The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments

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THE INTEGRATION OF ENVIRONMENTAL LAW INTO INTERNATIONAL INVESTMENT TREATIES AND TRADE AGREEMENTS: NEGOTIATION PROCESS AND THE LEGALIZATION OF COMMITMENTS

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I. INTRODUCTION

There were seventeen international investment agreements (“IIAs”) signed around the world in 2012, and each one of them contained some provision relating to the protection of the environment.1 In comparison, no investment treaty signed before 1985, and fewer than ten percent of treaties signed between 1985 and 2001, contained any reference to the environment at all.2 Environmental language has become increasingly

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common in bilateral investment treaties (“BITs”), and to an even greater degree in other IIAs, such as free trade agreements (“FTAs”). The legal implications of the integration of environmental law and norms into investment law treaties have yet to be fully explored, though there has been significant literature on trade and environment “linkages.” This paper seeks to give a U.S.-centric overview of the recent trends in the inclusion of environmental provisions in BITs and FTAs. In particular, this paper focuses on the recognition and integration of multilateral environmental agreements (“MEAs”) into the text of investment agreements.

The analysis of this integration takes two approaches. In the first, the international legal implications of the inclusion of MEAs into other international treaties is aided by the concept of “legalization,” first introduced in 2000 by Abbot et al., in which the “hard” or “soft” nature of a legal norm is determined by the degree to which it possesses three characteristics: obligation, precision, and delegation. The second approach of the paper asks how and why these MEAs came to be prioritized in the trade negotiations of the United States. The answer to the question is found by applying theories of international negotiation, primarily Robert Putnam’s theory of “two-level games,” to the history of the development of environmental provisions of trade and investment agreements.

Section II continues the introduction of the topic by presenting the two main economic theories concerning the relationship between liberalized trade and environmental impact: the Environmental Kuznets Curve and the pollution haven hypothesis. It then presents the evolution of environmental provisions in U.S. FTAs, starting with the NAFTA side agreements in 1994 and culminating in the inclusion of MEAs in the U.S.-Peru FTA in 2009.

A. Legalization

Section III introduces the concept of legalization in more detail and uses it to describe the implications of the integration of multilateral environmental agreements into the body of a free trade agreement. This section looks, with a focus on the practices of the United States, at some of the more innovative “linkages” between the environment and trade

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and investment law. Some of these linkages push environmental norms farther in the direction of “hard” legalization than ever before. They increase the obligation upon states to create and enforce environment laws; they often describe, with great precision, just how these laws are to be implemented; and they increase the amount of delegation given to third parties to determine compliance and resolve disputes. Some thought is given to whether the institutions of international economic law are truly the best fora for the enforcement of environmental norms.

Section IV focuses on changes in the Environment Article of the 2012 U.S. Model BIT and their potential implications for international investment arbitration. The final example presented of the merging of environmental and investment law is the recent trend toward the inclusion of Corporate Social Responsibility (“CSR”) provisions in both BITs and FTAs. Throughout its first half, this paper uses an analysis of the changes in the characteristics of obligation, precision, and delegation to describe the legal implications of these “linkages” between environmental and economic law.

B. Negotiation and process

Section V seeks to answer the questions: ‘Why these provisions?’ and ‘Why these treaties?’ First, a close look at the policy and politics behind these agreements is presented, with a focus on FTAs and the “fast track” authority they require for a successful negotiation. Applying theories of international negotiation, most significantly Putnam’s “two-level game,” this section identifies the factors that account for the trade and environment linkage outcomes outlined in the preceding sections. These factors include: trade-offs resulting from linkage of international issues; coalitions formed among domestic groups; transnational coalitions formed between allied groups from different states at the negotiation table; whether the agreement is bilateral or multilateral; and the relative size of the domestic “win-sets.” Reference to Putnam’s framework can be used to explain why the enforcement of the Multilateral Environmental Agreements were included in the U.S.-Peru Trade Agreement and why their enforcement in the upcoming Trans-Pacific Partnership (“TPP”) is one of the largest remaining areas of unresolved conflict in the negotiation.

