



International Trade and the Environmental Rule of Law

The influence of NAFTA and EU-Mercosul on the development and implementation of environmental law

Ass. Prof. Dr. Cathrin Zengerling, University of Freiburg

The Environmental Rule of Law, Fórum de Democracia Europa-Brasil, Brasilia, 28 November, 2019

International Trade

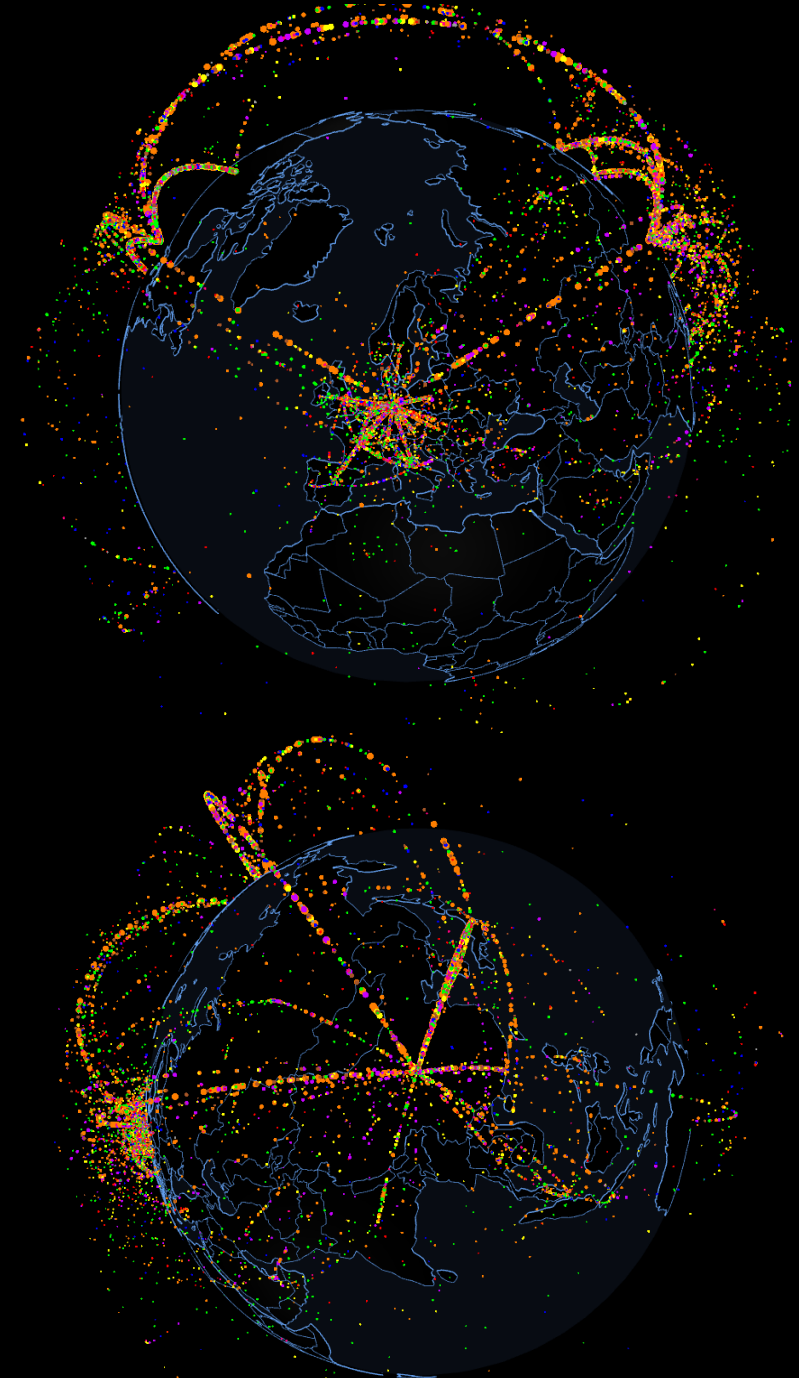
Zooming out: Trade flows

Global Goods Trade



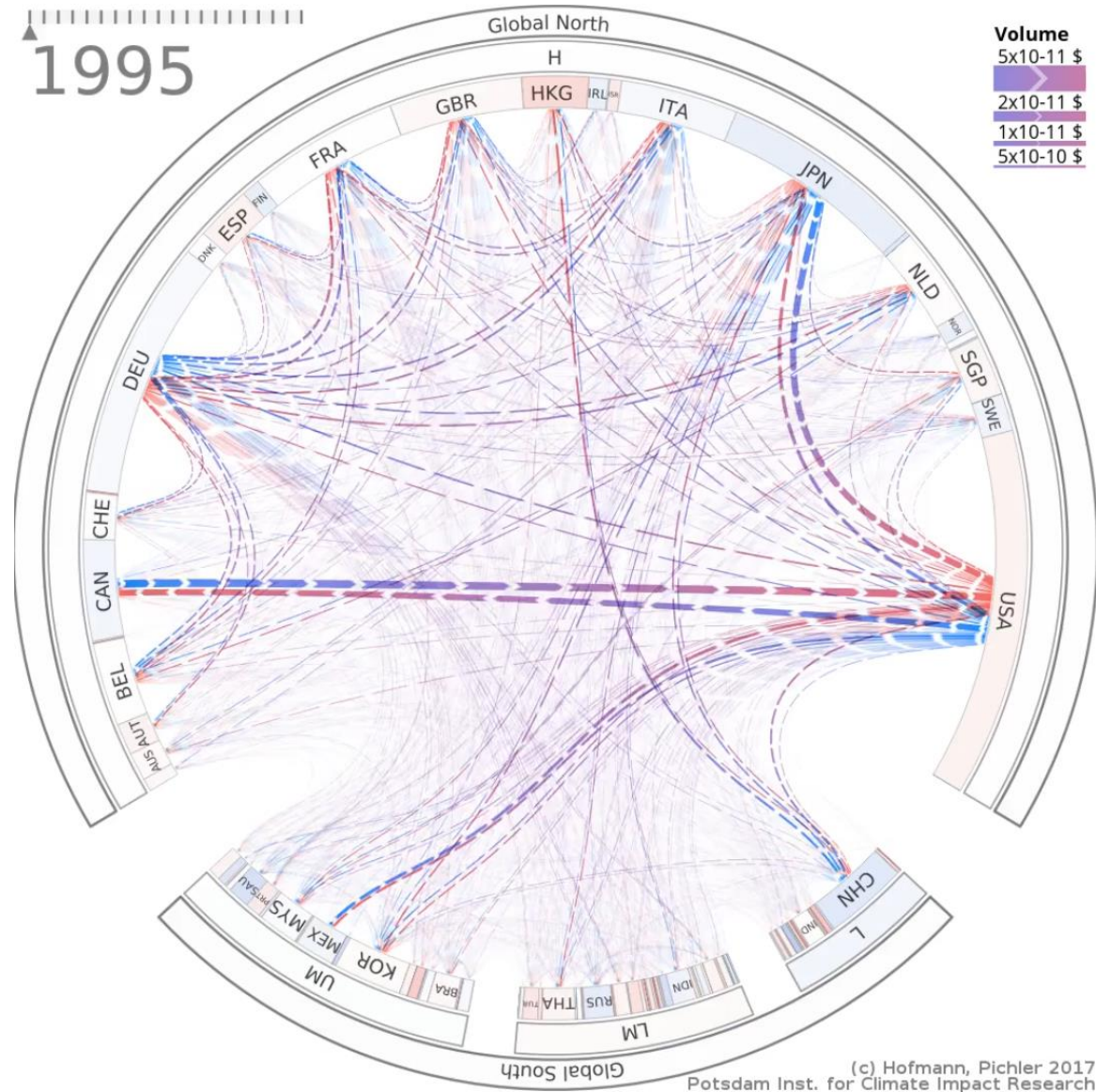
Max Glaka, <https://blueshift.io/international-trade.html>

