectator* 35, at 35-36, [Oberthür & Roche Kelly].

¹²⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Roadmap for moving to a competitive low carbon economy in 2050*, COM(2011) 112 final, at 3, [2050 Roadmap].

¹²⁹ Joanne Scott, "The Multi-Level Governance of Climate Change" (2011) 5:1 *Carbon & Climate Law Review* 25, at 28.

¹³⁰ Charles F. Parker & Christer Karlsson, "Climate Change and the European Union's Leadership Moment: An Inconvenient Truth" (2010) 48:4 *Journal of Common Market Studies* 923, at 924-926.

regime, and then delivered on those targets and used its climate policies effectively. The EU must fulfill international promises if it wants to maintain its leadership role in global climate change action.¹³¹ The following subsections will focus on how the EU has worked with integrating the environmental aspect into its legislation and policies, as well as what emissions targets it has set for itself. In addition, they will highlight important parts of the EU's current climate change action, which aims to be efficient tools in combating climate change, as well as to inspire other countries to pursue similar action.

3.2 Legal Basis and Environmental Integration

Protection of the environment is of great importance to the EU and this is apparent as it is mentioned in both pieces of EU primary legislation and included among the general principles of EU law. Article 3(3) of the Treaty on European Union¹³² (TEU) focuses on the domestic aspect and states that the EU's internal market shall “work for the sustainable development of Europe”, as well as that it shall aim at a “high level of protection and improvement of the quality of the environment”, while Article 3(5) TEU enhances that the EU shall promote sustainable development in its external relations. Accordingly, this has been confirmed by the CJEU, which has ruled that environmental protection is one of the EU's “essential objectives”.¹³³

Moreover, the environmental integration principle in Article 11 of the Treaty on the Functioning European Union¹³⁴ (TFEU) states that environmental protection requirements *must* be integrated into all EU policies and activities. By framing the provision in mandatory terms, the legislator has emphasized its importance, perhaps even intending it as imposing a legal obligation.¹³⁵

More specific environmental provisions are found in Articles 191-193 TFEU, which make up the Environmental Title. Article 191(1) TFEU establishes four objectives for EU environmental policy, one of them being the promotion of “measures at international level to deal with regional or worldwide environmental problems, and *in particular combating climate change*” [emphasis added]. The climate change aspect was added through

¹³¹ Oberthür & Roche Kelly, *supra* note 127, at 39.

¹³² *Treaty on European Union* (Consolidated version 2012), OJ, C 326/13, [TEU].

¹³³ See for example Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531, at para 13.

¹³⁴ *Treaty on the Functioning of the European Union* (Consolidated Version 2012), OJ, C 326/47, [TFEU].

¹³⁵ Cf. Gracia Marín Durán & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart, 2012) at 29, [Marín Durán & Morgera].

the adoption of the Treaty of Lisbon¹³⁶, which entered into force on December 1, 2009. This addition of an explicit reference to climate change as one of the objectives of the EU environmental policy can be interpreted as that which facilitates and opens up the possibility for the EU to take on an international leadership role within the climate change policy area.¹³⁷

In addition to the Environmental Title of the TFEU, Article 114 TFEU establishes EU competence for environmental action regarding measures related to the establishment and the functioning of the internal market, thus allowing for such legislative action to have an environmental protection aspect, and requiring those measures to be based on a “high level of protection”, as stated in the TEU.¹³⁸ How these objectives have been applied in EU climate change legislation will be explored below, after the EU’s climate change targets and current performance have been presented.

3.3 Demonstrating Commitment by Setting Ambitious Climate Targets

The EU acknowledges that climate change is a huge challenge, but it is committed to making Europe the most climate-friendly region in the world by continuing EU leadership in combating climate change.¹³⁹ At the latest UNFCCC Conference of the Parties (COP), in Warsaw in November of 2013, the EU Commissioner for Climate Action, Connie Hedegaard, stated that empty agreements are not enough when it comes to climate change – it is commitments and actions that matter, and if the set climate target is not met, the target cannot be changed. It is the policies implemented to achieve the target that have to be changed, or amended¹⁴⁰ – a standpoint that can be contrasted with that of Canada, which, as explained, has adjusted and changed its climate targets several times.

The EU’s set climate targets reflect the its commitment to tackling climate change and to taking climate action. First of all, for the first commitment period of the Kyoto Protocol (2008-2012), Article 3 of the Protocol required all Annex I parties to reduce their emissions by at least 5 percent. The EU and its fifteen Member States at the time¹⁴¹ (EU-15), however, committed to

¹³⁶ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon*, [2007], OJ, C 306/01, [Treaty of Lisbon].

¹³⁷ Cf. Sanja Bogojević, “EU:s handel med utsläppsrätter och de globala obalanserna i klimatskyddet” in Antonina Bakardjieva Engelbrekt, Lars Oxelheim & Thomas Persson, eds, *EU och de globala obalanserna* (Stockholm: Santérus, 2014) 109, at 113, [Bogojević (2014)].

¹³⁸ Fisher, Lange & Scotford, *supra* note 18, at 133.

¹³⁹ “Message by the Director General”, online: European Commission <http://ec.europa.eu/clima/about-us/director/index_en.htm>, accessed April 9, 2014.

¹⁴⁰ Connie Hedegaard, “Statement at the Opening of the High-Level Segment of the UN Climate Conference COP 19”, delivered at COP-19 in Warsaw, Poland, November 19, 2013, online: European Commission <http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2013-11-19_02_en.htm>, accessed April 9, 2014.

¹⁴¹ There is no collective reduction target under the Kyoto Protocol for the 28 current EU Member States.

reduce their GHG emissions by an additional three percentage points, and set their target at reducing emissions by 8 percent by 2012, compared to 1990 levels.¹⁴² The EU was not content with a 5-percent reduction, and showed that it had higher ambitions than what was required by going beyond what had been agreed to by the international community. The EU's total GHG emissions levels have been below that 8-percent Kyoto target since 2009.¹⁴³

At the COP in Copenhagen in 2009, the EU yet again demonstrated its commitment, when the Annex I parties to the Kyoto Protocol agreed, under the Copenhagen Accord,¹⁴⁴ to submit non-binding economy-wide emissions reductions targets for 2020.¹⁴⁵ The EU made a conditional commitment and set up a target of a 20-percent cut in emissions compared to 1990 levels, unless other developed countries would make similarly stringent commitments, preferably under an international treaty.¹⁴⁶ In that case, the EU would increase its target to a 30-percent reduction.¹⁴⁷ The conditional target was a way for the EU to try to get other actors to take more aggressive climate action.

Negotiations at the COP in Doha in 2012 resulted in a second commitment period being launched under the Kyoto Protocol through the Doha Amendment¹⁴⁸, however, only some developed nations, including the EU, agreed to setting up new reduction targets during this extended commitment period of eight years (2013-2020). The EU committed to a reduction of GHG emissions of 20 percent by 2020, with 1990 as the base year. As with its commitment under the Copenhagen Accord, the EU stated that it would move to a 30-percent reduction target, provided that other developed countries would make comparable commitments.¹⁴⁹ In a press release, the European Commission explained that even though the EU had already implemented these emissions reductions, ratifying the Doha Amendment, thus making its pledges legally binding, it would show the EU's and its Member States' commitment to tackling climate change at the international level, as well as demonstrate its support for a legally binding international agreement on climate change.¹⁵⁰

¹⁴² Annex B to the Kyoto Protocol, *supra* note 8.

¹⁴³ European Environment Agency, *Annual European Union greenhouse gas inventory 1990–2011 and inventory report 2013 – Submission to the UNFCCC Secretariat*, Technical report No 8/2013, at v.

¹⁴⁴ UNFCCC Decision 2/CP.15, Copenhagen Accord, UN Climate Change Conference 2009, Copenhagen, FCCC/CP/2009/11/Add.1, [Copenhagen Accord].

¹⁴⁵ *Ibid.*, para 4.

¹⁴⁶ Cf. European Commission, *Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions: The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020*, COM(2013) 167 final.

¹⁴⁷ Appendix I to the Copenhagen Accord., *supra* note 144.

¹⁴⁸ UNFCCC Decision 1/CMP.8, UN Climate Change Conference 2012, Doha, FCCC/KP/CMP/2012/13/Add.1, [Doha Amendment].

¹⁴⁹ *Ibid.*, Annex I.

¹⁵⁰ European Commission, 6 November 2013, “Questions & Answers on EU Ratification of the Second Commitment Period of the Kyoto Protocol”, MEMO/13/956, Brussels, online:

Currently, the EU has a climate and energy policy that has set up the so-called “20-20-20” targets for 2020, in the form of three key objectives, which are all aimed at meeting the EU’s international climate targets under the Copenhagen Accord and the Kyoto Protocol:

- GHGs to be cut by 20 percent compared to 1990 levels
- Renewable resources (such as wind, solar, and biomass energy) to make up for 20 percent of the total energy production
- Energy efficiency to be improved by 20 percent¹⁵¹

The latest reports, with figures from 2011, show a decrease of 18.4 percent in total GHG emissions in the EU-27 (Croatia joined the EU as the 28th Member State in 2013) between 1990 and 2011.¹⁵² Furthermore, renewable energy made up 13 percent of total energy consumption.¹⁵³ In the 2014 CCPI, however, Germanwatch and Climate Action Network Europe pointed out that the EU had not yet developed an efficient way of using the fight against the economic crisis as a tool for environmental protection, and that the EU is no longer in the lead when it comes to implementing ambitious climate policy on a national level.¹⁵⁴

3.4 The EU ETS

The EU established its emissions trading scheme in 2005, which is now its key tool for reducing industrial GHG emissions in a cost-efficient way,¹⁵⁵ and could potentially be called the world’s most important GHG emissions trading scheme, because of its high value.¹⁵⁶ The Scheme now limits GHG emissions from more than 11,000 installations, including power plants, oil refineries and civil aviation, and covers around 45 percent of the EU’s total emissions.¹⁵⁷ By putting a price on the emission of GHGs, the EU aims to

Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-956_en.htm>, accessed April 25, 2014.

¹⁵¹ *Presidency Conclusions of the Council of the European Union*, Brussels, 8/9 March 2007/Presidency Conclusions, 7224/1/07 REV 1; reconfirmed by the European Council on June 17, 2010, see *Conclusions of the European Council*, EUCO 13/10; see also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 – A strategy for competitive, sustainable and secure energy*, COM(2010) 639 final.

¹⁵² European Environment Agency, *Annual European Union greenhouse gas inventory 1990–2011 and inventory report 2013 – Submission to the UNFCCC Secretariat*, Technical report No 8/2013, at iv.

¹⁵³ European Commission, *Sixth National Communication and First Biennial Report from the European Union under the United Nations Framework Convention on Climate Change (UNFCCC)*, Technical Report 2014-075 (Luxembourg: Office for Official Publications of the European Communities, 2014) at 83.

¹⁵⁴ CCPI 2014, *supra* note 12, at 6.

¹⁵⁵ Sanja Bogojević, *Emissions Trading Schemes: Markets, States and Law* (Oxford: Hart Publishing, 2013) at 59.

¹⁵⁶ Kulovesi, Morgera & Muñoz, *supra* note 11, at 847.

¹⁵⁷ “The EU Emissions Trading System (EU ETS)”, online: European Commission <http://ec.europa.eu/clima/policies/ets/index_en.htm>, accessed April 26, 2014.

integrate climate change considerations into the covered sectors, which are all energy-intensive.¹⁵⁸ The objective is to stimulate innovation and to create an incentive for these industries to start investing in low-carbon technologies,¹⁵⁹ and can be understood as an internalization of some of the costs for climate change.¹⁶⁰

The EU ETS was established through the ETS Directive¹⁶¹ as the world's first cap-and-trade system for CO₂ and other GHG emissions,¹⁶² meaning that a limit is set on how much GHGs that installations are allowed to emit. Within this *cap*, which equals the total number of allowances under the EU ETS, companies receive emission *allowances* to sell or buy from one another.¹⁶³ One allowance gives the right to emit one metric tonne of CO₂eq.¹⁶⁴ The cap is decreased every year, to make sure that the total amount of emissions is correspondingly reduced over time.¹⁶⁵ At the end of each year, each company must surrender enough allowances to cover all of its emissions. Should a company's emissions exceed its allowances, fines will be imposed, now set to 100 euros per tonne CO₂eq exceeding the amount of allowances surrendered.¹⁶⁶ Any surplus allowances can be saved to cover future needs, or sold to another company that is short of allowances. Consequently, by buying allowances from the market, installations can emit more than they have been allocated without the environment being more adversely affected, since the total amount of allowances that can be allocated is fixed.

Prior to 2013, the majority of emission allowances were given away for free to companies, a method referred to as "grandfathering". However, this did not create a great enough incentive for industries to actually cut their emissions.¹⁶⁷ Several problems can be identified in relation to grandfathering, a significant one being that allowances may be over-allocated, and companies would thus receive more allowances than they actually need, which means that market price would not be paid for

¹⁵⁸ Kulovesi, Morgera & Muñoz, *supra* note 11, at 847.

¹⁵⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 by 2020 – Europe's Climate Change Opportunity*, COM(2008) 30 final, at 5, [2020 Strategy].

¹⁶⁰ Cf. Sanja Bogojević's "Economic Efficiency Model" in Sanja Bogojević, "Ending the Honeymoon: Deconstructing Emissions Trading Discourses" (2009) 21:3 *Journal of Environmental Law* 443, at 452-456.

¹⁶¹ *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, [2003], OJ, L 275/32, [ETS Directive].

¹⁶² European Commission, *EU Action Against Climate Change: The EU Emissions Trading Scheme, 2009 Edition* (Luxembourg: Office for Official Publications of the European Communities, 2008) at 5.

¹⁶³ "Emissions Trading System (EU ETS)", online: European Commission – Climate Action <http://ec.europa.eu/clima/policies/ets/index_en.htm>, accessed May 5, 2014.

¹⁶⁴ ETS Directive, *supra* note 161, Article 3(a).

¹⁶⁵ *Ibid*, Article 9.

¹⁶⁶ *Ibid*, Article 16(3).

¹⁶⁷ 2020 Strategy, *supra* note 159, at 5.

allowances. In addition, over-allocation could constitute state aid, if seen as an advantage received from the state which the companies do not have to pay for.¹⁶⁸

The intention is now to gradually phase out free allocation, thereby to make sure that the Polluter Pays Principle is practiced.¹⁶⁹ In 2013, the EU ETS moved to its third phase with an amendment¹⁷⁰ to the ETS Directive, as part of the 2009 Climate and Energy Package, which will be expanded on in the following subsection.