Section VI looks ahead to mega-treaties such as the TPP, and applies the lessons learned from Section V to explain the battles currently being fought in secret over its environmental agenda. In this section, the author also questions whether, empirically, environmental commitments made under economic treaties have had positive effects.

Section VII concludes.
II. ENVIRONMENTAL LAW IN U.S. TRADE AGREEMENTS

A. Theory Behind Trade and Environment Linkages

Concern over the relationship between trade and the environment, and the theoretical literature that resulted from it, was sparked in the early 1990s by two major developments in international law. The first was the debate over the creation of the North American Free Trade Agreement (“NAFTA”) and its predicted impacts. While the greatest American opposition to NAFTA came from organized labor, environmentalists also raised fears that unregulated polluting industries would spring up and destroy Mexico’s natural resources. The second event was a GATT panel ruling that the U.S. had violated its obligations by banning imports of Mexican tuna, because the fish were caught in a manner that harmed dolphins. The GATT laid the foundation for what in 1993 was going to become the World Trade Organization, and there was concern that international trade law would infringe upon the sovereignty of individual nations to determine their own domestic environmental regulation.

To this day, there are two main theories regarding the effect of liberalized trade on the environment: the Environmental Kuznets Curve (“EKC”) and the pollution haven hypothesis. The Kuznets Curve refers to the upside-down U-shaped relationship between income inequality and levels of income first hypothesized in 1955: as poor countries become rich, inequality among the population grows at first, but then begins to decrease past a certain threshold. In 1993 two economists proposed that this relationship also existed between income and environmental degradation. The EKC describes the fact that richer

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4 See Kevin P. Gallagher, Free Trade and the Environment: Mexico, NAFTA, and Beyond (2004).
5 Id. at 1; Judith Adler Hellman, Mexican Perceptions of Free Trade: Support and Opposition to NAFTA, in The Political Economy of North American Free Trade 193, 194 (Ricardo Grinspun & Maxwell A. Cameron eds., 1993).
7 Esty, supra note 6, at 113–14.
countries (like the United States) can afford to prioritize environmental protection.

The pollution haven hypothesis refers to the fact that it is cheaper to operate industry (and pollute) in a country that lacks environmental regulation. As a result there is an economic incentive for industry to flee from rich countries into poor countries once barriers to trade are removed.\(^\text{10}\)

This paper holds that these two theories are embedded in much of the debate around the role of environmental provisions in trade agreements to this day. Many environmental groups either oppose free trade entirely or insist that agreements must only be signed with countries whose domestic regulations have been elevated to sufficient standards. Pure free-tradists argue that, “trade-generated wealth is a more powerful vehicle for change than forcing standards on a nation.”\(^\text{11}\)

This latter view echoes the sovereignty concerns that arose out of the GATT Tuna-Dolphin decision. Opponents of environmental provisions in trade agreements—including potential FTA partners of the United States—“fear that developing countries could be required to implement rules that are inappropriate for their level of development.”\(^\text{12}\)

B. Development of Environmental Provisions in Free Trade Agreements

What follows is a brief overview of the changes in the environmental provisions of U.S. Trade Agreements, staring with NAFTA in 1993 and ending with a detailed description of the legal obligations entailed by the U.S.-Peru FTA, concluded in 2006. For the purposes of comparison, a brief sampling of environmental provisions in non-U.S. FTAs follows. The policy and politics guiding these developments are presented later in Section V.

1. Early U.S. Practice

NAFTA was the first United States trade agreement to explicitly include environment provisions. Partially in response to the controversy that had developed over the GATT Tuna/Dolphin dispute, NAFTA reproduced the GATT Article XX environmental exceptions within its text. In addition, the treaty included a list of three multilateral


\(^{12}\) Id. at 190.
environmental agreements that were meant to be given precedence over NAFTA in the event that a conflict of norms arose in a dispute, “provided that the MEA is implemented in the least NAFTA-inconsistent manner.” 13 These treaties were: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”); the Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”); and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.14

This recognition of even a limited set of MEAs was a significant departure from the previous FTA that the U.S. had signed with Israel in 1985, in which the obligations under the FTA were given clear precedence over all other agreements:

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.15

The strength and relevance of NAFTA’s inclusion of environmental exceptions and reference to privileged MEAs has been widely debated. Environmental groups take issue in particular with the way in which dispute settlement tribunals established under the Investment Chapter of NAFTA have interpreted and enforced international environmental norms. In the case of Metalclad Corp. v. Mexico, the International Centre for Settlement of Investment Disputes (“ICSID”) tribunal engaged in no discussion of the environmental provisions provided under NAFTA before ruling against Mexico’s “environmental” measures.16 In the S.D. Myers v. Canada award, the arbitrators found that while Canada was attempting to fulfill its obligations under The Basel Convention on the Movement of Transboundary Wastes (one of

16 Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).
the three protected MEAs), it should have done so in a manner that was more consistent with NAFTA investment rules.\textsuperscript{17}

Most of NAFTA’s environmental provisions are contained within a side agreement, the North American Agreement on Environmental Cooperation (“NAAEC”). The NAAEC contains a dispute resolution chapter, though the dispute resolution process differs significantly from the process contained in the main agreement.\textsuperscript{18} Under the NAAEC, one state party may allege that another state party has failed to enforce a domestic environmental law and convene an arbitral panel to investigate the violation. The panel may then impose a “monetary enforcement assessment,” capped at twenty million dollars, or .007% of the value of the trade between the two parties in the most recent year, and create an “action plan” for the violating state.\textsuperscript{19} One unique aspect of this fine is that it is paid directly to the Environmental Commission established under the NAAEC and then spent as the Commission sees fit to improve “environmental law enforcement” in the violating state.\textsuperscript{20} These dispute settlement provisions have never been invoked by any of the three state parties (See Section VI).\textsuperscript{21}

2. Second Phase of U.S. FTAs

The next generation of U.S. FTAs merged the environmental side agreements into the main text and created full and separate Environmental Chapters within the treaties.\textsuperscript{22} Free trade agreements with Australia (2005), Morocco (2004), Bahrain (2004), and Oman (2009) all establish dispute resolution for environmental matters in the form of state-state consultation, contain strengthened provisions for public participation, and note the importance of multilateral

\textsuperscript{19} Kevin W. Patton, Note, \textit{Dispute Resolution Under the North American Commission on Environmental Cooperation}, 5 Duke J. Comp. & Int’l L. 87, 106 (1994) (citing NAAEC Annex 34(1)).
\textsuperscript{20} Id. (citing NAAEC Annex 34(3)).
\textsuperscript{21} GALLAGHER, supra note 4, at 77.
environmental agreements. In addition to these developments, the Chile FTA (2004) and Dominican Republic-Central America FTA ("DR-CAFTA") (2006) create Environmental Affairs Councils to oversee the cooperation on environmental programs and also establish rosters of environmental experts to serve as panelists in disputes arising under the Environment Chapter. Dispute settlement procedures that could result in tariff suspensions are provided if a state was found to have failed to enforce domestic environmental laws.

3. Recent U.S. Free Trade Agreements

On May 10, 2007 a Bipartisan Trade Deal was reached between U.S. Congressional and Senate leadership in consultation with the U.S. Trade Representative. The May 10 Agreement, which is discussed in more detail later in the paper, was necessitated by the fact that there were four pending free trade agreements that would not be approved by the newly Democratically-controlled Congress without certain pro-labor and environment amendments. The Agreement effectively ratified the old Congressional trade policy agenda that had been outlined in the Trade Promotion Authority special legislation in 2002. Under the trade deal, all U.S. FTAs must “incorporate a specific list of [seven] multilateral environmental agreements,” all of which the United States is a signatory to. The non-derogation obligation for domestic environmental laws was amended from a "strive to" to a “shall” obligation. The most

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24 The Dominican Republic-Central America-United States Free Trade Agreement, art.17.5, Aug. 5, 2004, Hein’s No. KAV 7157; U.S.-Chile Free Trade Agreement, supra note 22, art. 19.03.
28 USTR TRADE FACTS, supra note 25, at 3 (“The list, with abbreviated titles, is as follows: Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, Inter-American Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).”).
29 Id. at 2.
significant modification from past policy was the stipulation that all FTA environmental obligations “will be enforced on the same basis as the commercial provisions of our agreements—same remedies, procedures, and sanctions.”