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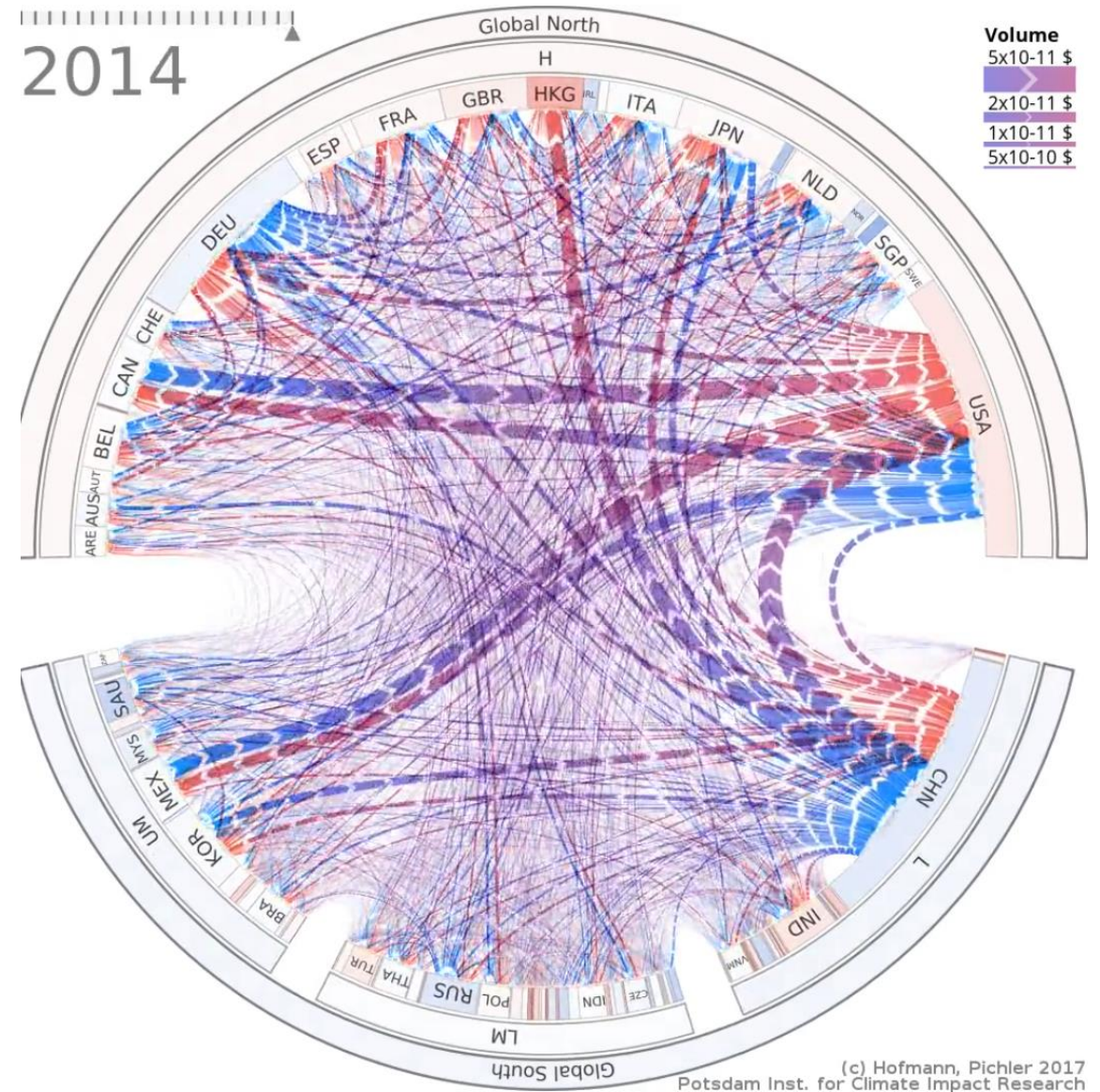
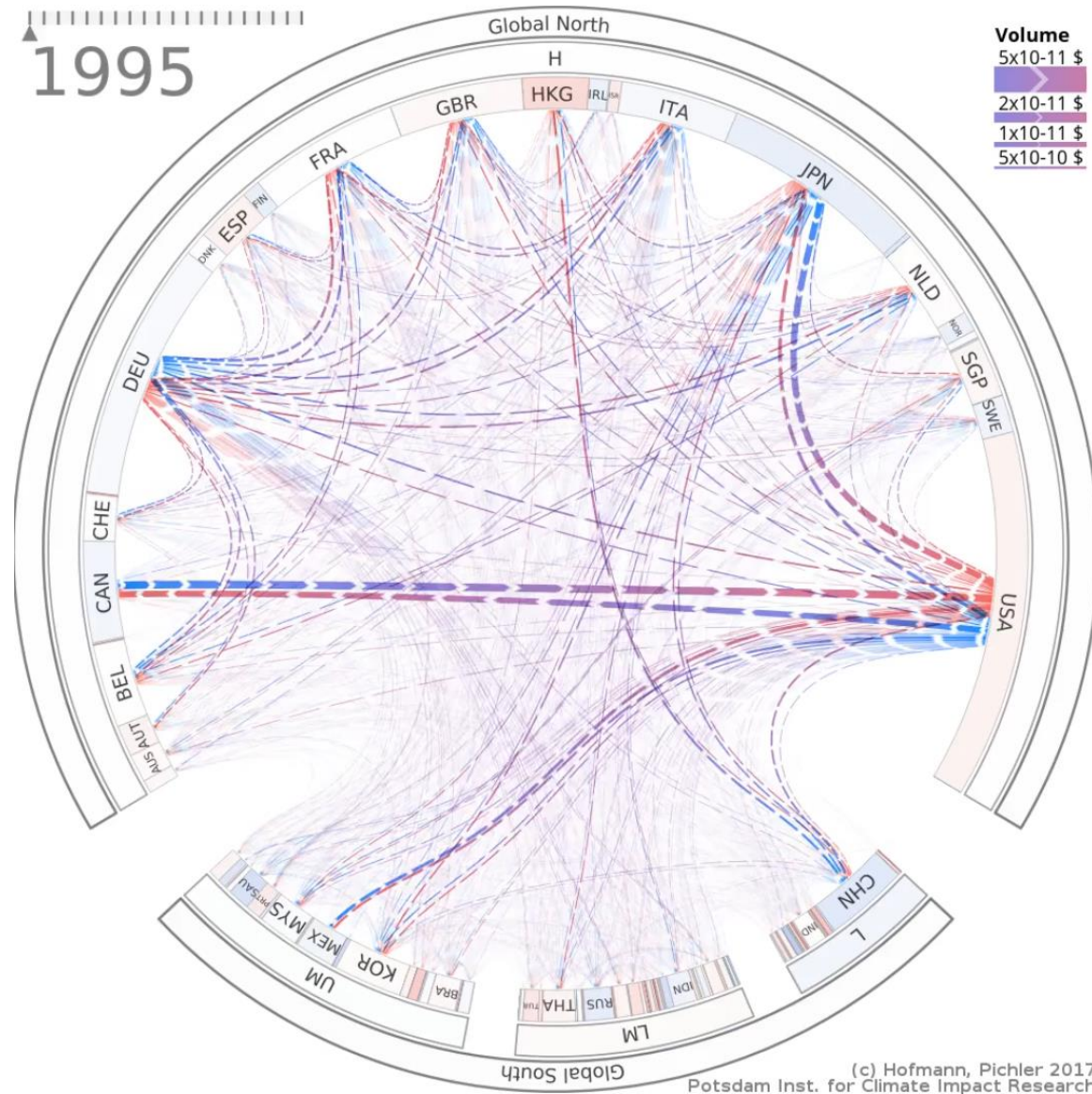


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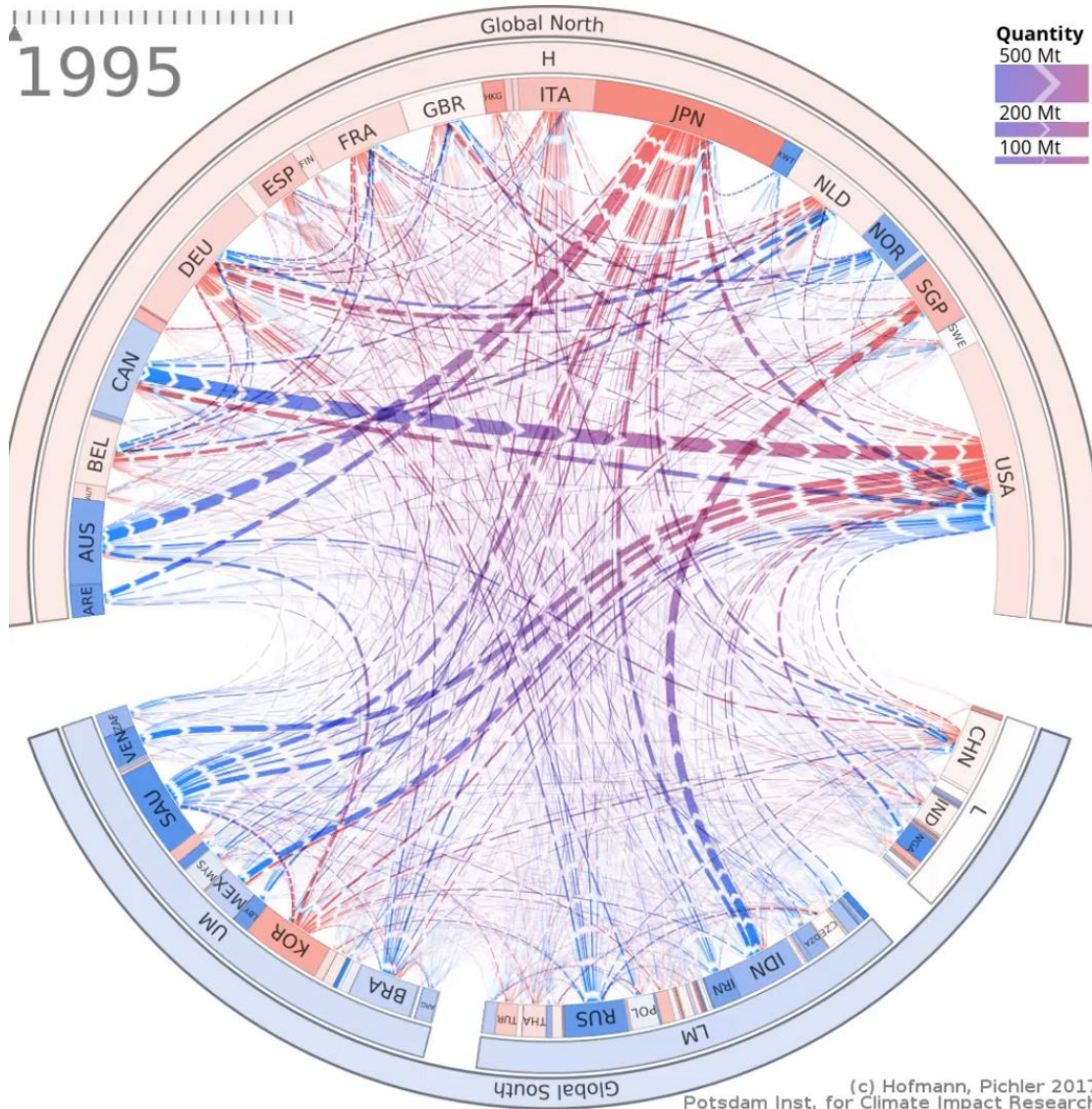
Trade flows over time (in USD)