3.5 The 2009 Climate and Energy Package

The most recent EU climate change policies and regulations have been implemented through the 2009 Climate and Energy Package. With this set of climate change regulations, the EU is preparing for the transition towards a low-emission economy. The EU wants to lead the way in showing that climate change policies can be implemented without slowing down economic growth.¹⁷¹ I will highlight three different elements included in the Package, which show the EU's leadership ambitions, each of which is a tool in achieving the 20-20-20 targets: a reform of the EU ETS,¹⁷² the Renewable Energy Directive,¹⁷³ aiming for renewable energy to make up 20 percent of the total energy consumption, and the Carbon Capture and Storage Directive,¹⁷⁴ which establishes a legal framework for the environmentally safe use of carbon capture and storage (CCS) technologies. These three parts of the 2009 Climate and Energy Package will now be explored further, as they are good examples of the EU's aspiring leadership role in climate action.

First of all, the reform of the EU's Emissions Trading Scheme (EU ETS) is carried out in the form of amendments intended to strengthen the scheme.¹⁷⁵ The Revised ETS Directive confirmed the EU's previous intentions to

¹⁶⁸ Jan H. Jans & Hans H.B. Vedder, *European Environmental Law* (Groningen: Europa Law Publishing, 2012) at 435.

¹⁶⁹ European Commission, *The EU Emissions Trading System (EU ETS)*, (European Union Publications Office, October 2013).

¹⁷⁰ *Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community*, [2009], OJ, L140/63, [Revised ETS Directive].

¹⁷¹ 2020 Strategy, *supra* note 159, at 2-3.

¹⁷² Revised ETS Directive, *supra* note 170.

¹⁷³ *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC*, [2009], OJ L140/16, [Renewable Energy Directive].

¹⁷⁴ *European Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide*, [2009], OJ, L 140/114, [CCS Directive].

¹⁷⁵ Revised ETS Directive, *supra* note 170.

continue its emissions trading system regardless of whether or not there would be a second compliance period under the Kyoto Protocol.¹⁷⁶

The revised ETS Directive introduced several new features. First of all, the over-allocation problems that the previous allocation method of grandfathering had caused¹⁷⁷ are intended to be erased by using auctioning as the main method for allocating allowances.¹⁷⁸ Second, a number of additional industries were included in the Scheme – the one attracting the most attention being the inclusion of the aviation sector.¹⁷⁹ Third, the revised ETS Directive encourages commitment and climate change responsibility outside the EU, by stating that at least 50 percent of the revenues generated from the auctioning of emission allowances should be used for investing in one or several of nine enumerated projects related to climate change adaptation or mitigation.¹⁸⁰ The list includes projects in developing countries, such as measures to increase reforestation,¹⁸¹ meaning that the EU uses its own emissions trading system in order to encourage financing of projects to combat climate change in third countries.¹⁸² It is an example of how legislation can be used to generate climate funding for both domestic and international purposes at the same time.¹⁸³

Last, the revised ETS Directive provides an opportunity to link the EU ETS to other, compatible schemes in third countries.¹⁸⁴ The possibility of linking the EU ETS to other, comparable schemes aiming to reduce GHGs, that the revised ETS Directive provides for could eventually lead to the creation of a global carbon market.¹⁸⁵ As far as Canada is concerned, a cap-and-trade system does exist at the provincial level, in Québec, as previously mentioned,¹⁸⁶ consequently opening up for an opportunity to connect the two systems.

Second, the EU stresses that the renewable energy sector is labor intensive, more specifically, that the target of a 20-percent share of renewable energy of the total energy consumption is estimated to amount to a million jobs in the renewable energy technology industry by 2020.¹⁸⁷ As a consequence, the Renewable Energy Directive was implemented as a part of the 2009 Climate and Energy Package. The Directive sets binding national targets for the EU

¹⁷⁶ Kulovesi, Morgera & Muñoz, *supra* note 11, at 850.

¹⁷⁷ See for example Sandbag, *ETS S.O.S: Why the Flagship 'EU Emissions Trading Policy' Needs Rescuing*, July 2009, at 8-10.

¹⁷⁸ ETS Directive, *supra* note 161, Article 10(1); Revised ETS Directive, *supra* note 171, Article 10(2).

¹⁷⁹ Fisher, Lange & Scotford, *supra* note 18, at 650-652; See *infra* subsection 4.4.

¹⁸⁰ Revised ETS Directive, *supra* note 170, Article 10(3).

¹⁸¹ *Ibid.*, Article 10(3)(c).

¹⁸² Bogojević (2014), *supra* note 137, at 116-117.

¹⁸³ Kati Kulovesi, "Climate Change in EU External Relations: Please Follow My Example (Or I Might Force You To)" in Elisa Morgera, ed, *The External Environmental Policy of the European Union* (Cambridge: Cambridge University Press, 2012) 115, at 137, [Kulovesi (2012)].

¹⁸⁴ Revised ETS Directive, *supra* note 171, Article 25(1)(a).

¹⁸⁵ Kulovesi (2012), *supra* note 183, at 137.

¹⁸⁶ See *supra*, subsection 2.2.3.

¹⁸⁷ 2020 Strategy, *supra* note 159, at 4.

Member States in order to meet the 2020 renewables target.¹⁸⁸ In addition, the Directive introduces unprecedented sustainability criteria for biofuels, which entail consequences for third countries. This will be expanded on below.¹⁸⁹

The third element of the Package is the *Carbon Capture and Storage Directive* (CCS Directive), which establishes a legal framework for the environmentally safe use of carbon capture and storage (CCS) technologies.¹⁹⁰ CCS refers to the capture of CO₂ emissions for storage underground where it does not contribute to global warming and is a technology with great mitigation potential. The capture process is, however, quite costly and requires large amounts of energy. In addition, a big concern is the safety and environmental risks that the CCS technology is associated with, as well as the risk that CO₂ could leak back to the atmosphere. Close monitoring of the storage is therefore essential.¹⁹¹ The EU still believes that the technology is necessary if global warming is to be kept below 2 degrees,¹⁹² albeit it does not support all CCS projects, as some are believed to involve deleterious impacts on the environment. The EU has furthermore shown its environmental concern by stressing that the development of CCS technology should not come at the expense of other safe and sustainable low carbon technologies, and that CCS can only be used as a mitigation option among others, if environmental protection can be ensured.¹⁹³

With the CCS Directive, the EU wants to inspire other industrialized countries to take the lead in developing and deploying these technologies. It has also proposed that CCS be included in the Kyoto Protocol's Clean Development Mechanism¹⁹⁴ (CDM), to involve developing countries and to create an incentive for them to invest in low-carbon technologies.¹⁹⁵

With the 2009 Climate and Energy Package, the EU shows progressiveness on climate change mitigation. It implements stringent measures which recognize the opportunities of new technology, and the potential for creating jobs while increasing the share of renewable energy, in order to significantly reduce GHG emissions by 2020, according to the EU's climate targets. Furthermore, the Package is followed up by the 2050 roadmap¹⁹⁶ to make sure that the EU moves to a "competitive low-carbon economy" by 2050, thereby showing the Union's commitment to ensuring the effectiveness of its legal measures. In addition to the 2050 Roadmap, the Commission has proposed a framework for 2030, to support continuous climate action after

¹⁸⁸ Renewable Energy Directive, *supra* note 173, Article 3.

¹⁸⁹ See *infra*, subsection 4.6.2.

¹⁹⁰ CCS Directive, *supra* note 174.

¹⁹¹ Bert Metz, *Controlling Climate Change* (Cambridge: Cambridge University Press, 2010) at 138-141.

¹⁹² CCS Directive, *supra* note 174, Preamble, Recitals 3-5.

¹⁹³ UNFCCC, "Views related to carbon dioxide capture and storage in geological formations as a possible mitigation technology", Submission from Parties, 13 April 2010, FCCC/SBSTA/2010/MISC.2, at 32, [UNFCCC, Submission from Parties].

¹⁹⁴ Cf. *infra*, subsection 4.5.

¹⁹⁵ UNFCCC, Submission from Parties, *supra* note 193, at 32-33.

¹⁹⁶ 2050 Roadmap, *supra* note 128.

2020 and make sure the EU's progress towards long-term climate objectives is secured.¹⁹⁷

3.6 Reflections

The objective of this chapter is to show how the EU has worked to inspire other states and actors to take climate action in the absence of a functioning climate regime. Although the EU has pushed for the adoption of a comprehensive international agreement that would impose legally binding commitments on a global level, it has been forced to look to alternative solutions for making other countries commit to reducing GHG emissions. In this chapter, selections of the EU's climate policies that are part of its directional leadership have been examined. First of all, it can be established that the EU has aimed to implement environmental aspects in all parts of its policies, both domestic and international ones, clearly demonstrated by the environmental integration principle in the TFEU. This comprehensive approach is easy to distinguish from the Canadian sector-by-sector approach, which does not recognize the importance of acknowledging all aspects of climate change causes. The EU's addition of climate change as an explicit environmental objective furthermore shows that the EU is committed *specifically* to tackling global warming, to the point where it cannot just fall under general environmental concerns, but deserves to be emphasized as an important objective of its own.

Time after time, the EU has set higher climate targets than other countries, thereby trying to set an example, which, however, few other countries have followed. The EU ETS serves an important purpose in this aspect, as it forces actors on the internal market to participate if the industry is listed in the ETS Directive, regardless of its nationality.

The effectiveness of the EU ETS has, however, been subject to debate, especially in relation to its allocation system. It has also been criticized for not providing industries with effective incentives for reducing their emissions, so the question is whether the Scheme is a functioning strategy? Carbon markets can be flexible tools in combating climate change. By internalizing external environmental costs, carbon markets let the polluters pay for the damage they are actually causing, but it is important to note that several issues can be raised as deficiencies of environmental markets in general. One example is that they are economic instruments and thereby designed to maximize *economic* efficiency, rather than to create *environmental* solutions.¹⁹⁸ However, this fact does not necessarily make carbon markets unsuitable as tools in combating climate change. The idea is that an actor that is successful in reducing its emissions should be able to trade any surplus allowances that have been left over with a less efficient

¹⁹⁷ European Commission, *Green Paper: A 2030 framework for climate and energy policies*, COM(2013) 169 final.

¹⁹⁸ Cf. Nicole Graham, "The Mythology of Environmental Markets", in David Grinlinton & Prue Taylor, eds, *Property Rights and Sustainability* (Leiden: Martinus Nijhoff Publishers, 2011) 149, at 160.

actor. This way, companies that are successful in reducing their emissions will make a financial gain without causing more environmental harm than “necessary”, as long as the total amount of allowances is within the cap. A way of ensuring proper use of this financial gain is to have the companies that have reduced their emissions use their profit to invest in innovative solutions, such as green technology. Moreover, it should be costly for industries to emit more than they have been allocated, that is, a functioning compliance mechanism is critical. As long as possible problems are identified and the markets are used properly, these trade-based mechanisms can consequently force the polluters into more sustainable behavior. For this to work, however, it is significant that the cap of the total amount of emissions allowed is set accurately and that over-allocation is avoided. It is therefore promising that the EU has decided to switch over to auctioning as its main method for allocating allowances, instead of the previous grandfathering method.

The concern that the EU can no longer be seen as a strong leader in climate policy could perhaps be connected to the expansion of the Union to 28 states, which potentially could make it more difficult to act as a united entity. By committing to a second compliance period under the Kyoto Protocol, the EU has, however, proved that it will not step down even though other major emitters, such as the United States and China, are not part of any binding international climate agreement. The EU is well on track to meet its own climate targets while at the same time encouraging other developed nations to step up their climate change game. Linking the EU ETS with Kyoto measures creates incentives for companies to invest in projects that may lead to reduced emissions outside of the EU, and opening up the possibility to link the system to other schemes shows ambition to create a global carbon market.

With the 2009 Climate and Energy Package, the EU has taken important steps towards a transition to a low-carbon economy. It has taken note of the criticism of the EU ETS and implemented measures intended to deal with those problem areas. In addition, new technology in the form of CCS is addressed, the EU ETS has been supplemented with the Effort-Sharing Decision, and the potential for creating new jobs within the renewable-energy sector is emphasized. These efforts show that the EU is prepared to work with different approaches and in different sectors at the same time, in order to reduce GHG emissions efficiently.

An examination of the EU’s current climate performance shows that its climate measures seem to be working domestically. The Union’s total amount of GHG emissions is decreasing, which naturally is an objective for the EU’s climate policies. However, its intention to inspire other countries to implement similarly stringent measures has not been as successful, and as a result, other options have to be explored. The next chapter will therefore investigate how some EU climate action has forced third countries to commit to the same conditions as the EU’s own Member States.

4 Spurring Climate Change Action Beyond External Borders

4.1 Overview

The EU has been aiming to take on a leading role in combating climate change for the past twenty years, however, its efforts have not been as successful as hoped for, and few countries have followed the EU's initiatives and implemented equivalent, national climate change legislation.¹⁹⁹ To be mentioned is, however, that there are examples of cap and trade systems being launched in other parts of the world, which opens up the opportunity for creating an international carbon market. The EU has for example announced that it will link the EU ETS with Australia's emissions trading system, as a step towards an expanded international carbon market. This means that, under the agreement, covered businesses will be able to use carbon credits from both systems for compliance under either one.²⁰⁰

This type of progress is, however, unfortunately not evident in all parts of climate change mitigation efforts. COP-15 in Copenhagen in 2009 is often depicted as a failure for the international climate regime.²⁰¹ The Conference was expected to result in the international community signing an international treaty of effective climate targets, which could replace Kyoto Protocol.²⁰² However, COP-15 ended in disappointment, with no binding emissions reduction targets agreed to. This triggered the EU to find other ways of making the international regime commit to taking more stringent climate action, for example through the use of the market.²⁰³

Following these failures, the EU has still been able to affect some parts of the rest of the world with its internal climate measures. This chapter will explore the most important ones, which have had the greatest effects outside the EU's territory.

¹⁹⁹ Kulovesi (2012), *supra* note 183, at 115.

²⁰⁰ European Commission, 28 August 2012, "Australia and European Commission agree on pathway towards fully linking Emissions Trading systems", Brussels, IP/12/916, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-12-916_en.htm?locale=en>, accessed May 15, 2014.

²⁰¹ Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem" (2010) 104 *American Journal of International Law* 230, at 230-231.

