

A New Era of Trade-Environment Politics: Learning from US Leadership and its Consequences Abroad

by Sikina Jinnah and Julia Kennedy

Skepticism regarding the feasibility and efficacy of multilateral environmental agreements (MEAs) to solve global environmental problems has catalyzed interest in alternative options to protect the global environment. In particular, there has been a recent resurgence of interest in using trade agreements, and their relatively stronger enforcement mechanisms, as tools for environmental protection. The existence of linkages between trade and environmental policies is not a new concept. The international environmental movement has long targeted trade as a means of addressing environmental problems by tying the economic benefits of liberalized trade (lower tariffs, lack of quotas, and increased market access) to effective environmental governance. For example, environmental organizations have lobbied World Trade Organization (WTO) member states to clearly legalize the use of import tariffs on products whose manufacturing process is deemed harmful to the environment, “production process method” (PPM) tariff.¹ Although WTO member states have yet to clarify the conditions under which such tariffs would be acceptable, recent innovations in the global governance of trade and the environment are increasingly binding the two domains together in new ways, such as by situating the implementation of MEAs as a condition of compliance with a trade agreement.

This recent development in United States trade policy is ushering in a new era of trade-environment politics; one in which trade agreements require substantive environmental policy developments of US trading partners, rather than weak statements relegated to legally feeble environmental side agreements. While this policy innovation holds great promise for enhancing the effectiveness of international environmental treaties, if not implemented with great care it may create significant social problems that outweigh the environmental gains. This article examines this new trend in US trade policy through the lens of the recently enacted US-Peru Trade Promotion Agreement (TPA), highlighting its environmental benefits

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and offering cautionary policy advice for the export of these new policy mechanisms in future FTAs.

The role of environmental provisions in US trade agreements has evolved dramatically over the past twenty-five years. The new approach strengthens the environmental provisions in US FTAs by requiring actionable agendas for improved environmental management with the possibility for non-compliance to result in financial or trade sanctions. This is a triumph for the international environmental movement and creates a provocative precedent for future FTAs. However, the US-Peru TPA also illustrates how applying trade pressure to achieve environmental ends can result in unanticipated negative impacts in practice if regime design is not carefully considered. In this article, we first describe how the environmental provisions in US FTAs have evolved over time before turning to an analysis of how recent progress demonstrates deeper policy shifts in the United States' approach to trade and environment linkages. The final section discusses the positive and negative impacts of the new trade-environment linkages realized in the US-Peru TPA, as well as implications for future policy.

THE EVOLUTION OF ENVIRONMENTAL PROVISIONS IN US FTAs

As the WTO's limitations come into sharp relief with the slow progress of the ongoing Doha Development round of negotiations, FTAs are rapidly proliferating to fill the trade governance gap. The WTO estimates that, as of December 2010, there were approximately 170 FTAs in force in addition to almost 120 other types of regional trade agreements (RTAs). The WTO has been officially informed of more than 30 RTAs² moving towards "entry into force."³

In addition to their core trade liberalizing function, FTAs serve as instruments of regional integration, vehicles for strategic market access and security, and as tactical tools to influence multilateral negotiations.⁴ Recent trends in FTA structure reflect an increase in cross-regional (particularly North-South) and bilateral free trade areas (as opposed to regional customs unions). Many of these recent agreements mirror the WTO's existing framework policies, while also increasingly providing reciprocal preferential treatment.⁵

FTAs are of increasing relevance to global environmental governance because they often articulate more complex rules on WTO plus issues such as environmental protection.⁶ The first era of environmental provisions in FTAs largely replicated the General Agreement on Tariffs and Trade (GATT) environmental exceptions (Article XX), which outline conditions under which domestic environmental policies may contravene GATT rules.⁷ The 1994 North American Free Trade Agreement (NAFTA) complemented these exceptions with side agreements designed to facilitate environmental cooperation and to encourage implementation of domestic environmental policies.⁸ While side agreements opened the door for building relations between environmental policy and trade objectives, they have been criticized as weak and ineffective by many environmental groups, and seen as a lost

opportunity by scholarly experts.⁹ Over time however, a new and much stronger model of environmental cooperation has been channeled through United States FTAs, one which “begins the process of re-envisioning the trade-and-environment relationship.”¹⁰

Environmental side agreements themselves have evolved significantly in their legal structure and function. While the primary environmental function of NAFTA’s side agreement is to provide a mechanism through which citizens can play a role in ensuring that their governments enforce existing environmental laws, these functions are now addressed in the main text of FTA Environmental Chapters. Side agreements in the post-NAFTA era are now identified as joint statements on environmental cooperation and largely function to identify specific areas of cooperation between parties on environmental issues through the development of work programs. These work programs are most often only tangentially related to trade liberalization. Another provision that originated in NAFTA and is important to the current state of trade and environmental governance lists specific MEAs whose implementation is protected under NAFTA even if they otherwise deviate from NAFTA rules (Article 104). This provision disappeared from US FTAs negotiated after NAFTA was enacted and reemerged in a much stronger form in 2009 as provisions related to covered agreements.