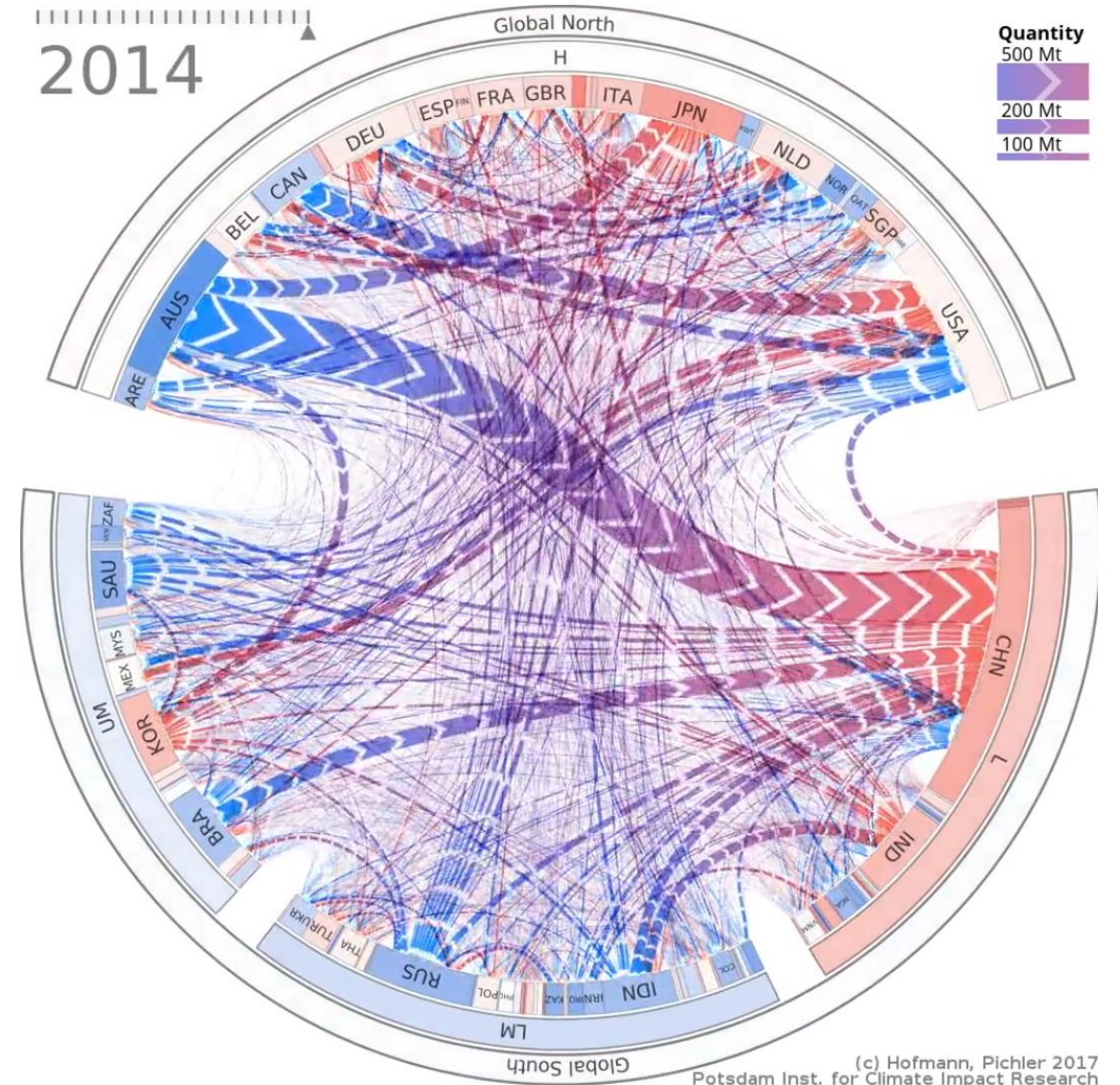
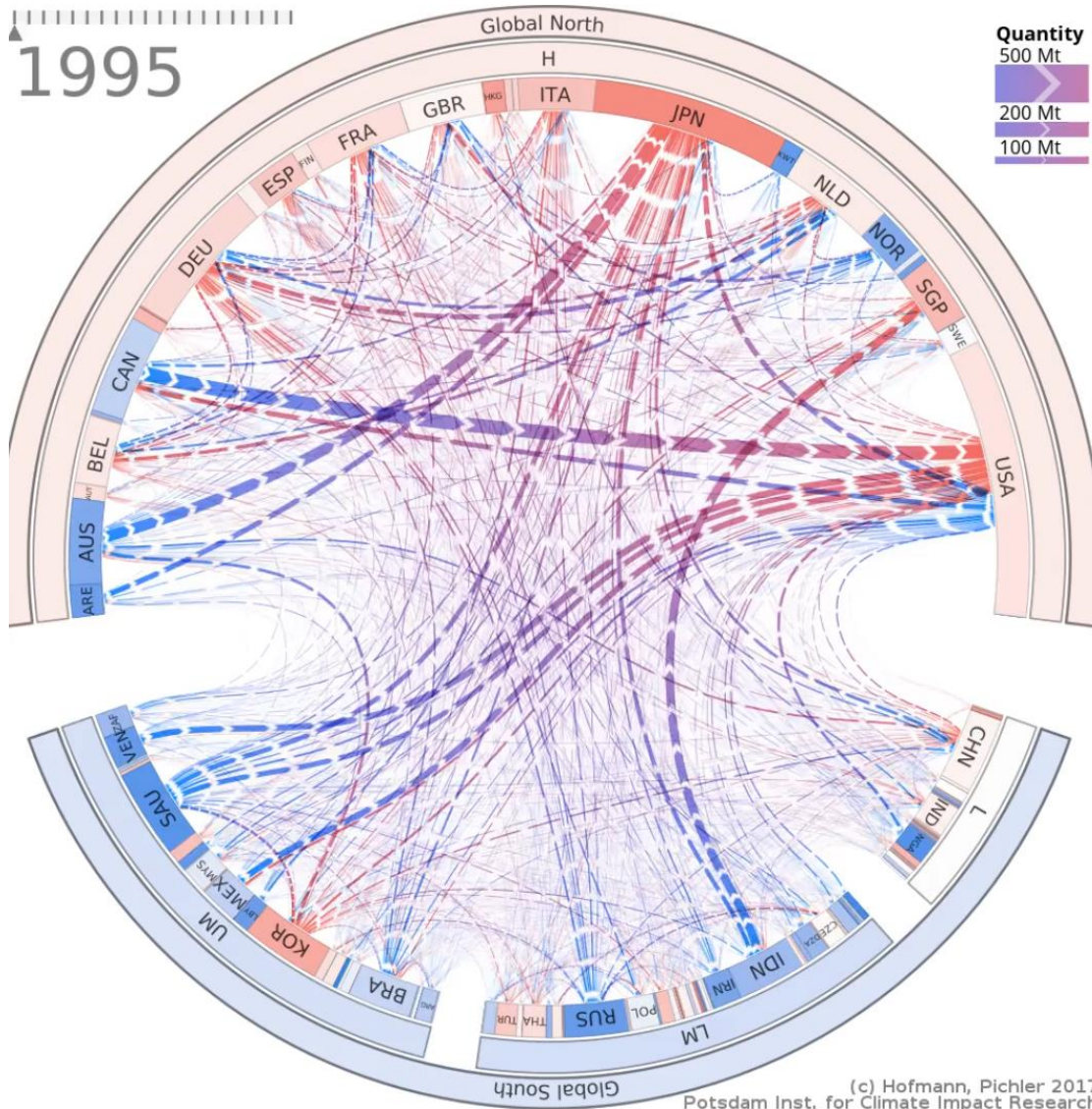
Trade flows over time (in USD)



Trade flows over time (in Mt)



Trade flows over time (in Mt)