²⁰² Kulovesi (2012), *supra* note 183, at 128.

²⁰³ *Ibid* at 118.

4.2 Shifting to Structural Leadership

As has been described in the previous chapter, the EU has implemented internal climate measures that appear to be serving their purpose of being tools for achieving the EU's 2020 climate targets. The Union has not, however, been very successful in its attempts to make other actors take similarly stringent climate change action by working through directional leadership. The strategy of leading by example in an attempt to inspire other nations to combat climate change or to set equally ambitious climate targets has, as it appears, been inadequate.

The insufficiency of the EU's directional leadership combined with the global institutional failure of the international climate regime has, from the EU's point of view, led to a higher focus on integrating climate change into bilateral relations.²⁰⁴ Scholars have identified a shift in the EU's leadership style, a shift from directional to *structural* leadership. Structural leadership requires that states use their material power, such as the size of their internal markets, to create incentives for other states to act in a particular, desired way. There are several examples of how the EU now tries to *make* other actors take action, instead of just *inspiring* them.²⁰⁵

Instead of working at the international level, the EU is now increasingly using its political and economic influence to advance climate change objectives through its bilateral external relations.²⁰⁶ Several examples of how the EU has exercised its structural leadership will be examined in the following subsections, as well as the ways in which Canada has been influenced by such action.

4.3 External Environmental Competence

There is a broad legal basis for integrating environmental considerations in the EU's external relations. First of all, in Article 21(2)(f) TEU, the pledge to "help develop international measures to preserve and improve the quality of the environment" is included as one of the general objectives for the EU's external action, to be pursued in all fields of EU external action.²⁰⁷ Moreover, the EU's internal environmental competence also allows for external action. The TFEU expressly states that the EU and its Member States are to cooperate with third countries as well as with competent international organizations and that such cooperation may result in agreements.²⁰⁸

The TFEU furthermore allows for the EU to conclude international, bilateral or multilateral agreements even where the Treaties do not expressly set out

²⁰⁴ Kulovesi (2012), *supra* note 183, at 138-139.

²⁰⁵ Cf. Joanne Scott, "The Multi-Level Governance of Climate Change" (2011) 5:1 *Carbon & Climate Law Review* 25, at 28.

²⁰⁶ Kulovesi (2012), *supra* note 183, at 138-139.

²⁰⁷ TEU, *supra* note 132, Article 21(3).

²⁰⁸ TFEU, *supra* note 134, Article 191(4).

such competence – which for example is the case for the Energy Title²⁰⁹. In such a case it is required that the conclusion of an agreement is necessary to achieve a Treaty objective, such as environmental protection in Articles 3(3) TEU and 191(1) TFEU. Agreements that the EU have concluded are binding upon all Member States.²¹⁰

Moreover, Article 192(1) TFEU leaves the EU legislator to decide “what action is to be taken by the Union in order to achieve” the environmental objectives in Article 191 TFEU, which includes combating climate change.²¹¹ Consequently, the EU legislator can exercise its external environmental competence in other ways than just by concluding bilateral, multilateral or international agreements. A few illustrative examples will be examined below: the inclusion of the aviation industry in the EU ETS through the Aviation Directive; how the EU has banned CDM credits from certain projects that have been deemed to have an adverse impact on the environment; and lastly two elements of the Fuel Quality Directive – sustainability criteria for biofuels, and the proposal of default GHG intensity values for fossil fuels, the latter which has stirred some debate in Canada.

4.4 Conditioning Internal Market Access on Climate Change Action by Third Countries

4.4.1 The Aviation Directive

With its introduction of the EU ETS, the EU has conditioned access to the internal market on actors participating in emissions trading, thereby aiming to internalize the externalities of GHG emissions, and ensuring that the polluter pays for the adverse impacts on the environment.²¹² The covered installations have to apply for a permit to emit GHGs.²¹³ The Scheme has, however, been limited in scope and covered specific installations in order to reduce GHG emissions *within the Member States*, consequently affecting installations in the Member States only.²¹⁴

This was true until the adoption of the Aviation Directive²¹⁵, which added the aviation sector to industries covered by the EU ETS, effective as of

²⁰⁹ *Ibid*, Article 194.

²¹⁰ TFEU, *supra* note 134, Article 216.

²¹¹ See *supra*, subsection 3.2.

²¹² This idea is reiterated in the Opinion of Advocate General Kokott, delivered on 6 October 2011, Case C-366/10 *Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v Secretary of State for Energy and Climate Change*, at para 153.

²¹³ ETS Directive, *supra* note 161, Article 5.

²¹⁴ Cf. *Ibid*, Article 1.

²¹⁵ *Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community* [2009], OJ, L 8/3, [Aviation Directive].

January 1, 2012. The Directive is applicable to *all flights* arriving or departing from an EU airport.²¹⁶ Airlines of all nationalities are hence required to surrender emission allowances to cover all parts of any given flight, which includes flight portions that occur outside EU airspace. The Aviation Directive is consequently a unilateral measure that the EU has adopted, which has significant implications for actors outside the Union. The implementation of the Directive was the EU's response to the failure of regulating emissions from aviation at the international level. The Kyoto Protocol states that reductions of GHG emissions from the aviation sector shall be regulated working through the UN agency for aviation, the International Civil Aviation Organization (ICAO),²¹⁷ but, at the time of the implementation of the Aviation Directive, the ICAO had not yet set any binding emission targets, only aspirational goals.²¹⁸ Despite international negotiations on international aviation emissions, they remained uncontrolled under a legally binding agreement. As a consequence, the EU eventually took unilateral action, on the basis that unregulated aviation emissions would undermine other measures taken to combat climate change.²¹⁹ The EU considers it critical that GHG emissions from aviation be limited in order for the Union to meet its 20-percent overall reduction target by 2020.²²⁰ It is, however, clearly articulated in the Aviation Directive, that the EU still wants to see an international agreement on the reduction of GHG emissions from the aviation sector.²²¹

The Directive furthermore sets out one possibility for the Commission to adopt amendments to exclude certain flights from the EU ETS, provided that the country, from which the flights depart, has adopted measures for reducing climate change impacts of flights.²²² Similarly, the Directive states that the Commission shall consider an amendment, should an agreement be reached on global measures to reduce GHG emissions from aviation activities.²²³ These are all indications that the EU does not attempt to substitute the international climate change regime, but rather that the intention is that the Aviation Directive serve as a complement and a temporary solution until negotiations at the international level result in a substantial agreement.²²⁴

²¹⁶ Revised ETS Directive, *supra* note 170, Annex I at 6.

²¹⁷ Kyoto Protocol, *supra* note 8, Article 2(2).

²¹⁸ Joanne Scott & Lavanya Rajamani, "EU Climate Change Unilateralism" (2012) 23:2 *The European Journal of International Law* 469, at 474.

²¹⁹ Cf. Aviation Directive, *supra* note 215, at recitals 9-12; Sanja Bogojević, "Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme" (2012) 24 *Journal of Environmental Law* 345, at 348, [Bogojević (2012)]; Kati Kulovesi, "'Make Your Own Special Song, Even If Nobody Else Sings Along': International Aviation Emissions and the EU Emissions Trading Scheme" (2011) 2 *Climate Law* 535, at 538-541.

²²⁰ Aviation Directive, *supra* note 215, Recital 4.

²²¹ *Ibid*, Recital 17 and Article 25a(2).

²²² *Ibid*, Article 25a(1).

²²³ *Ibid*, Article 25a(2).

²²⁴ Cf. Bogojević (2012), *supra* note 219, at 348-349.

The Aviation Directive has stirred much criticism from third countries, as it covers GHG emissions generated *outside* of EU airspace, which *inter alia* has resulted in the U.S. adopting an act prohibiting airlines from participating in the EU ETS.²²⁵ Furthermore, both Chinese and Indian airlines require government approval prior to participating in the EU ETS. China considered implementing restrictions on products originating from the EU and suspended orders by Chinese airlines of EU-built aircrafts.²²⁶ More than twenty countries also adopted a joint declaration, in which they criticized the impacts of the Aviation Directive, as leading to market distortions and unfair competition, and urged the EU to cease the application of the Aviation Directive to airlines registered in third countries. Canada was not one of the countries signing the declaration.²²⁷ It did, however, join the high-profile CJEU case, in which the Directive was challenged by three U.S. airlines, on the grounds of its alleged violation of international law and illegal application to international aviation, which will be expanded on below.

4.4.2 The ATA Case and Its Aftermath

In 2010, the Air Transport Association of America with three of its members – United, Continental, and American Airlines – brought judicial review proceedings, claiming that the Aviation Directive resulted in a unilateral application of the EU ETS to non-EU airlines. Allegedly, as a consequence, various principles of customary international law as well as several treaties, including the Kyoto Protocol, and the EU–U.S. Open Skies Agreement²²⁸ had been violated. The National Airlines Council of Canada (NACC), representing Canada’s four largest passenger air carriers, joined the case, arguing that the EU–Canada Air Transport Agreement²²⁹ had many similarities with the Open Skies Agreement. The NACC specifically

²²⁵ *European Union Emissions Trading Scheme Prohibition Act of 2011* (PL112-200, 27 November 2012).

²²⁶ Centre for International Sustainable Development Law, *Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading System*, May 2012, at 18; and Anurag Kotoky, "India to ask airlines to shun EU carbon scheme" (19 March 2012) *Reuters*, <<http://uk.reuters.com/article/2012/03/19/uk-india-eu-emission-idUKLNE82I02Y20120319>>, accessed May 17, 2014.

²²⁷ *Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU ETS*, 22 February 2012, online: Russian Aviation <<http://www.ruaviation.com/docs/1/2012/2/22/50/>>, accessed April 29, 2014.

²²⁸ *EU–U.S. Air Transport Agreement*, 30 April 2007, (approved by the Council through *Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union meeting within the Council, of 25 April 2007, on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand*, [2007], OJ, L 134/1).

²²⁹ *Agreement on Air Transport between Canada and the European Community and Its Member States*, 17 December 2009, (approved by the Council through *Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 30 November 2009 on the signing and provisional application of the Agreement on Air Transport between the European Community and its Member States, of the one part, and Canada, of the other part*, [2010], OJ, L 207/30), [EU–Canada Agreement on Air Transport].

highlighted that the agreement grants each party the right to implement appropriate measures to address the environmental impacts of air transport *within its own jurisdiction*²³⁰, and that the EU consequently had breached the bilateral agreement.²³¹ The NACC furthermore stated that it was concerned with sustainability issues and that it was already working to reduce impacts on the environment that aviation may cause.²³²

Questions were referred to the CJEU for a preliminary ruling.²³³ In its judgment, the Court upheld the validity of the Directive and established that any aircraft operating in the territory of one of the Member States is subject to the *unlimited jurisdiction* of the EU.²³⁴ Consequently, the Court legitimized the use of a market-based measure applicable to commercial actors who are based abroad, and only partly operate in the EU's internal market.²³⁵

The CJEU furthermore stated that EU law allows the EU to permit commercial activity, in this case air transport, to be allowed to be carried out within the EU “*only on condition that operators comply with the criteria that have been established by the European Union*” [emphasis added]. The Court justified this interpretation of the Aviation Directive by stating that it was drafted with the purpose of reaching the high level of environmental protection that the EU is aiming for, which is established in Article 191(2) of the TFEU. The Court stressed that this is especially important under circumstances where such environmental objectives originate from an international agreement such as the UNFCCC and the Kyoto Protocol,²³⁶ as in the case of the Aviation Directive.

The CJEU's judgment proved to be very controversial, as it entailed wide implications for the global climate change regime. By interpreting the Aviation Directive as an internal regulation as opposed to an external environmental measure,²³⁷ the Court, in essence, justified the EU's regulatory actions on the basis of the high environmental protection standards that the EU has established.²³⁸ The ruling can furthermore be interpreted as the CJEU legitimizing the EU's leading role in combating climate change.²³⁹ Perhaps even more importantly, the ruling implies the justification of a regional response to global institutional failure on the

²³⁰ EU–Canada Agreement on Air Transport, *supra* note 229, Article 18(2).

²³¹ “Written Observations of the International Air Transport Association and the National Airlines Council of Canada” in relation to ATA, *supra* note 37, at paras 32-33.

²³² Cf. *ibid* at paras 49-53.

²³³ The EU–Canada Air Transport Agreement issue was not part of the questions that the CJEU was asked to rule on, however, the alleged breach of the EU–U.S. Open Skies Agreement was.

²³⁴ ATA, *supra* note 37, at paras 124-125.

²³⁵ Cf. Bogojević (2012), *supra* note 219, at 351.

²³⁶ ATA, *supra* note 37, at para 128.

²³⁷ Bogojević (2012), *supra* note 183, at 356.

²³⁸ Eileen Denza, “International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case” (2012) 37:3 *European Law Review* 314, at 320.

²³⁹ Bogojević (2012), *supra* note 219, at 347.

grounds of an environmental objective established by the international climate change regime.²⁴⁰

After facing extensive criticism, the EU decided to “stop the clock” regarding the implementation of the inclusion of international aviation in the EU ETS, by amending the ETS Directive to allow for exemption of international flights arriving and departing from the EU during 2012. The EU Commissioner for Climate Action announced the EU’s new intentions following the ICAO Council meeting in November of 2012, where the Council members decided to move forward the plans of establishing a market-based mechanism at the international level.²⁴¹ The ICAO’s intentions were further confirmed in a resolution adopted by the ICAO Assembly in October 2013, where guiding principles for the design and implementation of these measures were agreed upon.²⁴²

4.5 Banning of CDM Credits from Industrial Gas Projects

The EU has furthermore demonstrated its strong leadership in international climate change action by using the size and importance of the EU ETS to control, or at least significantly affect, the international carbon market. With the intention of doing so, the EU no longer accepts offset credits from certain projects outside its borders, typically in advanced developing countries,²⁴³ for ETS participants to be counted towards ETS compliance.²⁴⁴

The ban of these credits must be seen in the context of the EU ETS being connected to the two Kyoto mechanisms Joint Implementation (JI) and the CDM. This means that installations covered by the EU ETS can buy and use credits from the CDM and JI in order to meet their emissions targets.²⁴⁵

²⁴⁰ *Ibid* at 351-352.