The May 10 Agreement explicitly encouraged the use of trade sanctions instead of fines in the enforcement of environmental obligations—including those obligations arising under the listed MEAs.

There are four FTAs that have been completed since the creation of the Bipartisan Trade Deal: Peru, Colombia, South Korea, and Panama. Each contains reference to this list of seven “covered agreements.”

Under the text of the treaties, actions taken in pursuit of compliance with the MEAs are not merely protected in the event that they conflict with an investment or trade law norm. Rather, the FTAs mandate the implementation of the listed MEAs. The Environmental Chapter overall is linked quite tightly with the main Dispute Settlement Chapter of the FTAs. While the U.S.-Chile FTA in 2004 was the first agreement to permit dispute settlement mechanisms for the derogation from a state’s own domestic environmental laws, these new FTAs expand the application of dispute settlement to the entire Environment Chapter.

The four most recent FTAs provide for broad use of trade sanctions in disciplining states that derogate from their domestic environmental law or from the list of MEAs.

4. U.S.-Peru FTA

The 2009 U.S.-Peru Trade Promotion Agreement (“TPA”) has gone the farthest in implementing what Jinnah and Morgera call “innovations in trade-environment linkages.” Its Environment Chapter contains a

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30 Id. at 2–3.
31 Id. at 2–3.
33 U.S.-Chile Free Trade Agreement, supra note 22.
unique article on biodiversity, it provides for expansive dispute settlement for a number of environmental conflicts, and it contains an Annex on Forest Governance that authorizes unprecedented U.S. supervision of the enforcement of Peruvian law.

Article 18.11 on Biological Diversity contains mostly weak, non-binding obligations. The Parties “recognize the importance of . . . conservation” and “remain committed to promoting and encouraging the conservation . . . of biological diversity.”36 The Parties also “recognize the importance of public participation and consultations, as provided by domestic law” and “will enhance their cooperative efforts . . . through the [Environmental Affairs Council]” created under the Environment Chapter.37 What is remarkable about this article is that the provisions are quite similar to the commitments created under the Convention on Biological Diversity (“CBD”), a treaty to which the United States declined to become a party.38 Jinnah reports that in a private interview a U.S. government representative admitted that there were political concerns that “the U.S. not effectively ratify the CBD through an FTA.”39

The U.S.-Peru TPA’s Annex on Forest Sector Governance governs specifically the implementation and enforcement of a particular MEA: the Convention on International Trade in Endangered Species of Wild Flora and Fauna (“CITES”).40 The eight-page Annex, contained within the Environmental Chapter of the TPA, is explicitly subject to Dispute Settlement under Chapter 21 of the TPA.41 The document outlines in detail the steps that Peru alone must take in order to combat illegal logging practices. These steps include passing new regulations on illegal logging, establishing export quotas on mahogany, and increasing criminal penalties for violations of forestry laws.42 In addition, the Annex requires that Peru allow officials from the United States to participate in the auditing and verification of compliance of Peruvian wood exporters.43

These enforcement measures are stronger than any provided for under CITES itself. Indeed, Peru has been a signatory to CITES since

36 U.S.-Peru Trade Promotion Agreement, supra note 32, art. 18.11.
37 Id.
38 Convention on Biological Diversity, June 5, 1992, Hein’s No. KAV 3747.
40 U.S.-Peru Trade Promotion Agreement, supra note 32, annex. 18.3.4.
41 Id. art. 21.2.
42 Id. annex. 18.3.4.
43 Id.
1975 and had sat comfortably in noncompliance for three decades prior to the signing of the TPA. The United States Trade Representative (“USTR”) has made it clear that the TPA “commits Parties to adopt, maintain and implement laws and all other measures to fulfill obligations under covered multilateral environmental agreements, including CITES. Along with other obligations in the Environment Chapter . . . this obligation is subject to the PTPA’s dispute settlement procedures and enforcement mechanisms.”