International Trade

Zooming out: Legal frameworks and their relation to environmental law

Legal frameworks that enhance trade



Regional economic
integration



World Trade
Organization



Investment
Treaties



Free Trade
Agreements

Legal frameworks that enhance trade

Regional economic
integration

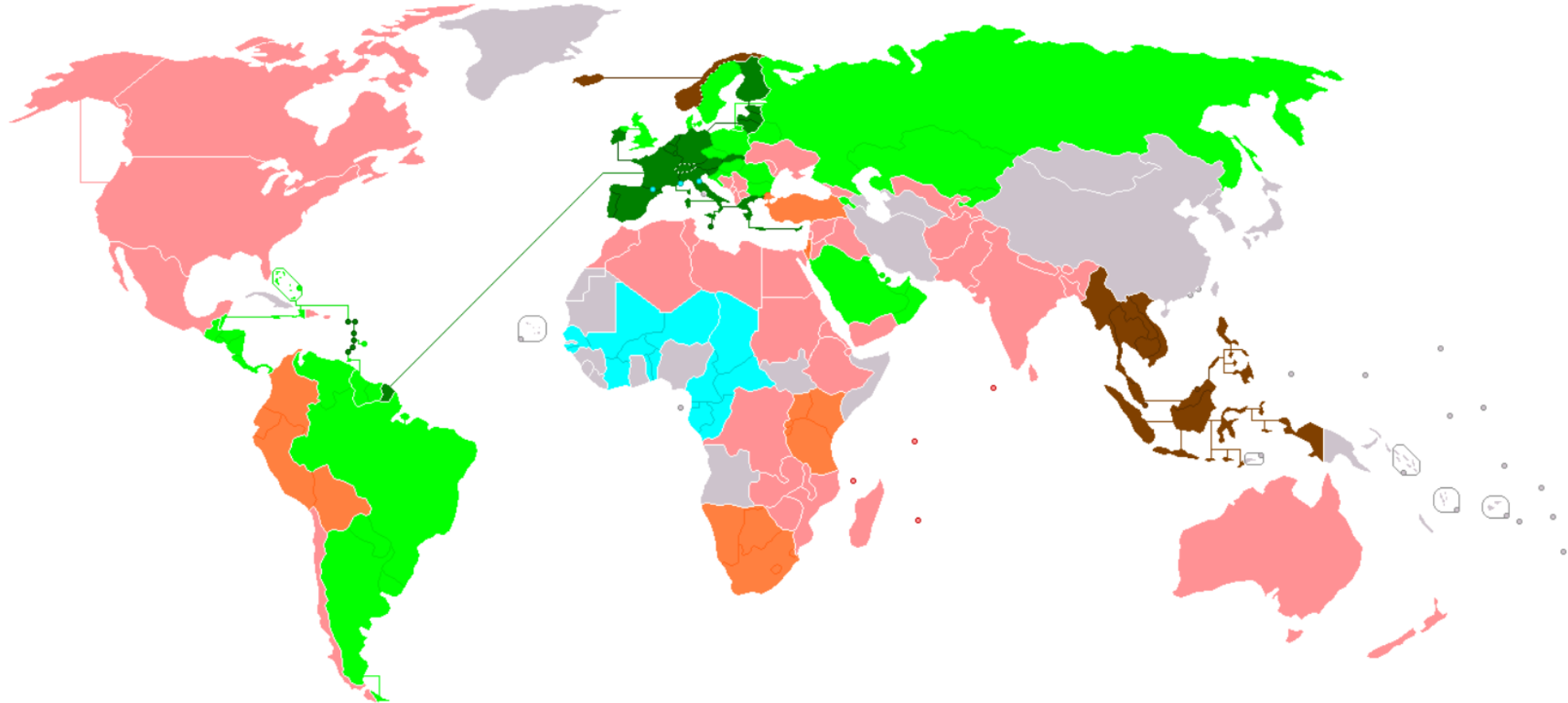
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Environmental Law?

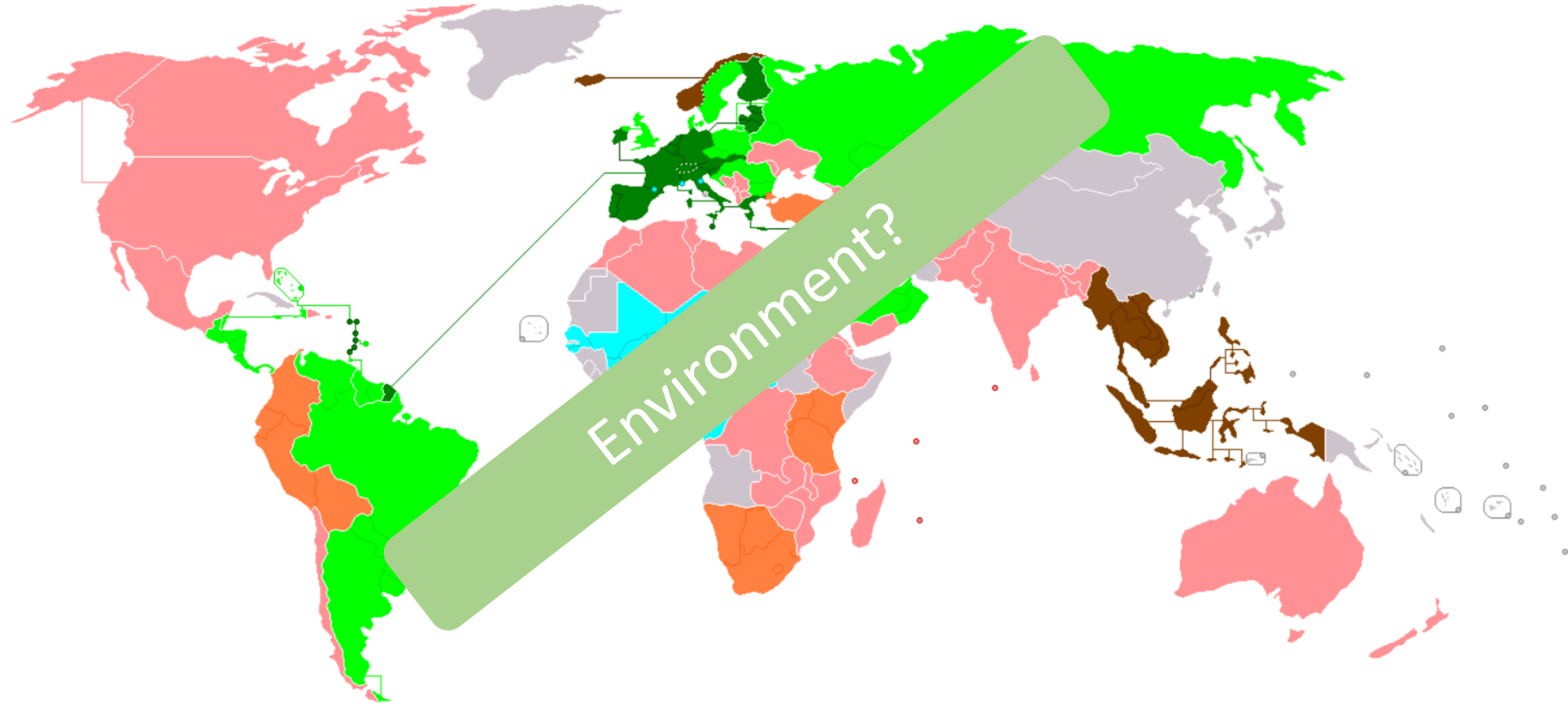
Regional economic integration



Stages of **economic integration** around the World (each country colored according to the most integrated form that it participates with):

- Economic and monetary union (CSME/EC\$, EU/€, Switzerland–Liechtenstein/CHF)
- Economic union (CSME, EU, EAEU, MERCOSUR, GCC, SICA)
- Customs and monetary union (CEMAC/XAF, UEMOA/XOF)
- Common market (EEA–Switzerland, ASEAN^[dubious – discuss])
- Customs union (CAN, EAC, EUCU, SACU)
- Multilateral Free Trade Area (CEFTA, CISFTA, COMESA, CPTPP, DCFTA, EFTA, GAFTA, NAFTA, SAFTA, AANZFTA, PAFTA, SADCFTA) v t e