²⁴¹ European Commission, 12 November 2012, “Stopping the Clock of ETS and Aviation Emissions Following Last Week’s International Civil Aviation Organisation (ICAO) Council”, MEMO/12/854, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-12-854_en.htm>, accessed March 31, 2014; see also ICAO News Release, “New ICAO Council High-Level Group to Focus on Environmental Policy Challenges”, COM 20/12, 15 November 2012, <<http://www.icao.int/Newsroom/News%20Doc%202012/COM.20.12.EN.pdf>>, accessed May 8, 2014; and ICAO, *Assembly Resolution A37-19: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change*, 8 October 2010, at 13.

²⁴² ICAO, *Assembly Resolution A38-18: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change*, 4 October 2013, at 18-19 and its Annex.

²⁴³ *Commission Regulation (EU) No 550/2011 of 7 June 2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international credits from projects involving industrial gases*, [2011], OJ, L 149/1, Preamble, Recital 7.

²⁴⁴ Cf. Kulovesi, Morgera & Muñoz, *supra* note 11, at 850-851.

²⁴⁵ *European Parliament and Council Directive 2004/101/EC of 27 October 2004 amending Directive 2003/87/EC in respect of the Kyoto Protocol’s project mechanisms*, [2004], OJ, L 338/18.

These project-based flexibility mechanisms were set up under the Kyoto Protocol for developed countries to use in order to meet their reduction commitments. JI allows for transferal of emission reduction units between Annex I parties,²⁴⁶ while the CDM concerns emissions trading between a developed nation and a developing nation.²⁴⁷ This way, additional incentives are created for businesses to invest in projects aiming at reducing emissions outside of the EU and the Scheme's cost-effectiveness is enhanced. The EU ETS thus provides opportunities for reducing GHG emissions in other parts of the world, through the use of CDM and JI.²⁴⁸

Not all CDM credits are eligible under the EU ETS. As of May 4, 2013, CDM credits from certain industrial gas projects can no longer be used for compliance under the EU ETS.²⁴⁹ The reason for the ban is that those projects stimulate an over-production of powerful GHGs, which are then destroyed, thus producing a high amount of cheap carbon credits. Allowing these credits could potentially create a perverse incentive to continue producing, or even to increase the production of, these GHGs.²⁵⁰

As the EU ETS is dominating the global carbon market,²⁵¹ it is expected that this decision will affect the demand for credits from industrial gas projects under the CDM.²⁵² From the EU's point of view, this is a step towards the Union's wish to bring about a reform of the CDM. The EU does not believe that CDM in its current form, as a mechanism of purely offsetting character, will contribute to a reduction of emissions sufficient to keep global warming below the agreed 2-degree target.²⁵³

4.6 The Fuel Quality Directive

4.6.1 Overview

The Fuel Quality Directive²⁵⁴ (FQD) aims to reduce GHG emissions associated with the production and use of transportation fuel. It was recently amended by the Fuel Specification Directive²⁵⁵, as part of the 2009 Climate

²⁴⁶ Kyoto Protocol, *supra* note 8, Article 6.

²⁴⁷ *Ibid*, Article 12.

²⁴⁸ Kulovesi, Morgera & Muñoz, *supra* note 11, at 850.

²⁴⁹ *Commission Regulation (EU) No 550/2011 of 7 June 2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international credits from projects involving industrial gases*, [2011], OJ, L 149/1, [Regulation 550/2011].

²⁵⁰ *Ibid*, Preamble, Recitals 8-9.

²⁵¹ Cf. Alexandre Kossoy & Pierre Guigon, *State and Trends of the Carbon Market 2012* (Washington: The World Bank, 2012) at 10.

²⁵² Kulovesi, Morgera & Muñoz, *supra* note 11, at 851.

²⁵³ Regulation 550/2011, *supra* note 249, Preamble, Recitals 1-2.

²⁵⁴ *Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC*, [1998], OJ, L 350/58, [Fuel Quality Directive].

²⁵⁵ *Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and*

and Energy Package. The amended FQD now requires fuel suppliers to reduce the GHG intensity of all gasoline, diesel and biofuels used for road transport by 6 percent between 2010 and 2020.²⁵⁶ The EU recognizes that the reduction of GHG emissions from transport fuels is significant in order for the Union to meet its reduction targets, as transport fuels contribute significantly to overall GHG emissions in the EU. The objective of the FQD is hence to encourage the use of low-carbon transport fuels.²⁵⁷

Below, two elements of the FQD which will have implications for third countries will be expanded on, as these are attempts of the EU to influence third countries and to spur climate change action beyond its borders. The first one is the sustainability criteria for biofuels, mentioned above, which has been introduced in both the Renewable Energy Directive and the FQD. The second one is a proposed revision of Article 7a, which would assign a higher GHG intensity value to fuels derived from natural bitumen (oil sands) than those derived from conventional crude oil, against which Canada has been lobbying very aggressively.²⁵⁸ The argument is that the categorization will have a discriminatory effect against Canadian oil, as the higher GHG intensity value will make it less competitive on the EU market.

4.6.2 Introduction of Sustainability Criteria for Biofuels

The first example is the aforementioned sustainability criteria for biofuels that were introduced through the 2009 Climate and Energy Package. Scholars have suggested that these criteria are a way of the EU to influence the international debate on biofuels.²⁵⁹ The issue with an increased use of biofuels, which are fuels derived from plant materials, is that they might have negative impacts on the environment, in relation to *inter alia* changes in land use, where for example tropical forests are cleared in favor of producing biofuel feedstocks.²⁶⁰

As mentioned above,²⁶¹ one of the EU's climate targets is the renewables target of 20 percent by 2020, which refers to the aim that 20 percent of the

introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, [2009], OJ, L 140/88, [Fuel Specification Directive].

²⁵⁶ Fuel Specification Directive, *supra* note 255, Article 7a(2)(a).

²⁵⁷ *Ibid*, Preamble, Recital 4.

²⁵⁸ For an overview, see Friends of the Earth Europe, *Canada's Dirty Lobby Diary: Undermining the EU Fuel Quality Directive* (2011), available at <http://www.foeeurope.org/publications/2011/FOEE_Report_Tar_Sands_Lobby_Final_July82011.pdf>, accessed May 3, 2014.

²⁵⁹ Kulovesi, Morgera & Muñoz, *supra* note 11, at 878-879.

²⁶⁰ For an overview of the sustainability issues of biofuels, see The Royal Society, *Sustainable Biofuels: Prospects and Challenges*, January 2008, Policy document 01/08, available at <<https://royalsociety.org/policy/publications/2008/sustainable-biofuels/>>, accessed May 10, 2014.

²⁶¹ See *supra*, subsection 3.3.

EU's overall energy consumption should stem from renewable sources. In this target, a specific target is included for the transport sector, that by 2020, at least 10 percent of the final energy consumption in the sector should come from renewable energy,²⁶² including, but not limited to, biofuels.²⁶³ For this reason, and in order to provide measures to reach the set target, the 2009 Climate and Energy Package has introduced sustainability criteria for the production of some biofuels through the Renewable Energy Directive.²⁶⁴ The language of the sustainability-criteria provisions is, however, reiterated in the Fuel Specification Directive. Only biofuels meeting the set sustainability criteria can be counted towards the reduction target.²⁶⁵ The ultimate objective of the sustainability criteria is hence to make sure that the increased use of biofuels, which is encouraged through the renewable-energy target, does not result in the destruction of biodiverse lands. By implementing sustainability criteria, the EU can consequently control which biofuels qualify against the target, thereby incentivizing the production of biofuels in a manner that does not deleteriously affect the environment and ensuring the sustainability of biofuel production.²⁶⁶

Sustainability criteria apply both to biofuels produced within the EU, and to biofuels imported from third countries,²⁶⁷ meaning that access to the EU's internal market for international actors is conditioned on their products meeting EU standards.

4.6.3 Proposed Default GHG Intensity Values for Fossil Fuels

The second example from the amended FQD is a proposed implementing measure under Article 7a(5)(a) of the FQD, which is to do with the calculation of the GHG intensity of fossil fuels. The methodology for calculating the GHG intensity of biofuels is included in the FQD,²⁶⁸ while that of fossil fuels and electric energy has not yet been established. A draft for a directive laying down the calculation method has been proposed by the European Commission through the Committee on Fuel Quality,²⁶⁹ and it has, as mentioned above, been heavily criticized by the Canadian government.²⁷⁰

²⁶² Renewable Energy Directive, *supra* note 173, Article 3(4) (cf. Preamble, Recital 18).

²⁶³ *Ibid*, Article 2(a).

²⁶⁴ *Ibid*, Articles 17-19.

²⁶⁵ Fuel Specification Directive, *supra* note 255, Article 7b(1).

²⁶⁶ *Ibid*, Preamble, Recitals 10-11.

²⁶⁷ *Ibid*, Article 7c(3).

²⁶⁸ Fuel Quality Directive, *supra* note 254, Annex IV.

²⁶⁹ Directorate General for Climate Action & The Committee on Fuel Quality, *Draft Commission Directive .../EU of [...] laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels*, December 2, 2011, D016937/03 (Draft implementing measure/act) in dossier CMTD(2011)1446, [Commission Directive Draft 2011].

²⁷⁰ See for example "Fuel Quality Directive", online: Natural Resources Canada <<https://www.nrcan.gc.ca/media-room/backgrounders/2012/3239>>, accessed May 3, 2014.

The GHG intensity of fuels will be calculated on a life-cycle basis,²⁷¹ thereby making sure that not only the emissions generated from *combustion* are considered, but also the emissions from the *extraction, processing* and *distribution* of fuels. Consequently, the whole life cycle, from production to combustion, of products such as gasoline and diesel is accounted for.

Total GHG emissions are to be calculated based on default values set for different fossil fuels' GHG intensity, and in this aspect, the proposal differentiates between transport fuels based on the types of "feedstock"²⁷² from which they are produced. The categories in the proposed directive include conventional crude oil, natural bitumen (oil sands), and shale oil. The different types are assigned default GHG intensity values based on the average, or most likely, value for that feedstock.²⁷³ The reason for the differentiation is that the extraction and refining processes associated with the production of the different types of fuels require different amounts of energy. Consequently, a production process that generates high GHG emission levels will be reflected in higher GHG intensity values for the products produced. For example, the extraction and processing of bitumen from the oil sands is generally more energy intensive than conventional oil production due to the heat required to separate heavy bitumen from the surrounding sand and rock, as well as the refining process.²⁷⁴ Fuels derived from the oil sands will therefore be assigned a higher GHG intensity value than those derived from conventional crude oil, which has given rise to criticism in Canada.

Canada has lobbied heavily against this proposal, and the federal government has threatened to take the EU to the World Trade Organization (WTO) if the directive is passed. The former Canadian Minister of Natural Resources, Joe Oliver (the Conservative Party), dismissed the proposed directive as being based on incomplete information and criticized the lack of a comprehensive scientific study of the GHG intensity of conventional crude oil.²⁷⁵ The Minister furthermore argued that the calculation methods were not based on scientific facts and that the measures are discriminatory against Canadian oil sands fuel, as the assigned higher GHG intensity value would render oil sands crude oil uncompetitive in the EU market.²⁷⁶ Natural Resources Canada²⁷⁷ commissioned a study to evaluate the FQD's default

²⁷¹ Fuel Specification Directive, *supra* note 255, Article 7a(1)(b).

²⁷² "Feedstocks" refers to the raw material used to produce fuel.

²⁷³ Commission Directive Draft 2011, *supra* note 269, Annex I.

²⁷⁴ For an overview, see Adam Brandt, *Upstream greenhouse gas (GHG) emissions from Canadian oil sands as a feedstock for European refineries*, (Stanford, CA: Department of Energy Resources, Stanford University, 2011), Executive summary; and Pembina Institute, *Oil sands, heavy crudes, and the EU fuel-quality directive*, Briefing note, March 2012.

²⁷⁵ "Minister Oliver Objects to the European Union's Discrimination of Canadian Crude Oil", October 23, 2011, online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2011/2381>>, accessed May 2, 2014.

²⁷⁶ "Minister Oliver Highlights Canada's Position on the Proposed European Fuel Quality Directive in Brussels", January 27, 2014, online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2013/1709>>, accessed May 2, 2014.

²⁷⁷ Natural Resources Canada is the ministry of the government of Canada responsible for *inter alia* natural resources and energy.

GHG intensity values, which ended up supporting the Canadian government's arguments.²⁷⁸

One plausible underlying reason for this is the importance of the oil industry for the Canadian economy, and that the government sees the proposed amendment to the FQD as a threat to Canada's plans to export fuels derived from the oils sands to the EU. The oil industry accounts for about 8 percent of total GDP,²⁷⁹ and energy products, including oil and natural gas, is the largest category of export goods, at 24 percent of total exports.²⁸⁰ The oil and gas sector does, however, account for 25 percent of Canada's total GHG emissions, and is the sector that emits the most GHGs of all.²⁸¹ The federal government still has no emission regulations in place for that sector,²⁸² which is illustrative of its approach to climate change and environmental protection, and their reasoning that such action cannot be taken at the expense of the Canadian economy.

The proposed directive which amends the FQD has been considerably delayed due to massive lobbying, and is still not implemented.²⁸³ In May 2012, the European Parliament declared its support for the FQD and insisted that fuels derived from the oil sands should be assigned a separate default GHG intensity value.²⁸⁴ The Commission has stated that the Directive needs further work, and an impact assessment study was concluded and approved, but not published in 2013.²⁸⁵

4.7 Reflections

With its structural leadership strategy, the EU has taken its climate change action one step further. Several examples show that the EU's internal climate measures have intentional spill-over effects on third countries,

²⁷⁸ "ICF International Independent Assessment of the European Commission's Fuel Quality Directive's Conventional Default Value", online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2013/13889>>; The full report from ICF International, *Independent Assessment of the European Commission's Fuel Quality Directive's "Conventional" Default Value*, is available at <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/EU_FQD_Study_Final_Report.pdf>, accessed May 14, 2014.

²⁷⁹ "Gross Domestic Product by Industry, February 2014", online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/140430/dq140430a-eng.htm?HPA>>, accessed May 3, 2014.

²⁸⁰ "Canadian International Merchandise Trade, February 2014", online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/140403/dq140403a-eng.htm>>, accessed May 3, 2014.

²⁸¹ "Greenhouse Gas Emissions Data", online: Environment Canada <<https://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=BFB1B398-1>>, accessed May 3, 2014.

²⁸² Cf. *supra*, subsection 2.2.3.

²⁸³ EurActiv, "EU Tar Sands Law Would Cost Oil Firms 'Less than a Euro Cent a Litre'", 3 October 2013, <<http://www.euractiv.com/energy/eu-tar-sands-law-cost-oil-firms-news-530835>>, accessed May 3, 2014, [EurActiv (2013)].