The next step in the development of environmental provisions in US FTAs came in the late 1990s. President Bill Clinton issued Executive Order (EO) 13141, “Environmental Review of Trade Agreements,” in November 1999, which ushered in a new era of trade-environment linkages.¹¹ The EO required that the US Trade Representative (USTR) conduct environmental reviews of US trade agreements, asserting that:

*Trade agreements should contribute to the broader goal of sustainable development. Environmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects...*¹²

The US-Jordan FTA was the first test case of the EO, and for the first time a US FTA contained a specific article related to environmental governance in the core agreement text. In this case, the Environment Article (Article 5) mirrored and extended the provisions of previous side agreements by not only discouraging parties from weakening environmental laws but also encouraging them to strengthen these laws. Although the Article requires each party to strengthen and enforce their environmental regulations, the language is also careful to not infringe on parties’ sovereign rights to decide how exactly this should be done. Specifically, the Article recognizes “the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws.”¹³

The next catalytic force in the evolution of environmental policies in US FTAs

occurred with the negotiation and passage of the 2002 Trade Act. This hotly-debated bill granted President George W. Bush fast-track trade negotiating authority, or Trade Promotion Authority (TPA), contingent on the satisfactory adherence to a set of negotiating guidelines established by Congress.¹⁴ The TPA allows the President to introduce FTAs to Congress for a vote without the possibility of introducing amendments or filibusters. In return, the President must follow a set of negotiation guidelines. The set of guidelines established in the Trade Act of 2002 ramped up the environmental governance provisions of EO 13141. Not only did it reinforce the EO's norms and principles noted above, but it also encouraged parties to establish consultative processes in FTAs for strengthening environmental protection, and to continue to consider the relationship between FTAs and MEAs.

Negotiated in tandem with the Trade Act, the Chile and Singapore FTAs reflect these strengthened environmental standards. The entry into force of these two FTAs in 2004 signaled a second wave of environmental provisions that would serve as a template for US FTA development on this issue until 2009. These FTAs expanded the US-Jordan FTA's Environment Article into the first full-scale FTA Environment Chapter. In addition to the existing environmental provisions required by the Trade Act, the Chile and Singapore FTAs' Environment Chapters initiated a variety of new environmental provisions into common practice. These provisions, which are roughly replicated in the Australia (2005), Morocco (2006), CAFTA (2006), Bahrain (2006), and Oman (2009) FTAs included: the establishment of an environmental consultation process to resolve disputes related to the Environmental Chapters; an Environmental Affairs Council (Chile and CAFTA) to oversee implementation of the Chapters; strengthened requirements for public participation; rosters of environmental experts to serve as panelists in FTA dispute resolution (Chile and CAFTA); and provisions related to the relationship between the FTA and MEAs. Table 1 illustrates the progression of environmental provisions in US FTAs from the bare minimum language contained in the Jordan FTA to the increasingly complex and wide-reaching provisions found in the newest FTAs.

Table 1: Environment Provisions in US FTAs

FTA	Entry into Force	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Israel	1985																						
NAFTA	1994		x	x				x	x		x	x			x	x		x			x	x	
Jordan	2001	x	x	x	x										x						x		
Chile	2004	x	x	x	x			x	x	x		x	x		x			x	x		x	x	x
Singapore	2004	x	x	x	x			x	x	x		x			x			x	x		x	x	x
Australia	2005	x	x	x	x	x		x	x	x					x			x	x	x	x	x	
Morocco	2006	x	x	x	x	x		x	x		x				x			x	x		x	x	
CAFTA	2006	x	x	x	x	x	x	x	x	x	x	x	x		x			x	x	x	x	x	
Bahrain	2006	x	x	x	x	x		x	x		x				x			NA	x	x	x		
Oman	2009	x	x	x	x	x		x	x						x			x	x	x	x	x	
Peru	2009	x	x	x	x	x	x	x	x	x					x	x	x	x	x	x	x	x	
Colombia	NA	x	x	x	x	x	x	x	x	x					x	x	x	x		x	x	x	
Panama	NA	x	x	x	x	x	x	x	x	x	x	x	x		x			x		x	x	x	
Korea	NA	x	x	x	x	x	x	x	x	x	x				x			x		x	x	x	