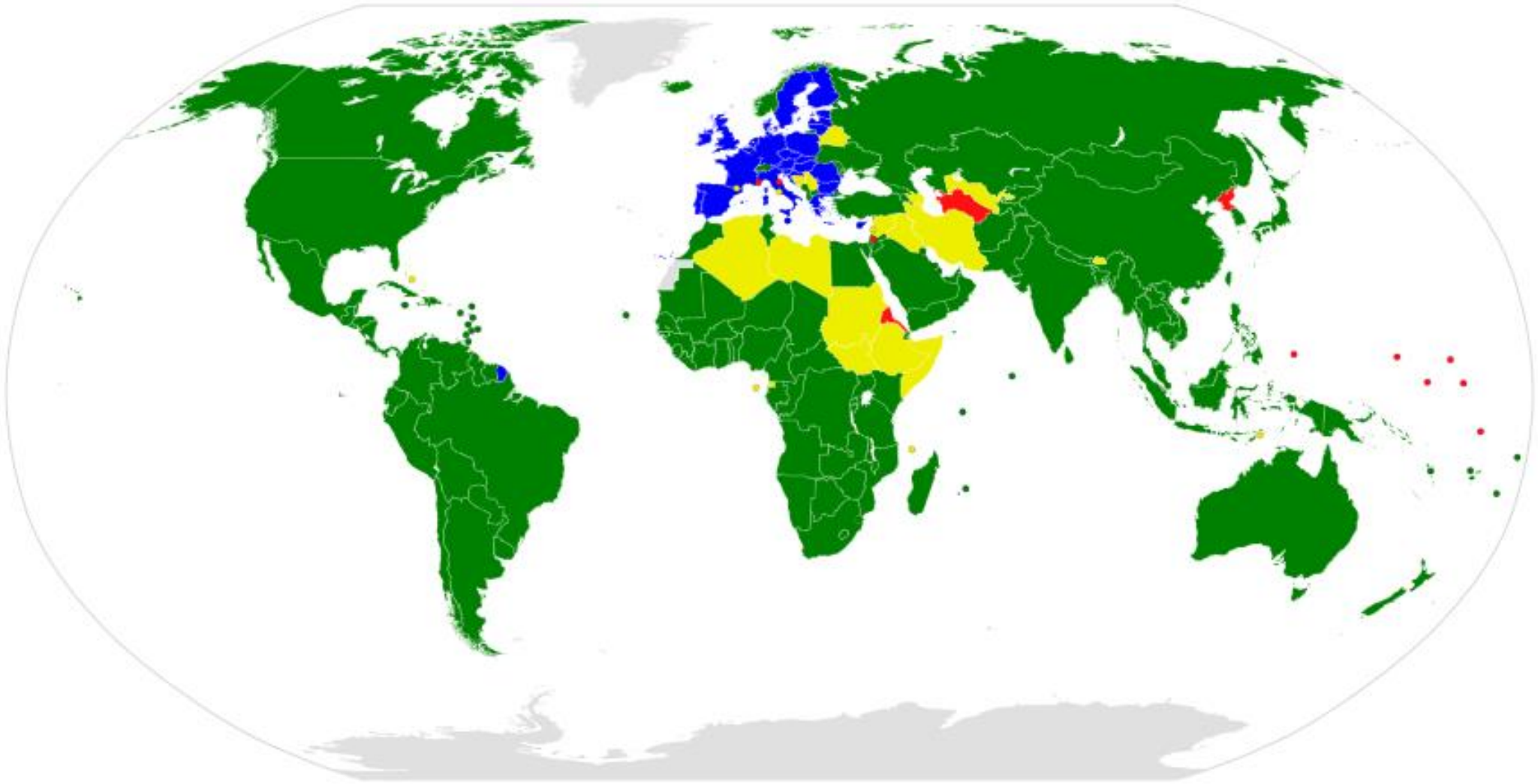
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World Trade Organization



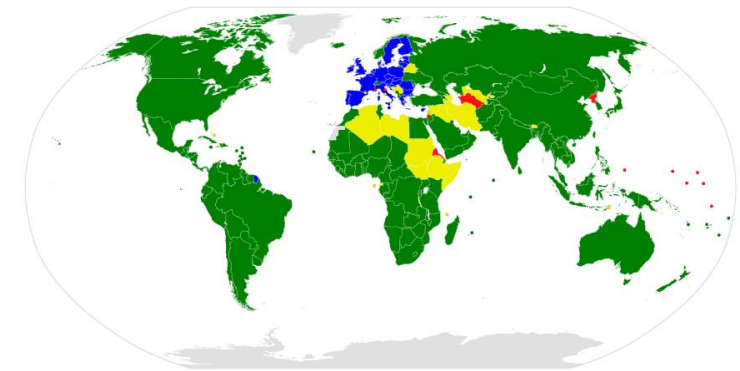
World Trade Organization

Article XX

General Exceptions

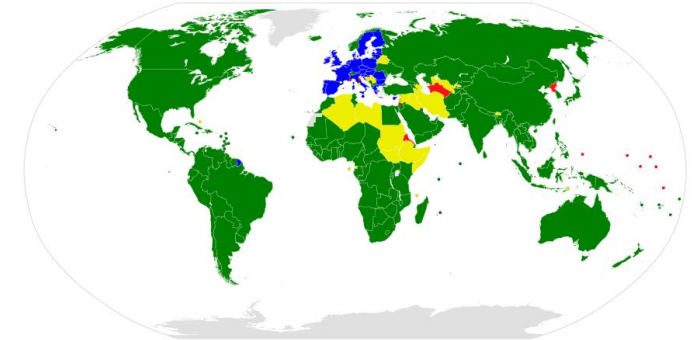
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;



World Trade Organization

CANADA – RENEWABLE ENERGY/ CANADA – FEED-IN TARIFF PROGRAM¹ (DS412, 426)



PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	Japan, European Union	ASCM Art. 1.1 GATT Arts. III:4, III:8(a) TRIMs Art. 2.1	Establishment of Panel	6 October 2011 (Japan) 23 January 2012 (European Union)
			Circulation of Panel Report	19 December 2012
Respondent	Canada		Circulation of AB Report	6 May 2013
			Adoption	24 May 2013

1. MEASURE AND PRODUCT AT ISSUE

- **Measures at issue:** Feed-in Tariff (FIT) Program of the Province of Ontario (the FIT Programme), and all individual FIT and microFIT Contracts implementing the FIT Programme
- **Products at issue:** Certain electricity generation equipment in the renewable energy sector, and the electricity generated by such equipment

Investment Treaties

Frequently used

- >3.000
- GER: over 130

Substantive law

- Expropriation clause
- Fair and equitable treatment clause
- Over time: general exemptions and „right to regulate“

Active dispute settlement

- International Center for the Settlement of Investment Disputes (ICSID)
- Company-trigger
- Case law with „regulatory chilling“-effect, e.g.:
 - Metalclad vs. Mexico
 - Vattenfall vs. Germany

Investment Treaties

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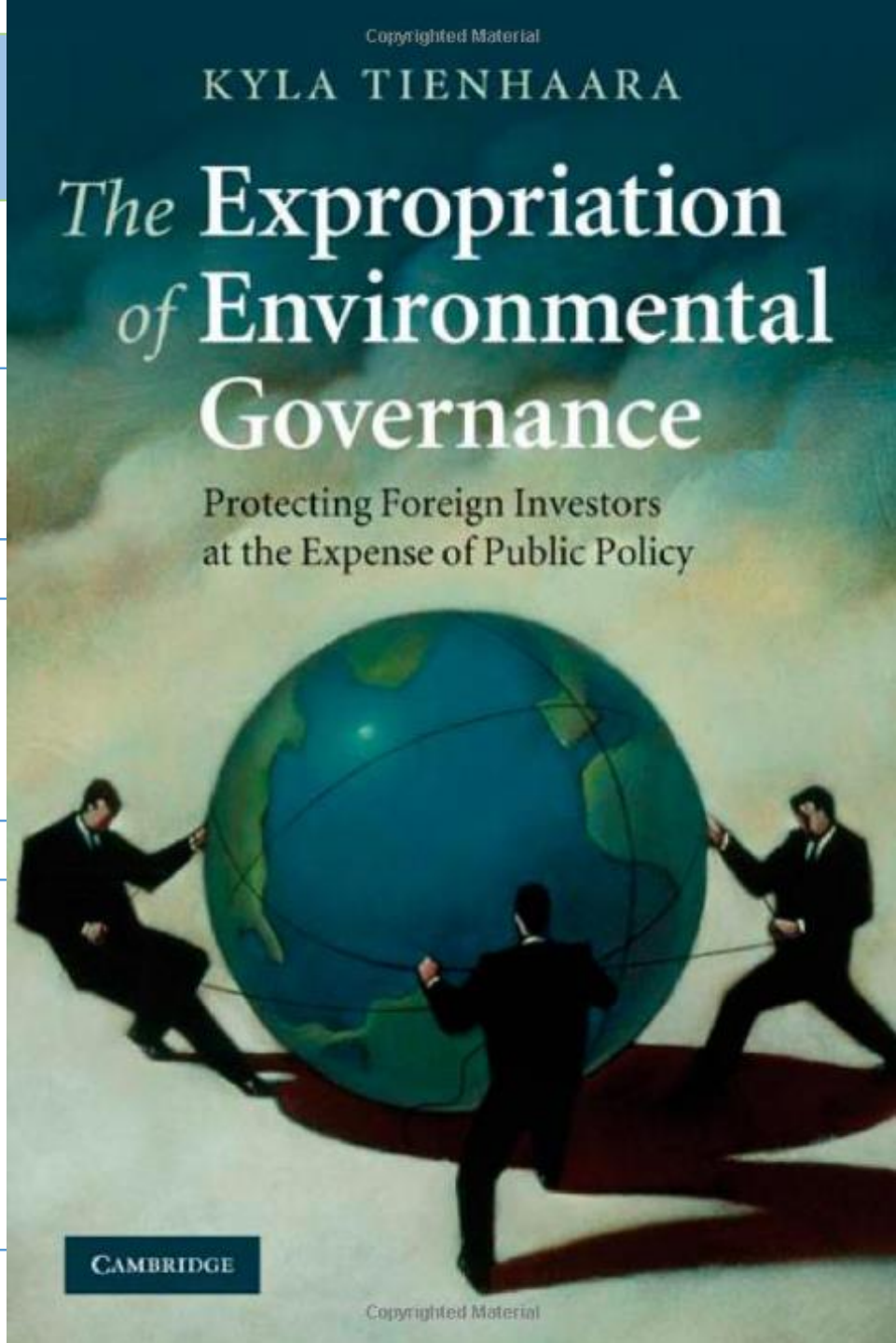
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Free Trade Agreements

- Growing number
- „Deep integration“ (far beyond WTO)
- Some with investment chapters, newer EU FTAs without
- Since about ten years: inclusion of TSD-chapters with evolving content