²⁸⁴ *European Parliament resolution of 24 May 2012 on a resource-efficient Europe* (2011/2068(INI)), at 39 and 65.

²⁸⁵ EurActiv (2013), *supra* note 283; "Transport & Environment", online: European Commission <<http://ec.europa.eu/environment/air/transport/fuel.htm>>, accessed May 3, 2014.

which are not always appreciated – clearly illustrated by the *ATA* case. As explained in chapter two, climate change litigation is on the rise, and the *ATA* case exemplifies how the ultimate decision for the application of a climate change measure was left to the courts, in the form of the CJEU, to decide. In this case, the Court was persistent and agreed with the EU on what right it had to legislate with implications on other jurisdictions. One may question whether such legislation infringes on other states' sovereignty, but the Court interpreted it to be a question about the EU's right to regulate terms for access to its own territory. Ultimately, what has happened is that the international debate on how to regulate GHG emissions from international aviation was transferred to a question for the CJEU to decide on, instead of politicians representing different countries and their interests. In this case though, the CJEU did not play the "gap-filling" role, as is the case for some climate litigation, when it comes to making up for policy gaps. The *ATA* case only confirms that the EU had adequate jurisdiction to legislate as it did. The CJEU thus recognized and affirmed the EU's ability to unilaterally control GHG emissions outside of its territory, justifying its decision on the basis of the EU's high standards of environmental protection.

Despite the judgment, the EU still decided to cease application of the Aviation Directive to international flights, after the ICAO had announced that emissions from international aviation was going to be dealt with. Currently, only intra-EU flights are covered. This means that, in order to keep up with its leadership ambitions, the EU will have to follow up on these plans to make sure that some kind of agreement or regulations will be implemented concerning these emissions. If not, the Aviation Directive's initial scope should be put back in place, otherwise the EU's credibility as a leader in progressive climate change action would be questioned.

By joining the claimants' case, the NACC demonstrated its disapproval with the Aviation Directive's application. The NACC's approach reflects that of the Government of Canada, claiming that it already has measures in place to deal with adverse impacts of aviation on the environment and that they are leery of external advice. The aviation industry clearly wants to protect its economic interests at the expense of the environment, and this stance is also reflected in the Canadian oil industry's disapproval of the proposed default GHG intensity values for fossil fuels. The purpose of default values is to acquire more accurate calculations for different fossil fuel GHG emissions. Several studies have shown that crude oil from oil sands affect the environment much more adversely than conventional crude oil. What the oil industry is concerned about in its opposition to the proposal, however, is that its products will be less competitive on the EU market, resulting in less profit. Currently, most Canadian oil is exported to the United States, and not to the EU, so this would not be an immediate problem for the industry, yet it cannot see beyond potential business expansion, and to what could hopefully be a tool for stabilizing the climate.

What the oil industry should perceive is the potential to develop new technology for its crude production, to make it less GHG-intensive. By

innovating new production methods, Canadian oil producers could potentially arise as a competitive choice on the EU market. The intention of the proposed amendment to the FQD is to create incentives for fuel producers to stimulate more environmentally friendly production. Since the EU is a big importer of energy, the oil industry has the opportunity to create a competitive choice by lowering the GHG intensity of its production.

By implementing sustainability criteria for biofuels, the EU aims to ensure that its climate laws on renewable energy, which essentially encourage an increased use of biofuels, do not just result in an environmental issue in one area (too little renewable energy being used in the EU) being shifted to another environmental issue in another area (the destruction of biodiverse lands elsewhere in order to produce biofuels for use in the EU). This type of regulation shows that the EU is concerned, not only with its own climate targets and performance, but with climate action on a global scale.

As seen in the examples of climate action taken by the EU as part of its directional leadership, trying to inspire other actors may not always be enough. In this chapter, some of the EU's climate action expressing more of a structural leadership has been highlighted. It can be established that by such action, such as implementing the Aviation Directive and sustainability criteria for biofuels, makes other states act more environmentally friendly, whether they want to or not, at least in selected areas. This is clearly a step in the right direction when it comes to combating climate change. The measures explored in this chapter target all actors who want access to the EU's internal market, however, the EU has also started to integrate climate change concerns into its bilateral agreements, hence opening up the opportunity to set specific objectives for selected countries. This strategy will be examined in the next chapter.

5 Conditioning Agreements on Climate Change Action

5.1 Conditionality Clauses in External Agreements

Conditionality clauses can be included in bilateral or multilateral agreements and then function as tools for achieving a political goal. When it seems that the lack of political will is a major obstacle in combating climate change in Canada, this type of legal construction can be a possibility for the EU to exert pressure.²⁸⁶

A contract clause can be drafted in a way that gives the parties a possibility to terminate the contract or agreement should one of them not fulfill their obligations according to that same contract or agreement, and this is an opportunity for the EU to integrate environmental and climate change concerns into its external relations.²⁸⁷ Since the early 1990's, the EU has been using conditionality clauses in its external bilateral agreements for different purposes. These clauses are tools for the EU to *inter alia* extend the respect for human rights and other democratic principles. This can be done by integrating the ideas into the agreement and making them a ground for termination of the contract.²⁸⁸

Human rights clauses are quite common in the EU's bilateral agreements, in which they are used to condition the benefits of the agreements on the beneficiary upholding human rights.²⁸⁹ For this type of conditionality clauses to function as an efficient tool, however, the agreement has to be of importance to the other party.²⁹⁰ This strategy works well with agreements on foreign aid, or official development aid, which grant the transfer of resources to a developing country. The question is whether this strategy could be used, and to what extent it already is used, by the EU to encourage climate change action in developed countries, in the same way it is used for the upholding of human rights in developing countries. This will be examined in the following subsections, as well as an overview of how the EU has integrated environmental concerns into its trade policy.

²⁸⁶ Cf. Andreas Moberg, *Villkorskláusuler – om avtalskláusuler som utrikespolitiskt instrument* (Uppsala: Iustus Förlag AB, 2009) at 585, [Moberg (2009)].

²⁸⁷ Marín Durán & Morgera, *supra* note 135, at 56.

²⁸⁸ Moberg (2009), *supra* note 286, at 25.

²⁸⁹ In 2011, the EU had at least 57 agreements with 132 states, which included human rights clauses, see Andreas Moberg, "Kan EU avtala bort den globala obalansen i skydd för mänskliga rättigheter?" in Antonina Bakardjieva Engelbrekt, Lars Oxelheim & Thomas Persson, eds, *EU och de globala obalanserna* (Stockholm: Santérus, 2014) 109, at 175, [Moberg (2014)].

²⁹⁰ *Ibid* at 176.

5.2 Environmental Integration into EU Trade Policy

There are several examples of environmental integration into the EU's trade policy, focusing primarily on the Union's relations with developing countries. First of all, the EU has a system for tariff removal for developing countries called Generalised Scheme of Preferences (GSP), which allows exporters to pay less or no duties on their exports to the EU.²⁹¹ The standard GSP arrangement allows for partial or full removal of tariffs of two thirds of all product categories, while the enhanced version, the GSP+²⁹², means full tariff removal for countries that ratify and implement certain international conventions concerning human and labor rights, environment and good governance.²⁹³ Among the conventions concerning the environment, the UNFCCC and the Kyoto Protocol are included,²⁹⁴ thus requiring GSP+ beneficiaries to ratify and comply with their respective targets. As a result, the EU gives developing countries an incentive to implement *inter alia* more stringent environmental policies, by working through trade measures.²⁹⁵ Two different types of conditionality can be identified – positive and negative. The GSP+ arrangement is an example of positive conditionality, as participating countries are given additional benefits, as opposed to negative conditionality, which is used under the general GSP arrangement, where preferences are withdrawn in the case of non-compliance.²⁹⁶

The adoption of the EU's new approach to integrating environmental provisions into its free trade agreements (FTAs) is another example of environmental integration in EU trade policy.²⁹⁷ In the Renewed EU Sustainable Development Strategy from 2006, it is emphasized that international trade and investment should be used increasingly as tools for achieving sustainable development, and that the EU should use *inter alia* bilateral trade agreements when working with its trading partners to improve environmental standards.²⁹⁸ Before that time, environmental provisions were not systematically included in the EU's FTAs, and if they were, they were framed in very general terms.²⁹⁹ The inclusion of these

²⁹¹ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, [2012], OJ, L 303/1, [Regulation 978/2012].

²⁹² *Ibid*, Chapter III.

²⁹³ “Generalised Scheme of Preferences (GSP)”, online: European Commission, <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm>, accessed April 7, 2014.

²⁹⁴ Regulation 978/2012, *supra* note 291, Annex VIII at 20 and 23.

²⁹⁵ Rok Žvelc, “Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements” in Elisa Morgera, ed, *The External Environmental Policy of the European Union* (Cambridge: Cambridge University Press, 2012) 174, at 174, [Žvelc].

²⁹⁶ *Ibid* at 177.

²⁹⁷ Council of the European Union, *Review of the EU Sustainable Development Strategy (EU SDS) — Renewed Strategy*, 10917/06, Brussels, June 26, 2006.

²⁹⁸ *Ibid* at 14.

²⁹⁹ Žvelc, *supra* note 295, at 193-194.

types of provisions in recent FTAs is a step in the right direction, however, it is not enough to have the objectives in writing, they must be complied with as well. The Commission has stressed that it is important that the EU follows up on the mechanisms implemented in the agreements in order to ensure that they are used effectively, objectives are fulfilled, and that sustainable development is promoted in the intended way.³⁰⁰

Examples of such environmental provisions can be found in the EU's relations with developing countries, where *cooperation clauses* devoted to climate change recently have been included, *inter alia* in FTAs.³⁰¹ Cooperation clauses can be drafted in different ways, but generally require that the parties develop and strengthen their cooperation on different issues in the environmental field. In 2010, after the second revision of the Cotonou Agreement³⁰², which is the world's largest economic and political framework for cooperation between the EU and developing countries, climate change was identified as one of the objectives of the partnership between the EU and the African, Caribbean, and Pacific countries.³⁰³ Furthermore, a full article dedicated to climate change cooperation was added, in which the Parties recognize climate change as a serious global challenge, commit to supporting mitigation and adaptation efforts, and raise the political profile of climate change in development cooperation. Specific cooperation activities such as integrating climate change into development strategies and poverty reduction efforts are identified as well.³⁰⁴

Framing causes such as democratic principles or environmental protection as conditional clauses could, however, potentially give rise to issues in the case of suspension of a trade agreement on these grounds. It could be subject to legal recourse in the dispute settlement system of the WTO. The WTO dispute panel would have to assess whether the EU had the right not to honor its commitments according to the bilateral agreement as a consequence of the other party not upholding human rights, certain environmental standards, or whatever the clause in question may concern.³⁰⁵ Andreas Moberg suggests that in the case of the EU suspending terms of a trade agreement that are beneficial to the other party, sanctions will most

³⁰⁰ European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Trade, growth and development – Tailoring trade and investment policy for those countries most in need*, COM(2012) 22 final, at 14.

³⁰¹ See for example *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, (signed on 6 October 2010), [2011], OJ, L 127/6, Articles 13.5(3) and 13.11, Annex 13 at 1(f); *Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other*, (signed on 29 June 2012), [2012], OJ, L 346/3, Articles 50(3)(c), 63(2)(b) and 65(2)(d).

³⁰² *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States of the Other Part* (Signed in Cotonou on 23 June 2000), latest revision June 22, 2010 in Ouagadougou, [Cotonou Agreement].

³⁰³ Second Revision of the Cotonou Agreement, *supra* note 302, Article 1 (Agreed Consolidated Text, 11 March 2010).

³⁰⁴ *Ibid*, Article 32A.

³⁰⁵ Moberg (2014), *supra* note 290, at 187.

likely be taken by that other party, even though the EU had acted in favor of, for example, human rights. The situation may, however, be different, according to Moberg, in the case of a trade agreement between the EU and a more equal trade partner.³⁰⁶ This could potentially be the case in a bilateral agreement with Canada based on climate change action. The following subsections will examine how two important agreements between the EU and Canada have implemented environmental provisions.

5.3 Environmental Provisions in EU–Canada Bilateral Agreements

5.3.1 The Comprehensive Economic and Trade Agreement

As far as Canada is concerned, a new FTA has been concluded between the EU and Canada. The EU is Canada's second most important trading partner, after the United States, while Canada was the EU's twelfth largest trading partner in 2012. The new comprehensive trade agreement between the EU and Canada is expected to increase their bilateral trade by almost 23 percent.³⁰⁷ This could be an opportunity for the EU to promote climate change action in its bilateral relations with a country that has shown poor climate change performance in recent years, by using the size and importance of the Union's market and economy.

A political agreement on the key elements of a free trade agreement (the CETA) between Canada and the EU was reached between European Commission President José Manuel Barroso and Canadian Prime Minister Stephen Harper on October 18, 2013, and an agreement in principle was signed.³⁰⁸ The legal text of the agreement is yet to be finalized, but reports on the negotiated outcomes indicate that the FTA will remove over 99 percent of tariffs between the EU and Canada and hence create significant new market access opportunities in services and investment.³⁰⁹ CETA will include a chapter on trade and sustainable development as well as one on trade and the environment. This is the first time that Canada agrees to include chapters on these areas in an FTA,³¹⁰ perhaps as a sign of the importance of its relations with the EU. The agreement states that

³⁰⁶ Moberg (2014), *supra* note 290, at 187.

³⁰⁷ European Commission, 3 December 2013, "The EU's Bilateral Trade and Investment Agreements – Where Are We?", MEMO/13/1080, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-1080_en.htm>, accessed April 1, 2014, [European Commission Press Release, 3 December 2013].

³⁰⁸ European Commission, 10 October 2013, "EU and Canada conclude negotiations on trade deal", Brussels, IP/13/972, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-13-972_en.htm>, accessed April 1, 2014.

³⁰⁹ European Commission Press Release, 3 December 2013, *supra* note 307.

³¹⁰ Government of Canada, *Technical Summary of Final Negotiated Outcomes: Canada–European Union Comprehensive Economic and Trade Agreement*, Agreement-in-Principle, at 25, [CETA Final Negotiated Outcomes].

investment and trade relations should not develop at the expense of the environment; that economic growth and environmental protection should not be mutually exclusive.³¹¹ This can be contrasted with the Canadian government's regular stance, which has been described above, and which is more of a reverse argument – that environmental protection measures should not be implemented at the expense of the environment³¹² and this is interesting progress. There is, however, no indication of climate change specifically being addressed in the agreement.