NA -Awaiting Congressional approval as of January 2010

Environmental Provisions Key:**Environment Chapter¹**

1. Regulatory sovereignty
2. Continued strengthening of environmental protection
3. Enforcement of domestic environmental laws
4. Environmental laws will not be relaxed to enhance trade
5. Environmental Performance
6. Environmental Affairs Council
7. Public Participation- Procedural Matters
8. Public Participation- Opportunities for Public Participation
9. Public Participation- Submissions on enforcement matters*
10. Environmental consultations
11. Dispute Settlement - Environmental Roster
12. Relationship to other Environmental Agreements*
13. Covered Agreements*
14. Environmental Cooperation Agreement²*
15. Specialized Environmental Article - Biological Diversity*
16. Annex on Forest Sector Governance*

¹ Does not apply to Israel, Jordan, NAFTA, which do not have Environment Chapters.² Created in the Environment Chapter.

*MEA-related

Other Chapters with Specific Environment Provisions

17. Preamble
18. Dispute Settlement - Enforcement Mechanisms*
19. Dispute Settlement- Environmental Expertise*
20. Environmental Exceptions*
21. Investment
22. Corporate Stewardship

The third and most recent era of environmental provisions in US FTAs goes well beyond what we have previously observed. After the Democrats regained control of Congress in 2006 and allowed the TPA to lapse, the Peru, Colombia, and (to a lesser extent) the South Korea and Panama FTAs were renegotiated. These FTAs move beyond environmental lip service to include both normative and practical provisions that link FTA compliance to improved environmental management and enforcement of MEAs.¹⁵ These linkages include a specialized environment article on biodiversity (Peru and Colombia), covered agreements (all), and, most importantly, the Annex on Forest Governance (Peru) and a strengthened linkage between the FTA's environmental provisions and its dispute settlement process (Peru). We detail these key aspects of recent US trade-environment policy through the lens of the Peru TPA in the following section.

US TRADE POLICY AND INTERNATIONAL ENVIRONMENTAL GOVERNANCE

US policy regarding trade-environment governance has transitioned through three phases: (1) positioning global environmental governance as inherently inferior to trade governance; (2) acknowledging global environmental governance as important through normative claims but resisting strong substantive linkages to trade governance; and (3) tightly coupling global trade and environmental governance through the creation of specific benchmarks for the implementation of improved environmental performance. The US-Peru TPA marks the entrée of trade-environment linkages into this third phase, one in which the US asserts a long dormant leadership role in global environmental politics.

The first phase was short, and is exclusively represented in the 1985 US-Israel FTA. While the Israel FTA does not mention environmental objectives or MEAs explicitly, Article 3 makes the relationship implicitly clear. It states:

*The Parties affirm their respective rights and obligations with respect to each other under existing bilateral and multilateral agreements....In the event of an inconsistency between provisions of this Agreement and such existing agreements, the provisions of this Agreement shall prevail.*¹⁶

In short, the FTA shall prevail in the event of conflict.

The second phase characterizes the majority of US FTAs from NAFTA (1994) to Oman (2009). During this phase a variety of environmental provisions emerged, which established normative relationships between trade and environmental governance, introduced principles of international environmental law into FTAs, and established rules to manage implementation of those norms and principles. The second phase introduced important changes in the implications of US FTAs for MEA implementation. For example, environmental exceptions have implications for MEA implementation because they outline the conditions under which domestic law

and policy can deviate from trade rules, which include fulfilling MEA obligations. Once these policies are implemented domestically, provisions related to public participation on enforcement matters provide a mechanism (albeit a fairly weak one) for the public to police and facilitate enforcement of those laws.

Most notable with respect to MEAs, NAFTA's environmental cooperation (side) agreement privileged the implementation of three specific MEAs in the event of inconsistency with NAFTA. This provision did not show up again until the 2009 Peru TPA, at which time the list was included as an Annex to the Environment Chapter on "Covered Agreements" and was significantly lengthened and strengthened (as discussed below). FTAs between NAFTA (1994) and Oman (2009), with the exception of the US-Jordan FTA (2000), which contained no such language, addressed the relationship between FTAs and MEAs with normative, but action-limited, language recognizing the importance of MEAs. This included their appropriate use of trade measures to achieve specific environmental goals, and referenced the ongoing discussions within the WTO on this topic.