NAFTA, NAEEEC and USMCA

Substance, Implementation and „Enforcement“

NAFTA and environmental law

Preamble

- UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
- PROMOTE sustainable development;
- STRENGTHEN the development and enforcement of environmental laws and regulations

Article 104 – Relation to Environmental and Conservation Agreements

- List of bi- and multilateral MEAs (CITES, Basel Convention etc.)
- Trade obligations in such MEAs prevail if party chooses the alternative that is least inconsistent with other provisions of NAFTA

Articles 715, 904, 907 – Risk assessment and Appropriate Levels of Protection

- Relevant environmental and other ecological conditions
- Standard related measures relating to environment
- Appropriate levels of protection

Articles 2003 f – Dispute settlement

Chapter 11 on Investment, Investor-state dispute settlement

NAAEC side agreement to NAFTA

North American Agreement on Environmental Cooperation

- To foster the protection and improvement of the environment

Commission for Environmental Cooperation (CEC)

- Council, Secretariat, Joint Public Advisory Committee
- Compliance review procedure
- NGO and citizen trigger but filtered through Secretariat and Council comprises of representatives of the parties (not independent)

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- regional environmental awareness
- DDT phase out in Mexico
- environmental tracking system for key pollutants
- CEC as such

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- Not very effective
- CEC: Slow and ineffective process, NGOs lost trust (88 cases in 23 years)

USMCA

- United States-Mexico-Canada Agreement (USMCA)
 - will replace NAFTA
 - Signed in 2018 but not ratified yet
- Chapter on the Environment
 - Environmental enforcement and non-derogation
 - Lists MEAs but not the Paris Agreement
 - Prohibition of subsidies that contribute to overfishing
- Commission for Environmental Cooperation
 - Survives but not clear yet if/how updated
 - Citizen submission process on enforcement matters remains
- Investor-State-Dispute Settlement but w/o Canada



EU-Mercosur TSD Chapter

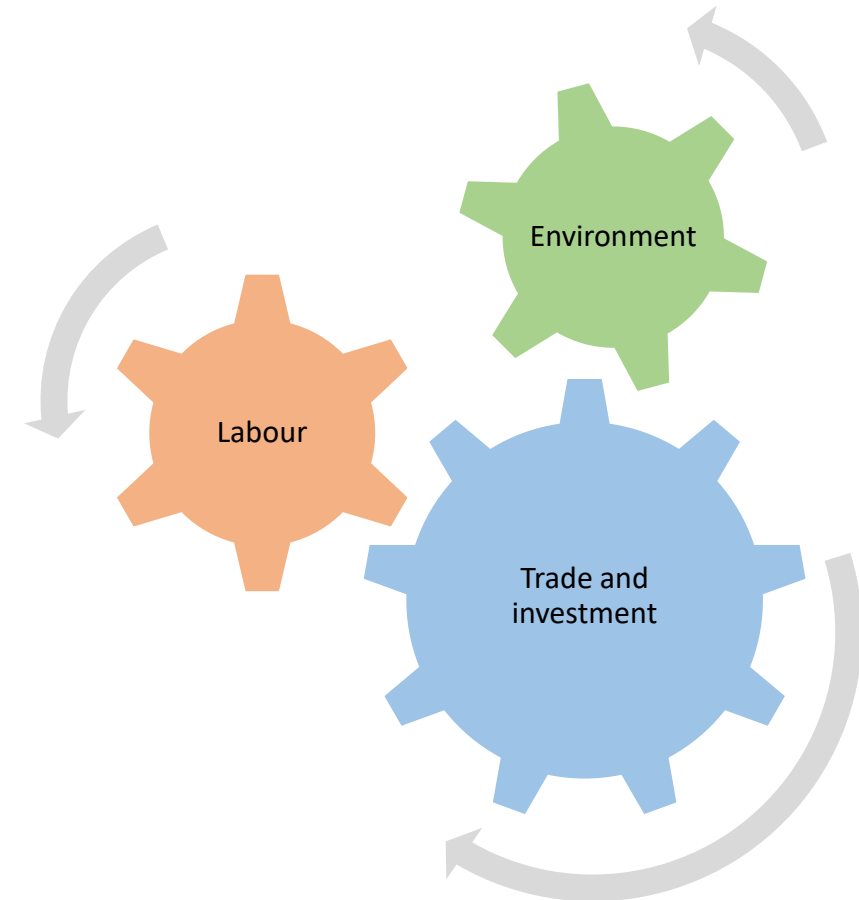
Substance, Implementation and „Enforcement“

Integration

Article 1

Objectives and Scope

1. The objective of this Chapter is to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour¹ and environmental aspects of sustainable development of specific relevance in a trade and investment context.
3. The Parties recognize that the economic, social and environmental dimensions are interdependent and mutually reinforcing dimensions of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations.



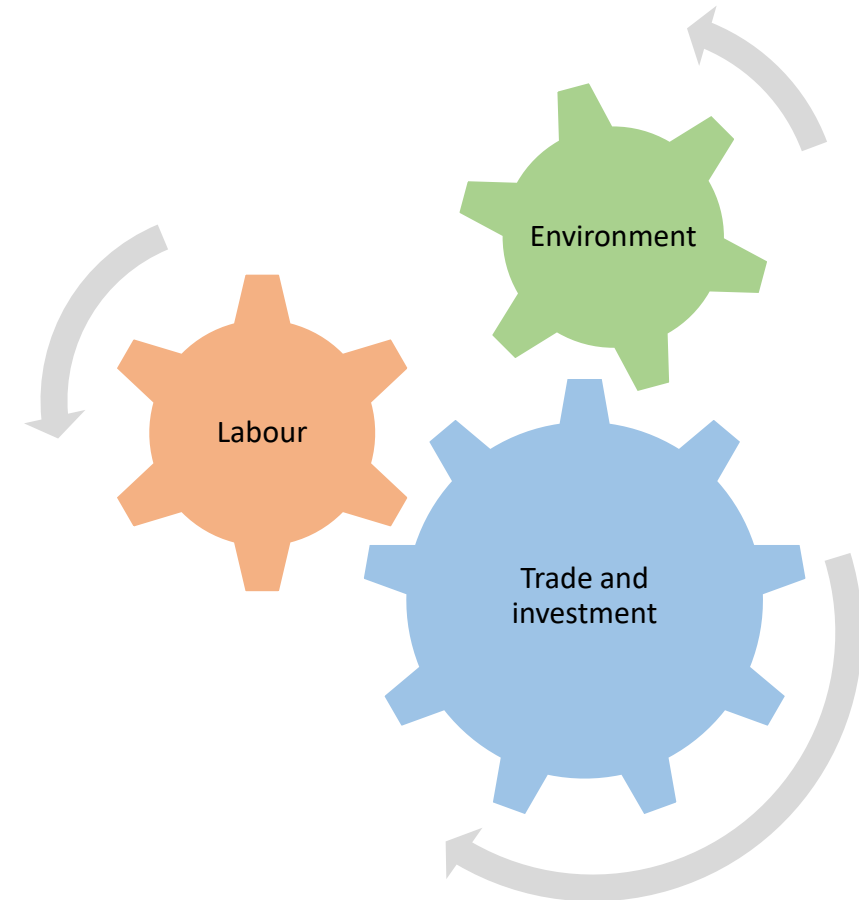
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Climate Change

Article 6

Trade and Climate Change

1. The Parties recognise the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end.
2. Pursuant to paragraph 1, each Party shall:
 - (a) effectively implement the UNFCCC and the Paris Agreement established thereunder;
 - (b) consistent with article 2 of the Paris Agreement, promote the positive contribution of trade to a pathway towards low greenhouse gas emissions and climate-resilient development and to increasing the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production.
3. The Parties shall also cooperate, as appropriate, on trade-related climate change issues bilaterally, regionally and in international fora, particularly in the UNFCCC.

Trade and Sustainable Management of Forests

Article 8

Trade and Sustainable Management of Forests

1. The Parties recognise the importance of sustainable forest management and the role of trade in pursuing this objective and of forest restoration for conservation and sustainable use.
2. Pursuant to paragraph 1, each Party shall:
 - (a) encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest;
 - (b) promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests.
 - (c) implement measures to combat illegal logging and related trade;

Reaction to “chilling effect” of trade regulation

Article 2

Right to regulate and levels of protection

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its law and policies. Such levels, law and policies shall be consistent with each Party's commitment to the international agreements and labour standards referred to in Articles 4 and 5.

Reaction to “chilling effect” of trade regulation

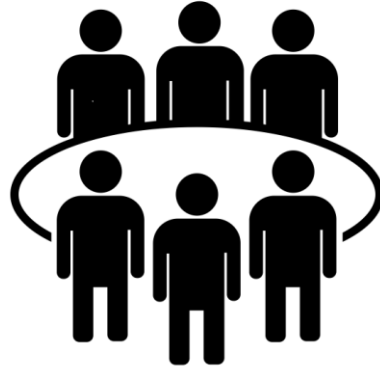
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2. Each Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection.
3. A Party should not weaken the levels of protection afforded in domestic environmental or labour law with the intention of encouraging trade or investment.
4. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws in order to encourage trade or investment.
5. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour laws in order to encourage trade or investment.