The entry into force of the U.S.-Peru TPA was only the beginning of the United States’ involvement in Peruvian environmental law. In order to come into compliance with the provisions of the TPA (not just the Environment Chapter), Peru was required pass nearly one hundred new laws. In order to meet the eighteen-month timeline stipulated under the TPA, the Peruvian Congress granted President Alan García the equivalent of “fast-track” authority to rapidly enact a block of legislation known as the “99 decrees.” “[T]wo teams of U.S. government lawyers” as well as representatives from the USTR flew to Peru to help with the drafting of these laws, including forestry laws and changes to indigenous land ownership. This assistance in the drafting of legislation was also accompanied by millions of dollars in “trade capacity building assistance” from the U.S. government. These changes were met with a mixed response from Peruvian citizens. Environmental activists claimed that some of the legal changes would hurt, rather than help forest preservation, making it easy for indigenous groups to sell off their lands for the establishment of biofuel plantations.

47 Jinnah & Kennedy, supra note 22, at 105.
48 Wasson, supra note 46.
49 Id.
Indeed, by June 2009 demonstrations by indigenous peoples and farmers against the unwanted “jungle laws” had become violent. One confrontation resulted in the deaths of thirty-four police and civilians. In response, the Peruvian legislature voted to repeal the two decrees intended to change the regulation of forest wildlife. President García issued a statement admitting that; “his government had made a mistake by failing to consult with indigenous communities before passing [ten] decrees that modified Peru’s legal and regulatory framework on access to and use of natural resources in the country’s Amazon jungle region.”

As of August 2010, Peru had failed to meet a deadline for implementing further legal reforms established under the Forest Annex. In response, USTR representatives traveled to Lima to discuss compliance, meeting not only with counterparts in the executive branch, but also with members of Peru’s congress to discuss a new forestry law, which a government source described to Inside U.S. Trade as an “unusual” step. Environmental groups in the U.S. issued statements that they would expect the U.S. to initiate dispute settlement proceedings under the TPA unless Peru made “significant progress” on its forestry obligations. A U.S. House of Representatives Ways and Means Committee member supported the use of formal dispute settlement.

5. Environmental Provisions in Non-U.S. FTAs

Jinnah and Morgera provide a comprehensive analysis of the European Union approach to the incorporation of MEAs in FTAs, which offers a useful tool for comparison. The E.U. Peru and Colombia (“EU-COPE”) FTA also contains a list of seven “covered” multilateral agreements, to which “[t]he Parties reaffirm their
commitment to effectively implement in their laws and practices . . . “60
The E.U. list includes more of the “major” MEAs currently in force, covering chemicals, hazardous waste, biodiversity, and climate change, but leaving out tuna, whaling, and Antarctic marine life. EU-COPE creates a dispute settlement procedure to cover its Trade and Sustainable Development Chapter, which is distinct from the dispute settlement provided for under the rest of the Agreement.61 Under this procedure, the Parties “shall make every attempt to arrive at a mutually satisfactory resolution of the matter through dialogue and [state-state] consultations.”62 Disputes unable to be resolved through consultation may be brought in front of a panel of environmental experts, who may issue a non-binding report with recommendations.63

III. THE INTERNATIONAL LEGAL IMPLICATIONS OF TRADE AND ENVIRONMENT LINKAGES

The preceding section described the growth of the scope of the environmental provisions in free trade agreements. The following section investigates the international legal implications of such growth. These provisions have been increasing the number of state obligations as well as strengthening their ability to be enforced—they have been following a course of “legalization.”

A. The Concept of Legalization

In 2000, Abbot et al. surveyed recent developments in international affairs and noted that institutions and norms had been following a trend of “legalization”—where subject areas previously dominated by diplomacy and politics were increasing governed by new international institutions with legal bite.64 The growing use and effectiveness of the WTO, the European Court of Human Rights, and the International