Finally, this second phase saw the emergence of enforcement mechanisms for violation of non-derogation provisions for the first time. Beginning with Chile in 2004, stipulations within FTA chapters on dispute settlement contain provisions related to the reward of monetary penalties and possibly tariff suspensions in relation to disputes surrounding parties' failure to enforce environmental laws. These penalties are explicitly limited in both the amount of monetary remedy available and how the reward must be used. This environmental provision (the failure to enforce environmental laws) was the only one eligible for dispute settlement procedures until the Peru TPA. The third and current phase of trade-environment policy linkages in the US builds upon the MEA and dispute settlement provisions established in earlier FTAs while introducing the new

element of specific, measurable environmental benchmarks that the trading partners must meet or risk fines or trade sanctions. The US is adopting a new trade-environment governance stance in which it is willing to use FTAs to apply direct pressure on trading partners to increase their domestic compliance with MEAs. Specifically, the US did this within the US-Peru TPA through four key measures: (1) an article in the

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Environment Chapter of the Agreement related to biodiversity (Article 18.11); (2) a Forest Sector Governance Annex that requires concrete, measurable action from the government of Peru to combat illegal logging and timber trade; (3) a more expansive list of "covered" MEAs; and (4) changes in the dispute settlement procedures, which for the first time allow remedy for violation of the Environmental Article

(beyond non-derogation) under the FTA's dispute settlement mechanism. Each of these developments is described below.

The Peru and Colombia TPAs are the first US trade agreements to contain provisions relating specifically to biodiversity. The biodiversity article includes concepts such as the sustainable use of natural resources, respecting traditional knowledge, and increasing public participation in decision-making regarding the use of biological diversity.¹⁷ None of this language requires specific action, but it is significant in that it explicitly references controversial and timely issues that combine trade, environment, and intellectual property concerns like the role of traditional knowledge and ownership of biological diversity. During the FTA negotiations, Colombia and Peru proposed specific intellectual property rights (IPR) language related to biodiversity and traditional knowledge that the US rejected.¹⁸ The final versions do contain side agreements relating to IPR issues, and the biodiversity article contains encouraging but unenforceable language recommending "best practices" with regards to biodiversity and IPR arrangements.

In contrast, the European Free Trade Association FTAs with Colombia and Peru (whose respective status is signed in 2008 but not yet in force and under negotiation) has been hailed for including intellectual property provisions regarding biodiversity for the first time in the 50 year history of FTAs. These provisions make important inroads toward aligning the IPR provisions in an FTA with the requirements of the Convention on Biological Diversity (CBD), and its newly minted Nagoya Protocol.^{19,20} The IPR-biodiversity provisions in these recent FTAs include several aspects that were sought by developing countries during the negotiation of the agreement, such as hard requirements on declarations of the origin or source of genetic material, and provisions requiring the fulfillment of Prior Informed Consent procedures and its application to traditional knowledge.²¹ However, the EFTA IPR provisions are not without detractors. Some Andean civil society groups regard the inclusion of biodiversity and traditional knowledge provisions in an FTA as an attempt at privatizing resources that have historically belonged to the Andean commons, and are in contravention to Andean Community law.²² Although the biodiversity article stops short of enacting strong provisions governing the relationship between biodiversity and trade and investment, its inclusion in the text of an FTA is an important change in the sense that it embodies norms the US had previously rejected through its refusal to ratify the 1992 CBD.

The Forest Sector Annex of the Peru TPA, however, is a more fully realized example of the inclusion of specific, enforceable environmental requirements in a trade agreement, and the development of strategic linkages that push domestic environmental policy development abroad through such an agreement. The Annex requires Peru to increase the resources it devotes to enforcement of forestry regulation, increase the weight of penalties brought against those who participate in illegal timber operation, and improve their existing monitoring programs to be more aligned with timber-relevant provisions of the Convention on International Trade in Endangered Species (CITES), which Peru has long delayed in implementing. All of

these changes were to be implemented within eighteen months of the agreement's entry into force. Should Peru fail to meet any of these requirements, the US can seek trade-based sanctions against Peru, including the refusal of timber shipments into the US.²³ This marks a major shift in US environment-relevant trade policy in that it uses market access to leverage Peru's improvement of its domestic environmental policies; in particular those related to forest management practices.

As mentioned earlier, NAFTA Article 104 establishes a list of MEAs whose rules and provisions supersede those of the trade agreement. For instance, in the case of a conflict between obligations under NAFTA and obligations under one of those MEAs; the provisions of the MEA should take precedence. After the implementation of NAFTA that language was significantly downgraded to encouraging the coordination of trade liberalization activities with MEA implementation, without specifying that in the case of conflict the MEA provisions should be the priority. The Peru, Colombia, Panama, and South Korea FTAs (of which only Peru has entered into force) expand upon the NAFTA treatment of MEAs under the rubric of covered agreements. The newer FTAs state that none of the rules of the trade agreement should preclude either or any party from taking action required under the environmental agreement. The Peru TPA adopts and greatly expands on this provision, listing seven MEAs in its covered agreements section with the option to include more

should both parties agree.²⁴ This is a significant change from the FTAs immediately preceding the Peru agreement (Oman, and all others since NAFTA), which states that the parties to the FTA will try to pursue mutually supportive MEAs and trade agreements.²⁵ This shift in language represents a firm, rather than implied, commitment from the US that trading partners can implement MEAs without fear of trade reprisal.