Furthermore, Canada and the EU have, in the agreement, committed to maintain a high level of environmental protection and to effectively enforce domestic environmental laws, as well as to provide domestic sanctions or remedies for violations of environmental laws. Any disputes will be settled through dispute resolution; however, the CETA will not include any penalties or trade sanctions in the case of non-compliance.³¹³

5.3.2 The Agreement on Air Transport

In the Agreement on Air Transport between the EU and Canada, which is the most ambitious air transport agreement between the EU and a major partner in the world so far,³¹⁴ the parties acknowledge the importance of environmental protection in relation to aviation.³¹⁵ Both parties have agreed to cooperate closely in order to mitigate the effects that aviation activities might have on climate change³¹⁶ and the Agreement includes one article devoted to the environment.³¹⁷ The approach is a little different in this article, however, as it states that environmental measures concerning aviation should only be implemented after an evaluation of how they might adversely affect “the exercise of rights contained in [the] Agreement”³¹⁸. The phrasing indicates that even though the Parties have affirmed the importance of protecting the environment, aviation commercial activities are of primary concern.

5.4 Reflections

Inspiration appears to not having been enough to influence other countries to commit to climate change action, and more stringent measures, such as

³¹¹ European Commission, 18 October 2013, “Facts and Figures of the EU–Canada Free Trade Deal”, Brussels, MEMO/13/911, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-911_en.htm>, accessed April 1, 2014.

³¹² See *supra*, subsection 2.2.3.

³¹³ CETA Final Negotiated Outcomes, *supra* note 310, at 25-26.

³¹⁴ “International Aviation: Canada”, online: European Commission – Mobility & Transport <http://ec.europa.eu/transport/modes/air/international_aviation/country_index/canada_en.htm>, accessed May 4, 2014.

³¹⁵ EU–Canada Agreement on Air Transport, *supra* note 229, Preamble.

³¹⁶ Cf. European Commission, 17 December 2009, “EU and Canada sign Air Transport Agreement”, IP/09/1963, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-09-1963_sv.htm>, accessed May 4, 2014.

³¹⁷ EU–Canada Agreement on Air Transport, *supra* note 229, Article 18.

³¹⁸ *Ibid*, Article 18.3.

the inclusion of the aviation sector in the EU ETS have met extensive criticism. Ultimately, the EU ceased the intended application of the Aviation Directive. Another method of influencing countries to increase efforts to mitigate climate change is by working through bilateral and multilateral agreements. In this last chapter, I have looked into how environmental and climate change clauses are used in the EU's current bilateral agreements, as the third method of legal measures available to the EU to exert pressure on third countries, after secondary legislation and case law. The question is whether these types of clauses could be used for additional purposes, such as meeting certain climate targets or improving climate performance. Using legal constructions such as conditionality clauses in bilateral agreements opens up for a new strategy of "targeting" third countries one by one, as opposed to trying to inspire an unspecified global community to pursue more stringent climate policy.

The GSP+ system is an example of how conditionality on environmental action is used as a means of bringing pressure on states perhaps less likely to use their resources for environmental protection purposes such as mitigating climate change. This strategy is different from that of the use of conditionality clauses such as human rights clauses, as states are *rewarded* for taking action with something they did not previously have, whereas failure to uphold human rights in the latter case would result in *withdrawal* of existing benefits. Even though these two arrangements represent different legal approaches and situations, the different ways of obtaining a desired side effect can be observed. As indicated by Moberg, this type of conditionality only works on the presumption that the agreement is of high importance to the other party.

For the purpose of this thesis, I wanted to discuss whether conditionality clauses could be used to pressure other industrialized countries to commit to take more stringent climate action. In the new CETA between Canada and the EU, Canada has agreed to incorporate chapters that deal with sustainability and environmental concerns in relation to trade. The EU is the second most important trading partner for Canada, while Canada is the EU's twelfth most important trading partner, which could be used to the EU's advantage when it comes to negotiating more stringent terms for Canada. The legal text for the provisions that have been agreed upon has not been finalized, but there are indications that they will be phrased quite vaguely, and as aspirational or desirable goals, rather than stringent terms. Furthermore, climate change specifically does not seem to have been touched upon, "only" sustainable development as well as the environment in general. This is in line with the EU's aforementioned environmental integration principle of Article 11 TFEU, which requires that environmental protection be an inherent part in all EU policy. Considering the importance for Canada of trading with the EU, however, this is an area in which the EU could have pushed the climate change issue specifically a little more. As mentioned, the final agreement text has yet to be published, but noting the reluctance that Canada has shown in the past years, it does not seem likely that the federal government would agree to condition an FTA on climate change action cooperation. On the other hand, taking into account the EU's

leadership ambitions in these issues, CETA would be a good opportunity for the Union to set a standard on what climate change performance is needed, or to ensure that sanctions were issued in the case of non-compliance with the environmental provisions. It is most definitely uplifting to see that Canada for the first time has agreed to include provisions on environmental concerns in an FTA; however, to stress the importance of mitigating climate change, the issue should be specifically mentioned in the agreement's preamble or similar.

What this chapter has aimed to illustrate is that bilateral and multilateral agreements can be used for integrating climate change concerns into the EU's external relations. Working through bilateral agreements is perhaps a more lenient manner for the EU to integrate climate change concerns into its relations with third countries, and an approach that leaves room for more negotiation, so that both the EU and its contracting party are satisfied with the arrangement.

6 Concluding Analysis

6.1 Different Approaches to Mitigating Climate Change

The objective of this thesis has been to examine legal methods available to the EU to influence Canada to pursue climate change action in times of institutional failure of the international climate regime. First, my examination has mapped the EU's and Canada's respective climate change approaches. The EU considers the environment to be of high importance, which is evident by how the Union finds ways to integrate environmental concerns into different parts of its policies. This stance has also been established in EU primary legislation in the form of the environmental integration principle, which explicitly *requires* that environmental protection be integrated into *all* Union policy and activity. Mitigating climate change is an evident part of environmental protection, but the EU has still chosen to explicitly include combating climate change as one of its objectives for its environmental policy, next to the protection of human health,³¹⁹ consequently showing that the Union considers *inter alia* the reduction of GHG emissions to be of high importance.

No similar approach can be distinguished in Canadian legislation. The development of Canadian climate policy shows no sign of any intention or desire to promote environmental protection as highly as the EU does. Instead, the government has clearly articulated that while it appreciates the need for a speedy response to global warming, no environmental protection measure can come at the expense of the Canadian economy. A study of Canadian climate policy during the past 20 years further demonstrates that the Government of Canada has adjusted Canada's climate targets several times, after having realized that the target in question would not be met. What was perhaps an ambitious reduction target from the beginning was not followed by similarly stringent legal measures to ensure its achievement. It is evident that the Canadian government is trying to avoid regulating emissions from the, for the economy, important oil and gas sector by choosing a climate change action approach that allows for prioritizing emission reductions from other sectors. This method allows for some visible climate change action without dealing with environmental protection that could negatively affect the Canadian economy.

The Canadian approach to mitigating climate change corresponds with the idea of the *tragedy of the commons*, one of the concepts of which is that an actor will overexploit a common resource, if it is financially rewarding for him or her. The conclusion is that economic incentives are needed in order to change that behavior. I have looked at three different measures through which the EU is trying to substitute for the lack of effective international climate law: EU legislation with external impact, EU case law, and bilateral

³¹⁹ Cf. TFEU, *supra* note 134, Article 191(1).

agreements. The ultimate question is now whether these means provide sufficient incentives to act on climate change, and whether they have given the same effect, or if one is stronger than the other?

6.2 Spurring Climate Action beyond the EU's External Borders

6.2.1 Substituting for Climate Inaction through Secondary Legislation

Through its secondary legislation, the EU has imposed requirements on external actors; in essence substituting for inaction on climate change issues elsewhere by demanding that industries fulfill certain criteria to get access to the EU market. The introduction of sustainability criteria for biofuels and the proposal for implementing GHG intensity values for fossil fuels show that the EU appreciates that climate change cannot be regulated in isolation; that several aspects have to be taken into consideration if emissions are to be reduced efficiently. These two measures both take into consideration the whole life cycle of fuels, that is, how much GHG emissions they actually generate during all stages, not only at the time of combustion. The measures point to a genuine environmental protection approach, which is needed in order to stabilize GHG emissions. It is not enough to target one phase of the fuels' life cycles. Rather, in order to effectively mitigate climate change, a realistic approach which recognizes all aspects of emission generation, is critical.

Through this type of secondary legislation, the EU imposes its own environmental standards on non-EU industries by making it mandatory to comply with set sustainability criteria for biofuels or apply intensity values for fossil fuels. Thereby third countries are forced to take some kind of climate change mitigation measures if they want access to the EU market.

6.2.2 Legitimizing Regulatory Influence through CJEU Case Law

CJEU has shown persistence in supporting EU legislation, clearly visible in the *ATA* case, where the Court legitimized the EU's regulation of aviation activities which generate GHG emissions outside of EU airspace. The *ATA* case sends a strong signal that the EU is ready to fight for its cause of maintaining high environmental performance standards, however, due to political pressure, the EU decided to cease the application of the Aviation Directive to international flights. The decision was taken based on the announcement that the ICAO will ensure that GHG emissions from aviation be regulated at the international level soon, a statement that was confirmed by a subsequent ICAO Assembly Resolution, which sets out guiding principles for such measures. It is important that the EU follows up on these plans, and reestablishes the original application of the Aviation Directive.

Especially if the ICAO's are executed improperly, if the EU wants to maintain its leadership role on climate action, and if its secondary legislation is to remain a credible tool on exerting pressure on third countries.

6.2.3 Conditioning Agreements to Achieve Political Goals

Conditionality or cooperation clauses in agreements can be used as tools for achieving political goals, hence, possibly a useful means of forcing Canada to take climate change action that it would be unwilling to take in the absence of clear incentives other than minor environmental benefits. When drafting an agreement, both parties have the opportunity to negotiate terms favorable to them; the contractual freedom thus opens up for creative and flexible solutions to bring on a certain behavior. In addition, the consequences of a breach of the agreement can be chosen so that both parties are content and willing to comply.

Working through contract clauses hence provides the opportunity to adjust the terms for each single contracting state. In essence, a contractual obligation to mitigate climate change can be created. Since both parties have been given the chance to deliver its opinions on the matter through negotiation, the chances of conditionality or cooperation clauses on climate change being complied with are potentially higher than those of obligations that the EU unilaterally has imposed on third countries through its internal legislation being met.

6.2.4 Effectiveness of the Measures Examined

Measures such as the Aviation Directive or the sustainability criteria for biofuel target unspecified external actors, as they target *every actor* seeking to access the EU's internal market in one way or another. There is no room for "customizing". In this aspect, cooperation or conditionality clauses in bilateral agreements are possibly a more flexible way of working, however, perhaps not as efficient, as they each target a smaller group. It is also important to include effective sanctions, in case of non-compliance, since the inability to deal with non-compliers has been a major problem within the international climate regime.

A important question is whether it is feasible to condition bilateral agreements with developed countries on climate change? Could CETA, for example, have included climate change conditions in addition to addressing the environment in general? First, we can establish that climate change action can be costly, and it is in the EU's interest that domestic firms are not put at a competitive disadvantage while working to reduce emissions. If they knew that industries from outside the EU would not be held to the same standards, they would have much less of an incentive to comply with the EU's climate change measures. In this regard, an international agreement setting international standards to ensure that other countries also implement

regulations leading to similarly stringent, and costly, climate change mitigation measures is of high importance to the EU. In the meantime, however, bilateral agreements can be an effective way of working on a state-by-state basis.

Going back to the feasibility question, it is evident that CETA is an FTA of great importance to both the EU and Canada. An increase of Canadian products in the EU will lead to an increase in competition between Canadian and EU businesses, hence making it important for EU industries that Canadian industries are subject to the same standards, as they would otherwise be disadvantaged. Specifying certain performance or production criteria, related to climate change mitigation, in such bilateral agreements could help EU industries maintain competitiveness without lowering their environmental protection standards.

6.3 The Different Measures Compared

Comparing these different legal approaches, the secondary legislation, the case law, and the agreements, it can be established that they all have a legitimate purpose, and can all be effective measures in mitigating climate change if used wisely. Secondary legislation can target a larger group and substitute for inaction at the international level quite effectively, provided that it is carefully designed so that it can withstand court proceedings if challenged. If so, the result is a solid climate measure, legitimized by the Court, that can send a strong legal message to states more reluctant to taking climate action that it is time to act, and that if they want to get access to the EU market they will have to accept that business cannot come at the expense of environmental protection.

Working through bilateral agreements may be a legal method that is narrower in scope. However, it can result in a stringent means of exerting pressure, provided that the agreement in question is of great enough importance for the contracting states, and there is a greater opportunity of “tailoring” the terms and drafting the agreement in a more specific way in order to achieve the desired effect.

Canada has been reluctant to the EU exercising regulatory influence on third countries, and has criticized both the Aviation Directive and the proposed GHG intensity values for fossil fuels, ultimately based on the argument that complying with such measures will damage the Canadian economy or put Canadian companies at a disadvantage. With an FTA such as the new CETA, Canada and the EU have the benefit of being able to negotiate over what climate change action that is needed, and due to the importance of EU as a trading partner for Canada, this is an opportunity for the EU to make demands on Canada to deliver on its presumed commitment to mitigating climate change.

6.4 Conclusion

I believe that an overarching international framework is needed in order to coordinate action on climate change taken by different countries, as well as to establish some kind of performance standard, which could possibly be different for different countries, based on their capabilities. However, this top-down approach has to be complemented by effective compliance mechanisms. If compliance cannot be assured, it will be difficult to regain and retain confidence in an international climate regime. If non-compliers are not dealt with properly, one can question what incentives there are for complying, or even remaining a party of such frameworks.

It is nevertheless a fact that different countries have different capabilities of combating climate change, and due to the urgency of climate change mitigation, an international top-down approach could be followed by bottom-up approaches to ensure effective regulation. Conditionality or coordination clauses on climate change in bilateral or multilateral agreements could constitute such an approach, and guarantee that more capable countries, such as Canada, are pushed to contribute a little bit more.