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61 EU-COPE FTA, supra note 60, art. 285.
62 Id. art. 283.
63 Id. art. 284.
64 Kenneth W. Abbott et al., The Concept of Legalization, 54 INT’L ORG. 401 (2000).
Criminal Tribunal for the Former Yugoslavia were all part of this trend. Abbot et al. define “legalization” as “a particular set of characteristics that institutions may (or may not) possess.” These characteristics are aligned along three axes: obligation, precision, and delegation. Obligation refers to the legally binding nature of the commitment in question. This means that there are procedures in place—under international law or domestic law—to analyze whether or not a state or other actors are in compliance. Precision refers to the detail with which the obligated conduct is described. Delegation refers to the degree to which third parties have been granted the authority to determine and enforce the compliance as well as the power to resolve disputes. The amount by which each of the properties are, in combination, maximized or minimized results in “hard” or “soft” legalization of a norm. These labels are not meant to be binary; institutions can be located on an “identifiable continuum from hard law to varied forms of soft law.”

The rise of bilateral investment treaties (“BITs”) and free trade agreements (“FTAs”) can be described in these terms. In terms of obligation, these treaties create binding legal rules rather than expressly non-legal standards. The rules contained within them are precise rather than vague principles. The method for resolving disputes under these treaties is, with some exception, binding dispute resolution delegated to an independent tribunal. The international legal community has, for the most part, embraced this legalization trend. The number of BITs on record has multiplied over the years such that there were 2,857 in force

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66 Id. (citing Made in the USA Found. v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999)).
67 Abbott et al., supra note 64, at 401.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id. at 401–402.
74 Id. at 418.
at the end of 2012. Nearly all states have at least one BIT. In addition, there are 339 “other” international investment agreements, such as free trade agreements with investment chapters. There were fifty-eight new investor-state claims initiated under such investment treaties in 2012.

This paper looks not at the increasing use of BITs and FTAs, but rather at the expansion in their scope. Specifically of interest is the incorporation of environmental norms in explicitly legal terms into the treaty texts. International economic law fora, namely the WTO and the investment arbitration system, have had great success in the hardening of all three legalization properties: obligation, precision, and delegation. States, with a few infamous exceptions, have typically complied with an ICSID award against them. This success has prompted many proposals for the expansion of subject areas that the dispute adjudication bodies are granted the competence to resolve. Many advocates bemoan the lack of teeth in other international treaties and support borrowing the adjudication and enforcement mechanisms of international economic law. Noah Feldman, for example, has proposed that state violators of human rights should be brought in front of the WTO, judged, and punished through trade sanctions. Some proposals argue that the expansion of the competence of arbitrators and the types of claims heard in investment arbitral tribunals is necessary to counteract investor-bias. To other observers of the investment law system, it seems inevitable that questions of environmental law will arise out of investment disputes, so the hierarchy of international norms ought to be made more explicit.

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75 U.N. CONFERENCE ON TRADE & DEV., supra note 1.
76 Id. at xix.
77 Id. at 110.
80 Noah Feldman, How Guantanamo Affects China: Our Human Rights Hypocrisies, SALON (May 19, 2013), http://www.salon.com/2013/05/19/how_guantanamo_affects_china_our_human_rights_hypocrisies/ (arguing that “...economic interdependence can be leveraged to help manage real political conflict.”).
81 Kate Supnik, Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law, 59 DUKE L.J. 343, 343–44, 346–47 (“Amending the ICSID Convention to include a provision allowing tribunals to consider environmental, public health, and labor concerns would serve as a positive step toward establishing an investment regime that maximizes the interests of investors and host states alike”).
82 Lise Johnson, International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It, 39 ENVTL. L. REP. 11147
B. The Legalization of Multilateral Environmental Treaties via FTAs