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Finally, on the strengthened dispute settlement provisions, previous agreements explicitly excluded most violations of the Environment Chapters from dispute settlement procedures, establishing a weaker environmental consultation process instead.²⁶ In contrast, the Peru and Colombia FTAs remove this restriction, thereby putting violation of the environment chapters on equal footing with the rest of FTA provisions vis-à-vis dispute settlement and the enforcement mechanisms contained therein. As articulated by the USTR under the new trade policy template:

We have agreed that all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions. Previously, our environmental dispute settlement procedures focused on the use of

lines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws. ²⁷

Access to dispute settlement for the environmental provisions of an FTA, particularly in tandem with the emergence of specific requirements for action on environmental management and performance in US FTAs, transforms the relationship between trade policy and environmental governance.

In sum, the US-Peru FTA contains measurable and enforceable environmental provisions, and makes access to preferential trade terms contingent on the complete and prompt realization of those provisions. These provisions are in themselves enough to mark the beginning of a new phase of environmental priorities in US trade agreements. However, the creation and implementation of these provisions is indicative of a much deeper shift in how the US is using trade agreements as a possible tool in achieving desired international environmental governance outcomes. The role of environmental provisions in US FTAs has clearly evolved over time from a peripheral position of marginal protection under extreme circumstances (as represented by GATT environmental exceptions) to a prominent role in the core text of the agreement and requiring specific actions to improve environmental performance. As these provisions have changed, the ability to affect global environmental governance through trade measures has increased. The next section will describe how the changes in US FTAs reflect larger movements in US policy regarding international environmental management and trade.

The current phase of trade and environment governance that the US is pursuing through FTAs highlights the United States' willingness and ability to use leverage in trade negotiations to achieve progress on the issues of international environmental concern. This is in many ways a triumph for the US and international environmental movements who have long sought to establish exactly this kind of connection between trade agreements and environmental issues. However, this new use of FTAs can, and indeed has, resulted in unexpected consequences on-the-ground in Peru for local communities who were largely marginalized from the trade negotiation process, despite the implications of the TPA for their lives and livelihoods.

SOCIAL IMPACTS OF NEW TRADE-ENVIRONMENT GOVERNANCE

Under certain conditions, this US policy shift toward greater provisions for environmental governance has even prioritized MEA implementation over trade norms (for example, via covered agreements articles). These are positive steps from an environmental perspective. However, if trade is used to promote environmental management at the expense of other social issues, problems of inequity and instability can result. The case of the US-Peru FTA highlights two significant issues of concern: (1) the ability of a major economy to coerce a-contextual environmental policy development in a smaller economy through direct trade pressure; and (2) trading partners' potential use of FTA requirements as a shield for implementing

broader social reforms without adequate consultation processes with impacted stakeholders.

In the case of the US-Peru TPA, this manifested as the deployment of largely US-designed environmental provisions (through the Forest Annex), which created a shield for the Peruvian government to implement sweeping land reforms that resulted in dispossessing of land rights, and even death of civilians and police involved in protests within impacted indigenous communities. Aside from the disastrous social consequences for indigenous communities, reforms that further marginalize land users have been demonstrated to further enhance environmental deterioration in the long term, thus also undercutting original environmental objectives.²⁸

Further, powerful states strong-arming environmental change in developing countries is a reflection of a long-held rift between the developing and developed world regarding environmental issues. Developing countries have long resisted attempts by developed countries to coerce environmental policy action on global commons problems on the grounds that the former caused many of the global environmental problems to begin with, and should thus be responsible for solving them. This argument has been reinforced by claims that coercing developing country participation in issues like global biodiversity conservation acts to divert much needed resources (domestic and international) away from core development issues to further priorities of industrialized states on environmental issues. This division is at the heart of the ongoing global climate change negotiations, among many other environment debates.²⁹

The US-Peru TPA clearly demonstrates how these concerns can become a reality. The US used its economic might to affect the domestic laws and practices of a weaker economy. Although the CITES-relevant goals embedded within the TPA (limiting illegal logging and protecting endangered tree species) hardly seem like disguised attempts to limit Peru's development, the means of achieving those ends draws into question the ethical responsibility of the US to respect Peru's environmental sovereignty.