In conclusion, the global challenge that climate change imposes on all countries calls for an international response, and where such a response fails several legal methods are available for single actors to exert pressure on others. The EU has been using secondary legislation supported by CJEU case law in innovative ways, and has complemented such action with environmental or climate change clauses in bilateral agreements, thus living up to its integration principle that environmental protection concerns should be an inherent part of all EU actions and policies. This is a progressive approach, not to mention an imperative one, considering the adverse consequences of climate change that we are starting to face. *We are what is wrong.* Climate change is a collective-action problem, and it is not enough if only a few countries take action to mitigate climate change. Furthermore, countries cannot pick and choose to act in areas that they are more comfortable with. There is no room for hesitation or delay. *We must make it right.* And we must act now. For reluctant countries, incentives have to be created. The EU has found a way of mixing a top-down and a bottom-up approach and it is my hope that it will steer Canada in the right direction.

Bibliography

Books

- Bogdan, Michael. *Concise Introduction to Comparative Law* (Groningen: Europa Law Publishing, 2013)
- Bogojević, Sanja. *Emissions Trading Schemes: Markets, States and Law* (Oxford: Hart Publishing, 2013)
- Cowie, Jonathan. *Climate Change: Biological and Human Aspects*, 2nd ed (Cambridge: Cambridge University Press, 2013), [Cowie]
- Fisher, Elizabeth, Bettina Lange & Eloise Scotford. *Environmental Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2013)
- Gall, Gerald. *The Canadian Legal System*, 5th ed (Scarborough, Ontario: Thomson Carswell, 2004), [Gall]
- Jans, Jan H. & Hans H.B. Vedder. *European Environmental Law* (Groningen: Europa Law Publishing, 2012)
- Jordan, Andrew *et al*, eds. *Climate Change Policy in the European Union: Confronting the Dilemmas of Mitigation and Adaptation?* (Cambridge: Cambridge University Press, 2010)
- Marín Durán, Gracia & Elisa Morgera. *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart, 2012), [Marín Durán & Morgera]
- Metz, Bert. *Controlling Climate Change* (Cambridge: Cambridge University Press, 2010)
- Moberg, Andreas. *Villkorsklausuler – om avtalsklausuler som utrikespolitiskt instrument* (Uppsala: Iustus Förlag AB, 2009), [Moberg (2009)]

Book Chapters

- Bogojević, Sanja. “EU:s handel med utsläppsrätter och de globala obalanserna i klimatskyddet” in Antonina Bakardjieva Engelbrekt, Lars Oxelheim & Thomas Persson, eds, *EU och de globala obalanserna* (Stockholm: Santérus, 2014) 109, [Bogojević (2014)]
- Graham, Nicole. “The Mythology of Environmental Markets”, in David Grinlinton & Prue Taylor, eds, *Property Rights and Sustainability* (Leiden: Martinus Nijhoff Publishers, 2011) 149
- Kulovesi, Kati. “Climate Change in EU External Relations: Please Follow My Example (Or I Might Force You To)” in Elisa Morgera, ed, *The*

External Environmental Policy of the European Union (Cambridge: Cambridge University Press, 2012) 115, [Kulovesi (2012)]

Moberg, Andreas. “Kan EU avtala bort den globala obalansen i skydd för mänskliga rättigheter?” in Antonina Bakardjieva Engelbrekt, Lars Oxelheim & Thomas Persson, eds, *EU och de globala obalanserna* (Stockholm: Santérus, 2014) 109, [Moberg (2014)]

van Asselt, Harro, Michael Mehling & Clarisse Kehler Siebert. “The Changing Architecture of International Climate Change Law”, forthcoming in Geert Van Calster, Wim Vanderberghe & Leonie Reins, eds, *Research Handbook on Climate Change Mitigation Law* (Cheltenham: Edward Elgar, 2014), [van Asselt, Mehling & Kehler Siebert]

Žvelc, Rok. “Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements” in Elisa Morgera, ed, *The External Environmental Policy of the European Union* (Cambridge: Cambridge University Press, 2012) 174, [Žvelc]

Articles

Bodansky, Daniel. “A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime”, 43:3 *Arizona State Law Journal* 697

Bodansky, Daniel. “The Copenhagen Climate Change Conference: A Postmortem” (2010) 104 *American Journal of International Law* 230

Bogojević, Sanja. “Ending the Honeymoon: Deconstructing Emissions Trading Discourses” (2009) 21:3 *Journal of Environmental Law* 443

Bogojević, Sanja. “Legalising Environmental Leadership: A Comment on the CJEU’s Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme” (2012) 24 *Journal of Environmental Law* 345, [Bogojević (2012)]

Denza, Eileen. “International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case” (2012) 37:3 *European Law Review* 314

Esty, Daniel C. & Anthony L.I. Moffa. “Why Climate Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime” (2012) 15:3 *Journal of International Economic Law* 777

Hardin, Garrett. “The Tragedy of the Commons” (1968) 162 *Science* 1243

Hare, William *et al.* “The Architecture of the Global Climate Regime: A Top-Down Perspective”, 10 *Climate Policy* 600, [Hare *et al.*]

Kotoky, Anurag. “India to Ask Airlines to Shun EU Carbon Scheme” (19 March 2012) *Reuters*, <<http://uk.reuters.com/article/2012/03/19/uk->

india-eu-emission-idUKLNE82I02Y20120319>, accessed May 17, 2014

Kulovesi, Kati. “‘Make Your Own Special Song, Even If Nobody Else Sings Along’: International Aviation Emissions and the EU Emissions Trading Scheme” (2011) 2 *Climate Law* 535

Kulovsei, Kati, Elisa Morgera & Miquel Muñoz. “Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU’s 2009 Climate and Energy Package” (2011) 48 *Common Market Law Review* 829, [Kulovesi, Morgera & Muñoz]

Oberthür, Sebastian & Claire Roche Kelly. “EU Leadership in International Climate Policy: Achievements and Challenges” (2008) 43:3 *The International Spectator* 35, [Oberthür & Roche Kelly]

Osofsky, Hari M. “The Continuing Importance of Climate Change Litigation” (2010) 1:1 *Climate Law* 3

Parker, Charles F. & Christer Karlsson. “Climate Change and the European Union’s Leadership Moment: An Inconvenient Truth” (2010) 48:4 *Journal of Common Market Studies* 923

Peters, Glen P. *et al.* “The Challenge to Keep Global Warming Below 2°C” (2013) 3 *Nature Climate Change* 4

Raynor, Steve. “How to Eat an Elephant: A Bottom-up Approach to Climate Policy”, 10:6 *Climate Policy* 615

Scott, Joanne. “The Multi-Level Governance of Climate Change” (2011) 5:1 *Carbon & Climate Law Review* 25

Scott, Joanne & Lavanya Rajamani. “EU Climate Change Unilateralism” (2012) 23:2 *The European Journal of International Law* 469

Vihma, Antto & Harro van Asselt. “Great Expectations – Understanding Why the UN Climate Talks Seem to Fail”, Finnish Institute of International Affairs Briefing Paper 109, 14 June 2012

Reports

Brandt, Adam. *Upstream Greenhouse Gas (GHG) Emissions from Canadian Oil Sands as a Feedstock for European Refineries* (Stanford, CA: Department of Energy Resources, Stanford University, 2011), Executive summary, available at <https://circabc.europa.eu/d/d/workspace/SpacesStore/06a92b8d-08ca-43a6-bd22-9fb61317826f/Brandt_Oil_Sands_Post_Peer_Review_Final.pdf>at 2-6>, accessed May 3, 2014

Burck, Jan, Franziska Marten & Christoph Bals. *The Climate Change Performance Index – Results 2014* (Germanwatch & Climate Action Network Europe, 2013), available at <<http://germanwatch.org/en/ccpi>>, [CCPI 2014]

- Centre for International Sustainable Development Law. *Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading System*, May 2012, available at <http://cisdl.org/public/docs/news/CISDL_EU_ETS_Expansion_Legal_Brief.pdf>, accessed May 17, 2014
- Elgie, Stewart & Jessica McClay. *BC's Carbon Tax Shift after Five Years: Results. An Environmental (and Economic) Success Story* (Ottawa: Sustainable Prosperity, 2013), available at <<http://www.sustainableprosperity.ca/article3685>>, accessed May 10, 2014
- Environment Canada. *Canada's Emissions Trends*, October 2013, available at <http://www.ec.gc.ca/ges-ghg/985F05FB-4744-4269-8C1A-D443F8A86814/1001-Canada's%20Emissions%20Trends%202013_e.pdf>
- European Environment Agency. *Annual European Union Greenhouse Gas Inventory 1990–2011 and Inventory Report 2013 – Submission to the UNFCCC Secretariat*, Technical report No 8/2013
- Friends of the Earth Europe. *Canada's Dirty Lobby Diary: Undermining the EU Fuel Quality Directive* (2011), available at <http://www.foeeurope.org/publications/2011/FOEE_Report_Tar_Sands_Lobby_Final_July82011.pdf>, accessed May 3, 2014
- ICF International. *Independent Assessment of the European Commission's Fuel Quality Directive's "Conventional" Default Value*, Final Report, 9 October 2013, available at <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/EU_FQD_Study_Final_Report.pdf>, accessed May 14, 2014
- International Energy Agency. *CO₂ Emissions from Fuel Combustion – Highlights*, 2013 Edition, available at <<http://www.iea.org/publications/freepublications/publication/CO2EmissionsFromFuelCombustionHighlights2013.pdf>>
- IPCC. *Climate Change: The IPCC Scientific Assessment* (Cambridge: Cambridge University Press, 1990)
- IPCC. *Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001)
- IPCC. *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2013), [IPCC (2013)]
- IPCC. *Climate Change 2014: Mitigation of Climate Change. Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Final Draft, available at <<https://www.ipcc.ch/report/ar5/wg3/>>, accessed May 5, 2014, [IPCC (2014)]

- Kossoy, Alexandre & Pierre Guigon. *State and Trends of the Carbon Market 2012* (Washington: The World Bank, 2012), available at <http://siteresources.worldbank.org/INTCARBONFINANCE/Resources/State_and_Trends_2012_Web_Optimized_19035_Cvr&Txt_LR.pdf>, accessed May 14, 2014
- National Round Table on the Environment and the Economy. *Reality Check: The State of Climate Progress in Canada* (Ottawa: NRTEE, 2010), [NRTEE]
- Pembina Institute. *Oil Sands, Heavy Crudes, and the EU Fuel-Quality Directive*, Briefing note, March 2012, available at <<http://www.pembina.org/pub/2325>>, accessed May 3, 2014
- The Royal Society. *Sustainable Biofuels: Prospects and Challenges*, January 2008, Policy document 01/08, available at <<https://royalsociety.org/policy/publications/2008/sustainable-biofuels/>>, accessed May 10, 2014
- Sandbag, *ETS S.O.S: Why the Flagship 'EU Emissions Trading Policy' Needs Rescuing*, July 2009, at 8-10, available at <http://www.sandbag.org.uk/site_media/pdfs/reports/Sandbag_ETS_SOS_Report_1.pdf>, accessed May 17, 2014
- Stern, Nicholas. *Stern Review: The Economics of Climate Change* (Cambridge: Cambridge University Press, 2007)
- United Nations Environment Programme (UNEP). *The Emissions Gap Report 2013: A UNEP Synthesis Report* (Nairobi: UNEP, 2013), available at <<http://www.unep.org/pdf/UNEPemissionsGapReport2013.pdf>>

Electronic Sources

- “2011 Report to the Canada-European Union Joint Cooperation Committee”, online: Government of Canada <http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2011jcc-cmc.aspx>, accessed March 31, 2014
- “Canada”, online: European Union External Action <http://eeas.europa.eu/canada/sector_en.htm>, accessed March 31, 2014
- Canadian Press. “Canada’s climate change stance ‘de-motivating’”, online: CBC News <<http://www.cbc.ca/news/technology/canada-s-climate-change-stance-de-motivating-1.2433224>>, accessed March 9, 2014
- “Canada’s Withdrawal from the Kyoto Protocol”, online: Environment Canada <<http://www.ec.gc.ca/Publications/default.asp?lang=En&n=EE4F06AE-1&xml=EE4F06AE-13EF-453B-B633-FCB3BAECEB4F&offset=3&toc=hide>>, accessed February 24, 2014

- “Canadian International Merchandise Trade, February 2014”, online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/140403/dq140403a-eng.htm>>, accessed May 3, 2014
- “CO₂ Emissions (kt), online: The World Bank <<http://data.worldbank.org/indicator/EN.ATM.CO2E.KT/countries>>, accessed May 10, 2014
- Ecojustice Media Release. “Canada in court for violating federal climate change law”, June 18, 2008, online: Ecojustice <<http://www.ecojustice.ca/media-centre/press-releases/canada-in-court-for-violating-federal-climate-change-law>>, accessed April 9, 2014
- “Emissions Trading System (EU ETS)”, online: European Commission – Climate Action <http://ec.europa.eu/clima/policies/ets/index_en.htm>, accessed May 5, 2014
- “Energy Imports, net (% of energy use), online: The World Bank <<http://data.worldbank.org/indicator/EG.IMP.CON.S.ZS/countries>>, accessed February 17, 2014
- “Energy Production (kt of oil equivalent)”, online: The World Bank <<http://data.worldbank.org/indicator/EG.EGY.PROD.KT.OE/countries>>, accessed February 17, 2014
- “Energy Statistics”, online: Eurostat <http://epp.eurostat.ec.europa.eu/portal/page/portal/energy/data/main_tables>, accessed February 17, 2014
- “Environment”, online: Canada–EU Relations, Government of Canada <<http://www.canadainternational.gc.ca/eu-ue/policies-politiques/environment-environnement.aspx?lang=eng>>, accessed April 22, 2014
- “EU–Canada Summit Joint Press Statement”, online: Government of Canada <http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2010_05_05_statement-declaration.aspx?lang=eng>, accessed March 31, 2014
- EurActiv. “EU Tar Sands Law Would Cost Oil Firms ‘Less than a Euro Cent a Litre’”, 3 October 2013, <<http://www.euractiv.com/energy/eu-tar-sands-law-cost-oil-firms-news-530835>>, accessed May 3, 2014
- EurActiv. “Fatih Birol: Energy Efficiency Is One of the Last Options after Kyoto”, 5 December 2012, <<http://www.euractiv.com/energy-efficiency/fatih-birol-energy-efficiency-op-news-516441>>, accessed May 5, 2014
- “Fuel Quality Directive”, online: Natural Resources Canada <<https://www.nrcan.gc.ca/media-room/backgrounders/2012/3239>>, accessed May 3, 2014
- “Generalised Scheme of Preferences (GSP)”, online: European Commission, <<http://ec.europa.eu/trade/policy/countries-and-regions/>