Through the mechanism of a Free Trade Agreement, the United States has been able to effectively enforce, in the territory of another state, a multilateral environmental treaty that on its own had much weaker compliance provisions. Through this process, which Jinnah labels “regulatory transference,” the three characteristics of legalization were each substantially increased. 83 Peru took on even greater obligations with regard to the regulation of mahogany exports than were required by CITES alone. 84 In the realm of precision, Peru agreed not only to implement very specific monitoring and regulation of its rainforests, but also to enact specific laws co-written by the United States regarding forest governance. The third characteristic of delegation was perhaps maximized to the greatest degree. The compliance or non-compliance of Peru with the CITES provisions that were incorporated into the FTA can now be determined through international arbitration under the FTA Dispute Settlement mechanisms. The United States can issue trade sanctions against Peru if it fails to meet its CITES-like obligations. It has become clear in the years since the entry into force of the FTA that the conflict never needs to reach the formal dispute resolution stage for the mandates of the FTA to exercise great influence over Peru’s behavior. 85 Indeed, U.S. officials have made several trips to Peru to demonstrate exactly how to implement and enforce the new land management laws. They are permitted under the FTA to conduct their own unannounced audits of timber exports, and the U.S. Forestry Service maintains an office in Lima “devoted to supporting Peru’s efforts to implement the Forest Annex.” 86 When Peru failed to meet an FTA-imposed deadline regarding the passage of new forestry regulation, officials from the U.S. government had the power to meet with members of the Peruvian congress and assist them in meeting that deadline. 87

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85 Wasson, supra note 46.
C. Implications of Legalization of Multilateral Environmental Treaties

The first concern raised is the ability of an economic superpower to set the environmental agenda of a developing nation through the carrot and stick coercion of a free trade agreement. Lack of sovereignty over natural resources is an ancient grievance of developing nations against the developed world.\(^{88}\) Interestingly, the first article of the Environment Chapter of the U.S.-Peru TPA itself provides that both Parties recognize the "sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies."\(^{89}\) The Forestry Annex and its process of implementation seem to cut against these principles. Indeed, Peru has spent significant resources and manpower implementing the exact forestry reforms that it had been comfortable ignoring under CITES.\(^{90}\) The intense public opposition to the changes made in indigenous land rights through the implementation of the FTA demonstrates that these reforms may be what the American people think is important—but not the Peruvian people.

One might ask, how much do Americans really care about the illegal trade in mahogany? Is it a significant enough priority to the American people to warrant U.S. Trade Representatives flying to Lima to oversee the drafting of forestry laws? Or, is it possible that there are a small number of individuals and NGOs with lobbying power who care a great deal about the preservation of the mahogany species and the United States Congress does not care much either way? These questions are addressed again in Section V, which investigates the domestic politics and coalitions that worked toward the inclusion of FTAs in the May 10 Agreement.

All seven MEAs are treaties to which the United States is a party, but they are also all treaties with which the U.S. is comfortably in compliance. From the perspective of an environmentalist, the seven treaties contained within the EU-COPE FTA represent a collection of the most "major" MEAs. Several of these treaties are ones that the U.S. has not yet ratified. The Rotterdam Convention on Chemicals has been ratified by 153 states and the E.U., but not the U.S.\(^{91}\) The Basel

\(^{89}\) U.S.-Peru Trade Promotion Agreement, supra note 32, art. 18.11.
\(^{91}\) Status of Ratifications, Rotterdam Convention, http://www.pic.int/Countries/Statusofra
Convention has been ratified by almost every state other than Haiti and the United States.\(^2\) The United States, South Sudan and Andorra are the only states not to have ratified the Kyoto Protocol (though Canada renounced its ratification in 2011).\(^3\)

Some have hailed the inclusion of MEAs in recent U.S. FTAs as the assertion of the role of the United States as a global environmental leader. It is true that by subjecting compliance with the MEAs to the scrutiny and enforcement of the dispute settlement, the U.S. has given them far more “legal bite” than any of the treaties had on their own. This new generation of FTAs advances the legalization of these environmental norms far beyond the mere recognition first given to them under NAFTA. Indeed, in the introduction to Legalization and World Politics, the authors pointed to NAFTA’s environmental provisions as an example of a weakly legalized institution, writing, “NAFTA’s transgovernmental Commission on Environmental Cooperation ‘is too weak to create the pressures necessary to cause substantial redrafting of environmental legislation’ and is useful largely as a device for disseminating information about effective domestic environmental law.”\(^4\) In contrast, the U.S.-Peru FTA, as we have seen, resulted in concrete changes to Peruvian environmental law.