Furthermore, in using trade measures to achieve environmental ends, the US required the Peruvian government to act rapidly to comply with obligations that were largely developed by an external authority. As a result, the Peruvian government was positioned to use the trade agreement as a shield to avoid adequate public consultations. Specifically, the Forest Sector Annex of the US-Peru FTA granted both parties (although virtually all of the actions specified were to be taken by Peru) eighteen months to implement the required measures. The Peruvian Congress took steps towards the necessary measures in mid-2008 by granting Peru's President special authority to pass legislation related to implementing the FTA, similar to Trade Promotion Authority in the US. The resulting block of legislation that was rapidly enacted became known as the *99 Decrees*. Many of these laws were related to the actions specified in the FTA; however, many of them were only tangentially related and were widely seen as an attempt by the government to grab land and other

resources from indigenous groups in the Peruvian Amazon and use them for economic development activities, including oil exploration and mining. The decrees included provisions that: allow for the privatization of land titled to indigenous communities, eliminate past requirements for consulting indigenous groups before leasing land to private companies for exploration, and expand the government's power over indigenous or environmentally-protected land.³⁰

The passage of the *99 Decrees* sparked months of indigenous protests in Peru, culminating in a confrontation between the military and indigenous protestors in the Bagua province in June 2009, in which as many as fifty civilians and soldiers were killed.^{31,32} The point of contention in the protests was the use of the FTA-related executive authority to adopt land use legislation that ignores or threatens the property rights of indigenous groups and minimizes their ability to freely participate in policy-making regarding the land they inhabit. After almost a year of protests and escalating violence, Peru's Congress repealed several of the most disputed decrees and the government entered into negotiations with the leading indigenous representative group. These negotiations have made little progress. In August of 2010, the USTR announced that Peru would not meet the original 18 month deadline for realizing the provisions of the Forest Annex. Trade and environment policy analysts have recommended that the governments of the US and Peru establish a new timeline for Annex implementation that will allow for the necessary consultation and public participation processes to garner public support.³³ As of December 2010, several leading indigenous community organizations rejected the draft Forest and Wildlife law that was circulated for consultations in November of this year. This law is the primary vehicle developed by the USTR and the Government of Peru for bringing Peru into compliance with the Annex. Despite these setbacks, Peruvian and US civil society, as well as US Congressional representatives, are in agreement that attempting to quickly pass a new forestry law without the proper participatory processes is likely to lead to further violent protest and should be avoided at all cost, even if Annex compliance is delayed.³⁴ The US-Peru FTA was hailed as an environmental landmark in 2007, but one year after entry into force (2009) the FTA is surrounded by political controversy in Peru and has garnered a good deal of negative attention from civil society groups in the US.³⁵

CONCLUSION

Recent struggles in achieving a global accord on binding rules for environmental protection have made the potential for linking environmental issues to much stronger trade law attractive. This article chronicled the evolution of trade-environmental politics through the lens of US bilateral and regional policies in this area. It further argued that the US-Peru TPA may be a harbinger of a new era of trade and environment politics wherein binding and economically enforceable trade measures are used as leverage to, among other things, improve compliance with and effectiveness of MEAs. This new era is the culmination of the gradual progression

of environmental provisions in US FTAs from a lack thereof in the 1985 US-Israel FTA (except for GATT Article XX) to the NAFTA side agreement (1994), and on through ever-increasing levels of strength, enforceability, and areas of relevance (domestic regulation, public participation, consultations, expert rosters). US policy in regards to trade and environmental governance has shifted from a dynamic in which trade was unquestionably the dominant factor to a one in which trade is used as a means to achieve environmental ends. The actionable and enforceable environmental obligations of the US-Peru FTA mark the beginning of a new era for US trade policy.

Despite these remarkable gains from an environmental perspective, there are no clear indications that the US intends to use similar measures to address other global environmental concerns, particularly those where the US is as likely to receive pressure from other countries to adopt new behaviors as it is to exert that pressure. Future research may compare the changes in environmental provisions in US FTAs and US trade policy to developments in the trade policies of other major economies, particularly the emerging markets. As mentioned earlier, the European Free Trade Association recently entered into FTAs with Peru and Colombia with equally innovative provisions relating to biodiversity, traditional knowledge, and intellectual property rights that may also redefine the state of trade and environment politics. The extent to which the precedent established in the US-Peru FTA will become an entrenched policy in the US and abroad is yet to be seen.