Implementation

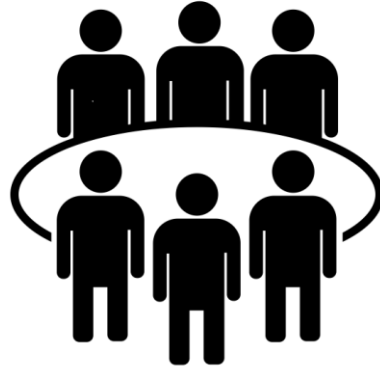
Sub-Committee on Trade and
Sustainable Development



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Implementation

Sub-Committee on Trade and Sustainable Development



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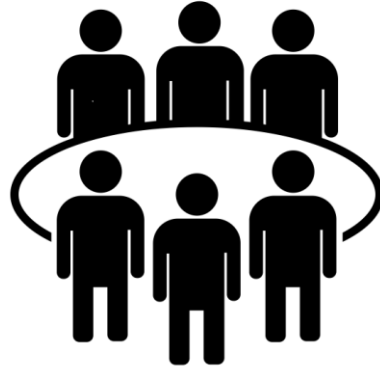
- facilitates and monitors effective implementation of TSD chapter
- supports consultations if asked towards mutually satisfactory resolution, taking into account civil society views and expert advice
- makes list of 15 experts to serve on the Panel of Experts
- submits recommendations to Trade Committee



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Implementation

Sub-Committee on Trade and Sustainable Development



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Contact Points



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- within the Parties administration
- communication and coordination between Parties re implementation
- receive requests for consultation
- are informed if TSD Sub-Committee is called in consultation
- receive request for establishment of panel of experts

Special Dispute Resolution

Article 15

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1. The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the interpretation or application of this Chapter.

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...

5. No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter.

Special Dispute Resolution

Consultation

- request submitted with local contact point
- shall start no later than 30 days after request
- in person, by videoconference or other virtual means
- to reach a mutually satisfactory resolution
- shall take MEAs into account and may seek advice if they agree
- any resolution reached by Parties shall be made publically available



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Civil society

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Civil society

Panel of Experts

- after 120 days of consultation party may request establishment of a panel of experts
- Task: examine the matter at issue with a view to the TSD chapter
- Issue report with recommendations for the resolution of the matter
- Include information and advice from relevant ILO or MEA bodies
- Interim report within 90 days, final report within further 30 days
- Parties have to make the report publicly available
- Parties discuss measures how to implement the recommendations
- Party complaint against shall inform civil society domestic advisory group no later than 90 days on actions and measures to be implemented
- civil society domestic advisory group may submit observations on implementation to the TSD Sub-Committee



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Civil society

Final thoughts

Environmental rule of law and EU-Mercosur considering the NAFTA experience

Are FTAs a solution or the problem?



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Pros

- Trade flows affected rather small
- Trade as such apart from transportation theoretically „neutral“
- FTAs include chapters on TSD
- Integration of trade and environmental / climate change regime
- Implementation and dispute resolution with transparency rules and inclusion of civil society
- Two level cooperative dispute resolution procedure with timeframe



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Cons

- Enhanced trade perpetuates unsustainable production and consumption patterns (deforestation, meat surplus, pesticides, fossil fuel cars, etc.)
- Weak and ineffective implementation and „enforcement“ procedure of TSD chapter
- Thus TSD chapters so far meaningless?
- Enhance via NAFTA/NAAEC experience?

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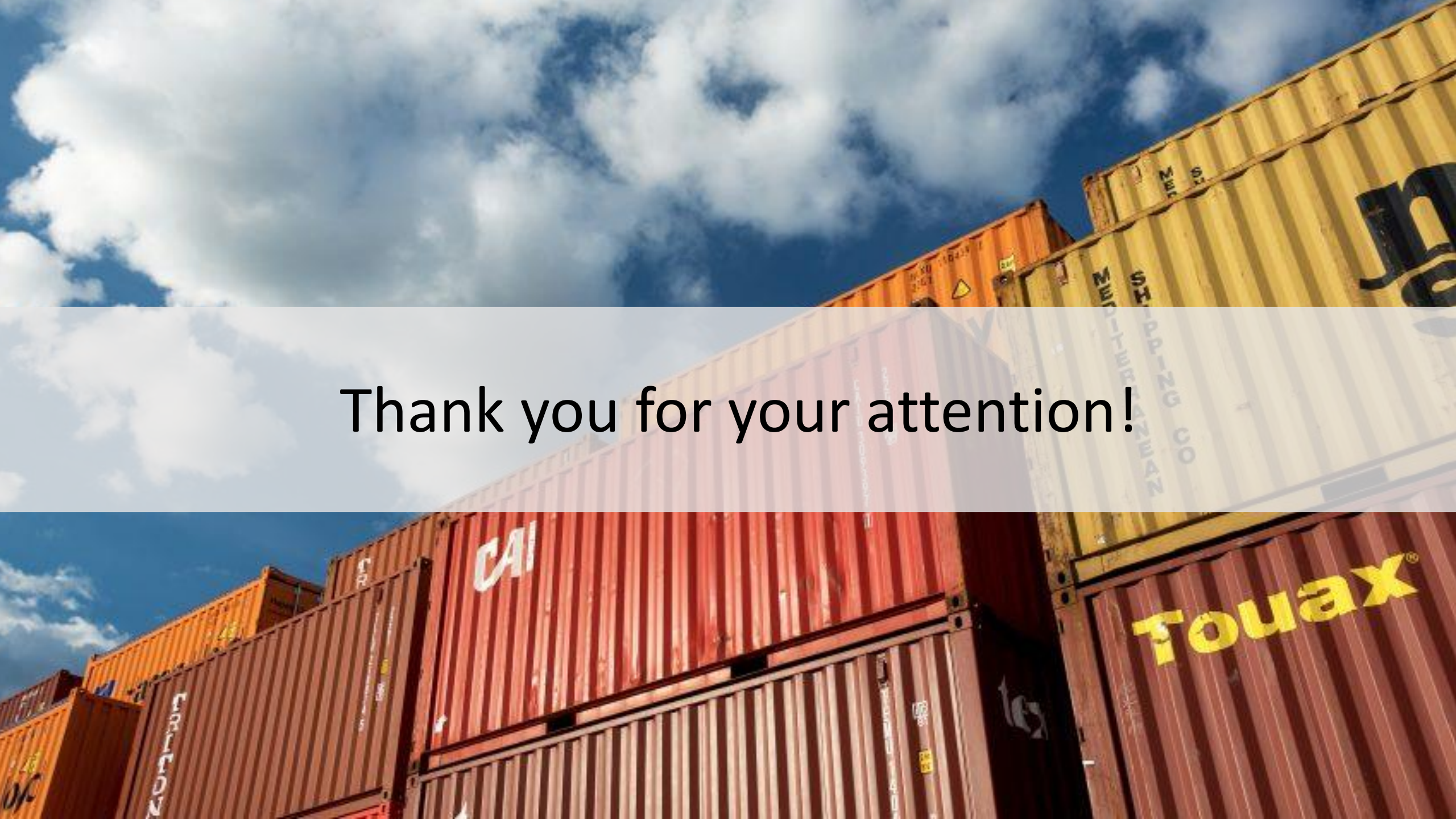
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Improve or boycott?