- development/generalised-scheme-of-preferences/index_en.htm>, accessed April 7, 2014
- “Greenhouse Gas Emissions by Economic Sector”, online: Environment Canada, <<http://ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=F60DB708-1>>, accessed May 6, 2014
- “Greenhouse Gas Emissions Data”, online: Environment Canada <<https://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=BFB1B398-1>>, accessed May 3, 2014
- “Gross Domestic Product by Industry, February 2014”, online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/140430/dq140430a-eng.htm?HPA>>, accessed May 3, 2014
- ICAO News Release. “New ICAO Council High-Level Group to Focus on Environmental Policy Challenges”, COM 20/12, 15 November 2012, <<http://www.icao.int/Newsroom/News%20Doc%202012/COM.20.12.EN.pdf>>, accessed on May 8, 2014
- “ICF International Independent Assessment of the European Commission’s Fuel Quality Directive’s Conventional Default Value”, online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2013/13889>>, accessed May 3, 2014
- “International Aviation: Canada”, online: European Commission – Mobility & Transport <http://ec.europa.eu/transport/modes/air/international_aviation/country_index/canada_en.htm>, accessed May 4, 2014
- “Message by the Director General”, online: European Commission <http://ec.europa.eu/clima/about-us/director/index_en.htm>, accessed April 9, 2014
- “Minister Oliver Highlights Canada’s Position on the Proposed European Fuel Quality Directive in Brussels”, January 27, 2014, online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2013/1709>>, accessed May 2, 2014
- “Minister Oliver Objects to the European Union’s Discrimination of Canadian Crude Oil”, October 23, 2011, online: Natural Resources Canada <<http://www.nrcan.gc.ca/media-room/news-release/2011/2381>>, accessed May 2, 2014
- “Mission Statement”, online: Germanwatch <<http://germanwatch.org/en/mission-statement>>, accessed February 25, 2014
- “Status of Ratification of the Convention”, online: United Nations Framework Convention on Climate Change <http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php>, accessed February 22, 2014
- “Status of Ratification of the Kyoto Protocol”, online: UNFCCC <https://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php>, accessed March 7, 2014

“The EU Emissions Trading System (EU ETS)”, online: European Commission <http://ec.europa.eu/clima/policies/ets/index_en.htm>, accessed April 26, 2014

“Transport & Environment”, online: European Commission <<http://ec.europa.eu/environment/air/transport/fuel.htm>>, accessed May 3, 2014

“United States-Canada Clean Energy Dialogue”, online: Government of Canada <<http://www.climatechange.gc.ca/dialogue/default.asp?lang=En&n=C3D58516-1>>, accessed April 9, 2014

Official Canadian Documents

Government of Canada. *Canada’s Green Plan for a Healthy Environment* (Ottawa: Supply and Services Canada, 1990)

Government of Canada. *Canada’s Sixth National Report on Climate Change, 2014: Actions to Meet Commitments under the United Nations Framework Convention on Climate Change* (Ottawa: Government of Canada, 2013), available at <http://unfccc.int/national_reports/annex_i_natcom/submitted_natcom/items/7742.php>, [*Canada’s Sixth National Report on Climate Change*]

Government of Canada. *Project Green: Moving Forward on Climate Change: A Plan for Honouring our Kyoto Commitment* (Ottawa: Government of Canada, 2005)

Government of Canada. *Technical Summary of Final Negotiated Outcomes: Canada-European Union Comprehensive Economic and Trade Agreement, Agreement-in-Principle*, at 25, available at <<http://actionplan.gc.ca/en/page/ceta-aecg/technical-summary>>, accessed April 1, 2014, [*CETA Final Negotiated Outcomes*]

Ontario Ministry of Energy. *Achieving Balance – Ontario’s Long-Term Energy Plan* (Toronto: Queen’s Printer for Ontario, 2013)

Official EU Documents

Council of the European Union

Conclusions of the European Council, 17 June 2010, EUCO 13/10

Presidency Conclusions of the Council of the European Union, 8/9 March 2007, 7224/1/07 REV 1

Review of the EU Sustainable Development Strategy (EU SDS) — Renewed Strategy, 10917/06, Brussels, 26 June 2006, [*Renewed EU Sustainable Development Strategy*]

European Commission

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 20 20 by 2020 – Europe’s Climate Change Opportunity, COM(2008) 30 final, [2020 Strategy]

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 – A strategy for competitive, sustainable and secure energy, COM(2010) 639 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Roadmap for moving to a competitive low carbon economy in 2050, COM(2011) 112 final, [2050 Roadmap]

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Trade, growth and development – Tailoring trade and investment policy for those countries most in need, COM(2012) 22 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020, COM(2013) 167 final

Green Paper: A 2030 framework for climate and energy policies, COM(2013) 169 final

Proposal for a decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020, COM(2008) 17 final

Sixth National Communication and First Biennial Report from the European Union under the United Nations Framework Convention on Climate Change (UNFCCC), Technical Report 2014-075 (Luxembourg: Office for Official Publications of the European Communities, 2014), available at <http://unfccc.int/files/national_reports/annex_i_natcom_/application/pdf/eu_nc6.pdf>

Press Releases

European Commission, 17 December 2009. “EU and Canada Sign Air Transport Agreement”, IP/09/1963, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-09-1963_sv.htm>, accessed May 4, 2014

European Commission, 28 August 2012, “Australia and European Commission Agree on Pathway towards Fully Linking Emissions

Trading Systems”, Brussels, IP/12/916, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-12-916_en.htm?locale=en>, accessed May 15, 2014

European Commission, 12 November 2012. “Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organisation (ICAO) Council”, MEMO/12/854, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-12-854_en.htm>, accessed March 31, 2014

European Commission, 10 October 2013. “EU and Canada Conclude Negotiations on Trade Deal”, Brussels, Press release IP/13/972, online: Press Releases Database <http://europa.eu/rapid/press-release_IP-13-972_en.htm>, accessed April 1, 2014

European Commission, 18 October 2013. “Facts and Figures of the EU–Canada Free Trade Deal”, Brussels, MEMO/13/911, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-911_en.htm>, accessed April 1, 2014

European Commission, 6 November 2013. “Questions & Answers on EU Ratification of the Second Commitment Period of the Kyoto Protocol”, MEMO/13/956, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-956_en.htm>, accessed April 25, 2014

European Commission, 3 December 2013. “The EU’s Bilateral Trade and Investment Agreements – Where Are We?”, MEMO/13/1080, Brussels, online: Press Releases Database <http://europa.eu/rapid/press-release_MEMO-13-1080_en.htm>, accessed April 1, 2014, [European Commission Press Release, 3 December 2013].

Other

Directorate General for Climate Action & The Committee on Fuel Quality, *Draft Commission Directive .../.../EU of [...] laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels*, 2 December 2011, D016937/03 (Draft implementing measure/act) in dossier CMTD(2011)1446, available at <<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&Yq9XhlnCmsmjEbl3DTIoXISib/wfUiHQfsIxzAIMZg=>>>, accessed May 2, 2014, [Commission Directive Draft 2011]

European Commission. *EU Action Against Climate Change: The EU Emissions Trading Scheme*, 2009 Edition (Luxembourg: Office for Official Publications of the European Communities, 2008)

European Commission. *The EU Emissions Trading System (EU ETS)*, (European Union Publications Office, October 2013)

Official UN Documents

UNFCCC, “Views related to carbon dioxide capture and storage in geological formations as a possible mitigation technology”, Submission from Parties, 13 April 2010, FCCC/SBSTA/2010/MISC.2, available at <http://unfccc.int/documentation/documents/advanced_search/items/6911.php?preref=600005749>, accessed May 5, 2014, [UNFCCC, Submission from Parties]

Other

Al Gore, “Nobel Lecture”, delivered at the Oslo City Hall, December 10, 2007, online: Nobelprize.org <http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html>, accessed February 16, 2014

Bill Clinton, at the World Economic Forum in Davos, January 30, 2006. The interview is available online, see “Davos Annual Meeting 2006 – Bill Clinton”, online: YouTube <<http://www.youtube.com/watch?v=tdn5rH-643Y>>, accessed February 16, 2014

Connie Hedegaard. “Statement at the Opening of the High-Level Segment of the UN Climate Conference COP 19”, delivered at COP-19 in Warsaw, Poland, November 19, 2013, online: European Commission <http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2013-11-19_02_en.htm>, accessed April 9, 2014

Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU ETS, February 22, 2012, online: Russian Aviation <<http://www.ruaviation.com/docs/1/2012/2/22/50/>>, accessed April 29, 2014

Leona Aglukkaq. “Canada’s National Statement at the 19th Conference of the Parties to the United Nations Framework Convention on Climate Change”, delivered at COP-19 in Warsaw, Poland, 20 November 2013, online: Environment Canada <<https://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=E691AE65-00D0-4DF2-9245-DA3AD224E2CE>>, accessed April 9, 2014

“Written Observations of the International Air Transport Association and the National Airlines Council of Canada” in relation to CJEU case C-366/10, available at <[http://www.airlinecouncil.ca/pdf/EU%20ETS%20Legal%20Challenge%20IATA-NACC%20Brief_FINAL%20\(21%20Oct%202010\).pdf](http://www.airlinecouncil.ca/pdf/EU%20ETS%20Legal%20Challenge%20IATA-NACC%20Brief_FINAL%20(21%20Oct%202010).pdf)>, accessed April 29, 2014

Table of Cases

Canadian Case Law

Federal Court of Canada

Friends of the Earth v Canada (Governor in Council), 2008 FC 1183

Turp v Canada (Attorney General), 2012 FC 893

Supreme Court of Canada

Friends of the Oldman River Society v Canada (Minister of Transport)
[1992] 1 SCR 3

Rothmans, Benson & Hedges Inc. (Trustee of) v Saskatchewan [2005]
1 SCR 188

EU Case Law

Court of Justice of the European Union

Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531

Case C-366/10 *Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v Secretary of State for Energy and Climate Change* [2011], OJ, C 260/9, [ATA]

Opinion of the Advocate General

Opinion of Advocate General Kokott delivered on 6 October 2011. Case C-366/10 *Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v Secretary of State for Energy and Climate Change*

Table of Legislation

American Legislation

European Union Emissions Trading Scheme Prohibition Act of 2011
(PL112-200, 27 November 2012)

Canadian Legislation

Federal Legislation

Canadian Environmental Protection Act, SC 1999, c 33, [CEPA]

Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 [*Constitution Act, 1867*]

Kyoto Protocol Implementation Act, SC 2007, c 30

Provincial Legislation

Carbon Tax Act [SBC 2008] c 40

Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations,
SOR/2013-24

*Passenger Automobile and Light Truck Greenhouse Gas Emission
Regulations*, SOR/2010-201

*Reduction of Carbon Dioxide Emissions from Coal-fired Generation of
Electricity Regulations*, SOR/2012-167

*Regulation Respecting a Cap-and-Trade System for Greenhouse Gas
Emission Allowances*, RRQ, c Q-2, r 46.1, [*Québec Cap-and-Trade
System Regulation*]

*Regulations Amending the Passenger Automobile and Light Truck
Greenhouse Gas Emission Regulations* (Proposal)

EU Legislation

Treaties

*Treaty of Lisbon amending the Treaty on European Union and the Treaty
establishing the European Community, signed at Lisbon*, [2007], OJ,
C 306/01, [Treaty of Lisbon]

Treaty on European Union (Consolidated version 2012), [2012], OJ, C
326/13, [TEU]

Treaty on the Functioning of the European Union (Consolidated version 2012), [2012], OJ, C 326/47, [TFEU]

Secondary Legislation

Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, [1998], OJ, L 350/58, [Fuel Quality Directive]

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003], OJ, L 275/32, [ETS Directive]

European Parliament and Council Directive 2004/101/EC of 27 October 2004 amending Directive 2003/87/EC in respect of the Kyoto Protocol's project mechanisms, [2004], OJ, L 338/18

Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009], OJ, L 8/3, [Aviation Directive]

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009], OJ L140/16, [Renewable Energy Directive]

Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, [2009], OJ, L140/63, [Revised ETS Directive]

Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, [2009], OJ, L 140/88, [Fuel Specification Directive]

European Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide, [2009], OJ, L 140/114, [CCS Directive]

Commission Regulation (EU) No 550/2011 of 7 June 2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international

credits from projects involving industrial gases, [2011], OJ, L 149/1, [Regulation 550/2011]

European Parliament resolution of 24 May 2012 on a resource-efficient Europe (2011/2068(INI))

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, [2012], OJ, L 303/1, [Regulation 978/2012]

EU Agreements

EU-U.S. Air Transport Agreement, 30 April 2007, (approved by the Council through Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union meeting within the Council, of 25 April 2007, on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, [2007], OJ, L 134/1)

Agreement on Air Transport between Canada and the European Community and Its Member States, 17 December 2009, (approved by the Council through *Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 30 November 2009 on the signing and provisional application of the Agreement on Air Transport between the European Community and its Member States, of the one part, and Canada, of the other part*, [2010], OJ, L 207/30), [EU–Canada Agreement on Air Transport]

Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States of the Other Part (Signed in Cotonou on 23 June 2000), latest revision June 22, 2010 in Ouagadougou, [Cotonou Agreement]

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, (Signed on 6 October 2010), [2011], OJ, L 127/6

Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, (Signed on 29 June 2012), [2012], OJ, L 346/3

ICAO Assembly Resolutions

Assembly Resolution A37-19: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change, 8 October 2010

Assembly Resolution A38-18: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change, 4 October 2013

UN Decisions

UNFCCC Decision 2/CP.15, Copenhagen Accord, UN Climate Change Conference 2009, Copenhagen, FCCC/CP/2009/11/Add.1, [Copenhagen Accord]

UNFCCC Decision 1/CP.17, “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action”, UN Climate Change Conference 2011, Durban, FCCC/CP/2011/9Add.1

UNFCCC Decision 1/CMP.8, “Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment)”, UN Climate Change Conference 2012, Doha, FCCC/KP/CMP/2012/13/Add.1, [Doha Amendment]

UN Treaties

United Nations Framework Convention on Climate Change, 9 May 1992, FCCC/INFORMAL/84, (entered into force 21 March 1994), [UNFCCC]

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162, (entered into force 16 February 2005), [Kyoto Protocol]