It is also unclear whether or not the replication of the trade-environment linkages in the US-Peru FTA is a desirable outcome from either an environmental or a development perspective. The impacts of the US-Peru FTA on CITES compliance in Peru are inconclusive as yet, but if fully implemented have the potential to greatly enhance CITES compliance on-the-ground in Peru. Further, actions taken by the Peruvian government under the auspices of the FTA obligations have the potential to further disenfranchise groups that are already politically marginalized, as well as possibly harm the environment. If the US-Peru FTA encourages compliance with CITES at the expense of opening tracts of Amazonian forest to oil exploration and mining operations, the net effect on the environment may be negative. Further research is required to follow the ongoing negotiations in Peru over the *99 Decrees* and to determine whether the FTA was used as a shield to adopt policies that weaken environmental protection rather than support it. Future efforts to apply similar strategies to enhance MEA compliance should use the lessons learned from the US-Peru FTA to ensure that sufficient time and outreach is allotted for public participation, and to include language in environmental provisions that prohibit backtracking on other environmental protections under the guise of accomplishing the FTA-required actions.³⁶

The US-Peru FTA is an exciting precedent for strengthening the strategic linkages between trade liberalization and environmental protection. It is tempting to move towards a similar method in order to address other seemingly intractable global environmental issues. However, advocates for the use of trade leverage to encourage

better environmental performance must be mindful of the potential for unanticipated outcomes. The means of governing trade and the environment that global society has used for almost two decades are showing signs of strain. As new policy regimes emerge to challenge the struggling status quo, we must rigorously analyze proposed solutions in order to better predict and protect against their diverse and potentially harmful consequences.

Notes

¹ Martin Khor, "How the South Is Getting a Raw Deal at the WTO," in *Global Backlash: Citizen Initiatives for a Just World Economy*, ed. Robin Broad (Lanham: Rowman & Littlefield Publishers, Inc. 2002), 154-57.

² RTA Summary Tables, *World Trade Organization*, Available at:

<http://rtas.wto.org/UI/publicsummarytable.aspx>, (accessed November 12, 2009).

³ When an international treaty, such as an FTA or MEA, "enters into force" its provisions become legally binding on the treaty's members. This point in time is defined within the treaty itself, typically occurring when a specified number or fraction of signatories have domestically ratified the treaty.

⁴ Roberto V. Fiorentino, Luis Verdeja, and Christelle Toquebocuf, *The Changing Landscape Regional Trade Agreements: 2006 Update*. Discussion Paper No. 12, Geneva, Switzerland: WTO; 2; John Whalley, "Recent Regional Agreements: Why So Many, Why So Much Variance in Form, Why Coming So Fast, and Where Are They Headed?" *World Economy* 31, no. 4 (2008): 517-532.

⁵ Fiorentino, Verdeja, Toquebocuf, "The Changing Landscape."

⁶ Other WTO plus issues include intellectual property, labor, and competition policies.

⁷ The GATT was created in 1948, after Bretton Woods and in lieu of an International Trade Organization. The GATT was replaced by the WTO in 1995 as the culmination of the Uruguay Round of GATT negotiations. See: Broad, Robin, ed. *Global Backlash: Citizen Initiatives for a Just World Economy*, New Millenium Books in International Studies. Lanham: Rowman & Littlefield Publishers, Inc., 2002.

⁸ The NAFTA side agreement, the North American Agreement on Environmental Cooperation (NAAEC), is now implemented by the North America Commission for Environmental Cooperation.

⁹ Steve Charnovitz, "The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy and American Treaty Making," *Temple International and Comparative Law Journal* 8 (1994): 257.

¹⁰ Chris Wold, "Evaluating NAFTA and the Commission for Environmental Cooperation: Lesson for Integrating Trade and Environment in Free Trade Agreements," *St. Louis University Public Law Review* 28 (1998): 206-207.

¹¹ Federal Regulation 63, 64, 169, November 18, 1999.

¹² "Executive Order 13141, November 16, 1999," *National Environmental Policy Act*, Available at: <http://ccq.hss.doe.gov/nepa/regs/eos/eo13141.html>.

¹³ Article 5.2, The United States-Jordan Free Trade Area Agreement (2001), Available at: http://www.ustr.gov/webfm_send/1041 (accessed October 12, 2009).

¹⁴ Fast-track authority in trade negotiations was first granted to the executive branch by Congress in the Omnibus Trade Act of 1988. It lapsed during the second Clinton administration because the President and Congress could not agree on negotiation guidelines. It was passed again in 2002 under the title "Trade Promotion Authority." The TPA expired in 2007 and has not been renewed. See: The Rise and Fall of Fast Track Authority. Available at: <http://www.fasttrackhistory.org/index.html> and John Audley, "Lemons into Lemonade? Environment's New Role in U.S. Trade Policy: The Trade Act of 2002." *Environment* 45, no. 2 (2003): 29-34.

¹⁵ ICTSD, "Environmental Provisions Strengthened under White House, Democrat Trade Deal," *Bridges Trade BioRes*, no. 10 (2007), Available at: <http://ictsd.org/downloads/biores/biores7-10.pdf>.