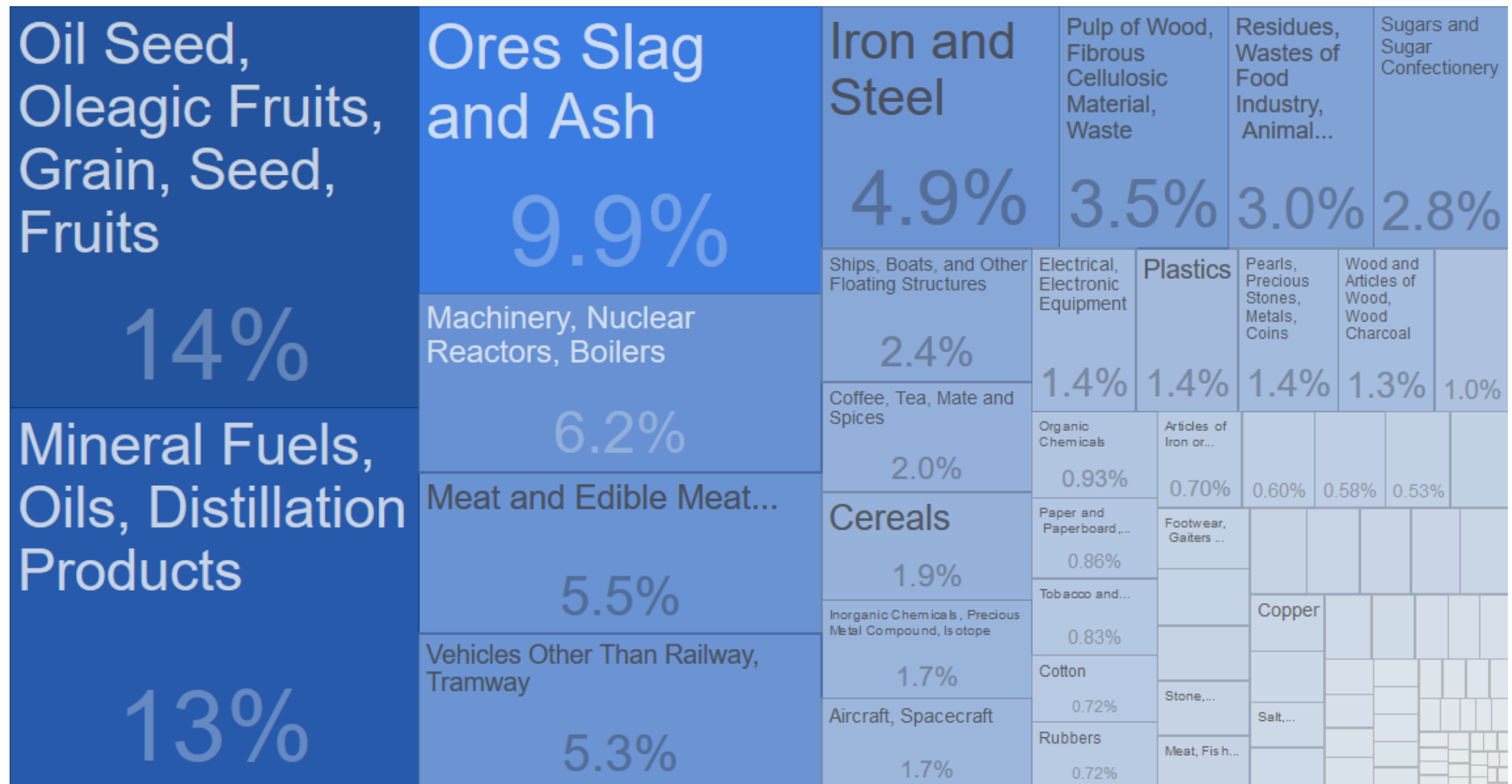


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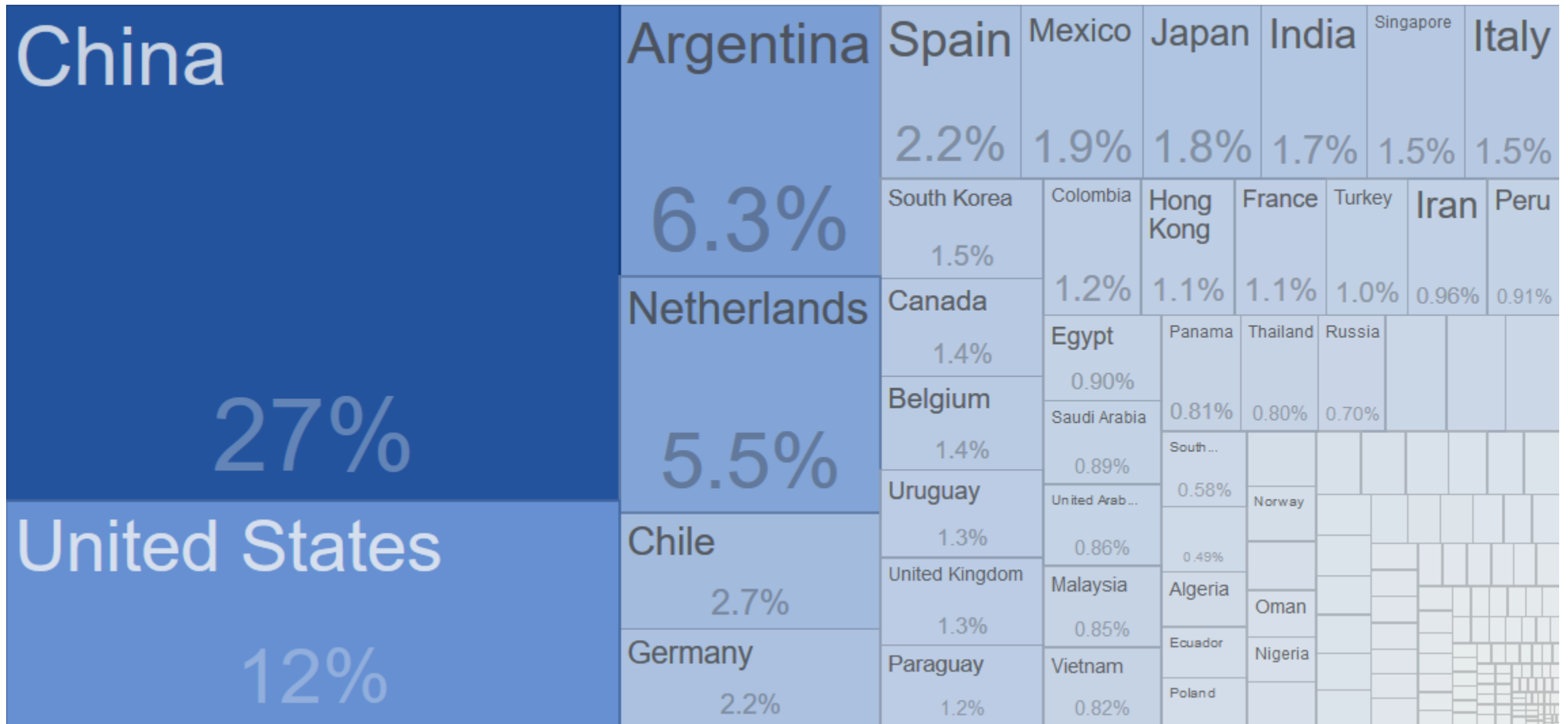
Supplementary

Imports and exports by categories and countries

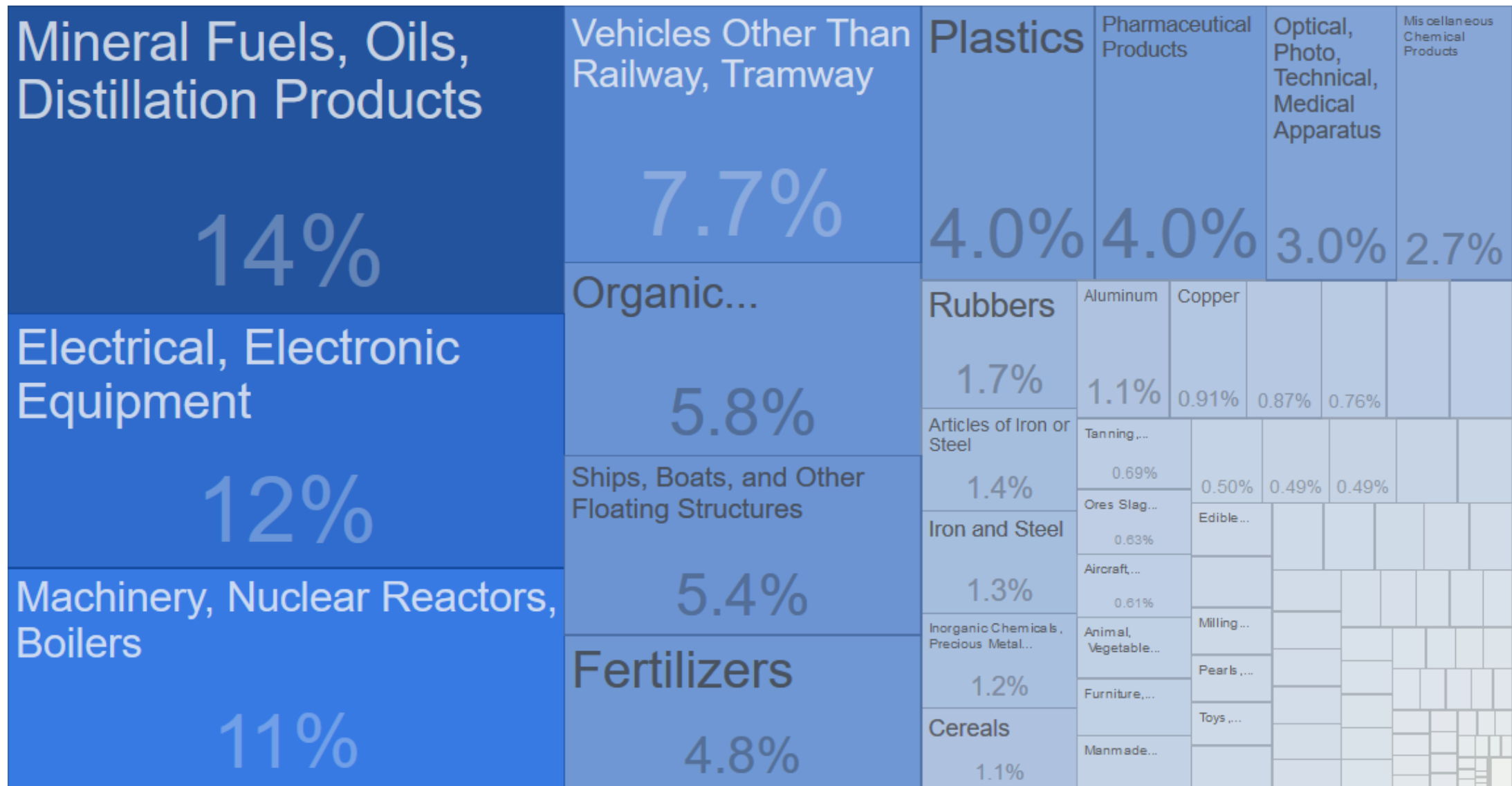
Brazil exports by category



Brazil exports by country



Brazil imports by category



Brazil imports by country



Exports Brazil to China