¹⁶ "Israel Free Trade Agreement," *Trade Compliance Center*, Available at:

http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp.

¹⁷ Article 18.11, The United States of America and the Republic of Peru Trade Promotion Agreement (2006), Available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (accessed October 12, 2009).

¹⁸ David Vivas-Hugui, "Landmark Biodiversity/TK Provisions Accompany EFTA-Colombia FTA," *Bridges Trade Bio Res Trade and Environment Review*, International Centre for Trade and Sustainable Development:

no. 2 (2009), Available at: <http://ictsd.org/i/news/bioresreview/56908/> (accessed December 22, 2010).

¹⁹ Christopher Bellmann, Trineesh Biswas, and Marie Chamay, "Recent Trends in World Trade and International Negotiations," *Revue internationale de politique de développement*, no. 1 (2010), Available at: <http://poldev.revues.org/143> (accessed July 27, 2010).

²⁰ The CBD aims to protect biological diversity, and ensure sustainable use of its resources and equitable sharing of benefits arising from those resources. It entered into force in late 1993. The Nagoya Protocol sets out provisions for sharing those benefits. It was agreed in October 2010.

²¹ Vivas-Eugui, "Landmark Biodiversity."

²² Catalina Toro Perez, "Biodiversity in the FTAs with the USA and Europe: the crisis of the Andean integration process," *Revista Semillas*, (2009): 40-41. Translated by bilaterals.org (accessed July 27, 2010).

²³ US-Peru TPA, United States of America and the Republic of Peru Trade Promotion Agreement (2006), Available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>, (accessed October 12, 2009).

²⁴ Ibid.

²⁵ US-Oman FTA, United States of America and the Government of the Sultanate of Oman Free Trade Agreement (2009), Available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>, (accessed October 12, 2009).

²⁶ Except in the case of non-derogation provisions, which are those related to a country's failure to enforce its environmental laws. Recent European regional trade agreements also remedy via the dispute resolution process but exclude sanctions as an available remedy for environmental issues. See: Beatrice Chaytor "Environmental provisions in Economic Partnership Agreements: Implications for developing countries." ICTSD. Trade Negotiations Insights, vol. 9, no. 1 (2010), Available at: http://ictsd.org/downloads/tni/tni_cn_9-1.pdf.

²⁷ USTR "Bipartisan Trade Deal," Trade Facts (2007), Available at:

http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf, (accessed August 2, 2010).

²⁸ Piers Blaikie and Harold Brookfield, *Land Degradation and Society* (London: Methuen & Co. Ltd., 1987).

²⁹ For more information on the relationship between local control of natural resources and environmental degradation see: Piers Blaikie, "Is Small Really Beautiful? Community-based Natural Resource Management in Malawi and Botswana," *World Development* 34, no. 11: (2006) 1942-1957; Anne M. Larson and Jesse C. Ribot, "The poverty of forestry policy: double standards on an uneven playing field" *Sustainable Science* 2, no. 2 (2007) 189-204; and Nancy Peluso, "Coercing conservation? The politics of state resource control" *Global Environmental Change* 3, no. 2 (1993): 199-217.

³⁰ Travis McArthur and Todd Tucker, "A Year After Implementation of Peru Free Trade Agreement, U.S. And Peru Left with Broken Promises and No New Trade Model," Washington: Public Citizen, 2010.

³¹ Simon Romero, "Protesters Gird for Long Fight Over Opening Peru's Amazon," *New York Times*, June 11, 2009, Available at: http://www.nytimes.com/2009/06/12/world/americas/12peru.html?_r=1.

³² The number of civilian casualties is disputed. The official count is nine people, but the protestors claim that more than twenty-five civilians were killed and twenty-four police officers were killed.

³³ Inside Trade, "Environmental Groups Say Peru Will Not Meet Aug. 1 Forestry Deadline," July 30 2010, Available at:

http://wtnewsstand.com/index.php?option=com_customproperties&view=show&tagId=194&Itemid=617&limitstart=200 (accessed December 21, 2010).

³⁴ Committee on Ways and Means, "Chairman Levin, Ways and Means Members Respond to Obama Administration Announcement on Peru," Available at:

<http://waysandmeans.house.gov/press/PRArticle.aspx?NewsID=11314> (accessed December 21 2010).

³⁵ ICTSD, "US-Peru Bilateral to Address Illegal Logging, Boost MFA Implementation," *Bridges Trade Bio Res* no. 13, Available at: <http://ictsd.org/downloads/biores/biores7-13.pdf>; McArthur, Travis, Tucker, "A Year After Implementation."

³⁶ Both the FTA and the Forest Annex have language requiring public participation measures. It is difficult to recommend ways to improve public participation when the usual tools to do so were already in effect yet the result was a failure.