However one must ask what exactly we are gaining by having the United States pick and choose the environmental priorities of the rest of the world, or at least the states it can coerce through economic fora. Had Peru attempted to use the FTA to impose climate change mitigation legislation upon the United States through a linkage with the Kyoto Protocol, it certainly would have failed. As Goldstein et al. point out, “[t]o the degree that legalization represents rules that do bind at least some governments, the realist explanation is clear: legal rules emanate from dominant powers and represent their interests.”\(^5\)

A second and related concern about this method of “hardening” international environmental law has to do with transparency and the democratic process. Peruvian President García was able to push through controversial land reform laws without stakeholder consultation because

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\(^3\) T ERESA M. THORP, CLIMATE JUSTICE: A VOICE FOR THE FUTURE 239 (2014).


\(^5\) Id. at 391.
he had been given a form of “fast track” authority to enact legislation necessary to comply with the mandate of the TPA. Public Citizen has accused the USTR of assisting García in making an “end-run around [his] constituents.” They point to a statement made by U.S. Trade Representative Susan Schwab regarding the Peruvian decrees:

> What free trade agreements enable a country to do, and I am talking about the United States and its trading partner, is implement reforms that we should probably be doing anyway but that could be difficult politically. Part of our effort is working with Peruvian authorities to help them get there.

This situation, in which the domestic negotiators are played against the international negotiators, is described well by Robert Putnam’s theory of “two-level games,” and will be applied in Section V.

It is important to note that the power of trade treaties to circumvent the democratic process is present in the United States in addition to its developing country trading partners. This power can be seen in the concerns raised regarding the Biodiversity Article contained with the Environment Chapter of the U.S.-Peru FTA. The Article, while composed of hortatory language, replicates many of the goals outlined in the Convention on Biological Diversity (“CBD”). Every U.N. state member is a party to the CDB, with the exception of two: Andorra and the United States. While the Senate declined to ratify the CBD in 1994, they did subsequently ratify many of its provisions through the ratification of the Peru FTA.

Further implications of the inclusion of MEAs in U.S. free trade agreements, particularly their relevance to dispute resolution provided under investment chapters, will be explored in the discussion of environmental provisions in recent bilateral investment treaties below.

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96 M CARThUR & TUCKER, supra note 50, at 4.
97 Id. (citing Lucien Chauvin, Peru, U.S. Officials Work on Implementing Bilateral FTA, Aim for Jan. 1 Effective Date, BNA, June 3, 2008) (emphasis added).
99 U.S.-Peru Trade Promotion Agreement, supra note 32, art. 18.11.
102 U.S.-Peru Trade Promotion Agreement, supra note 32, art. 18.11.
IV. LINKAGE OF INVESTMENT LAW AND ENVIRONMENT

Many states have included positive environmental provisions in their bilateral investment treaties or the investment chapters of free trade agreements.\textsuperscript{103} A report released in 2011 by the Organization for Economic Co-operation and Development ("OECD") provides a comprehensive survey of these provisions.\textsuperscript{104} The authors divide the wide variety of approaches into seven categories: 1. General references to environmental concerns in preambles; 2. Right to regulate—reserving policy space for environmental regulation; 3. Reserving policy space with respect to certain treaty provisions; 4. Precluding non-discriminatory regulation as a basis for claims of indirect expropriation; 5. Environmental matters and investor-state dispute settlement; 6. Not lowering standards—discouraging relaxation of environmental standards to attract investment; and 7. General promotion of progress in environmental protection and cooperation.\textsuperscript{105} The Belgium/Luxembourg-Colombia BIT takes a different approach and removes environment-related disputes entirely from investor-state dispute resolution.\textsuperscript{106} Notably, the 2004 Canadian Model Foreign Investment Protection Agreement was the first to directly incorporate general exceptions akin to GATT Article XX and the BIT practice of many other countries has followed suit.\textsuperscript{107}

This paper now turns to present the changes to the Environment Article that were made in the 2012 U.S. Model BIT and analyze their implications for international investment law.

A. The U.S. Model BIT

In April 2012 the United States government released the newly revised version of its model bilateral investment treaty. It was a long time in the making—the previous version of the model BIT had been released in 2004. Overall, the two versions differed only slightly,
disappointing both industry and advocacy groups who had been pushing for more significant changes. The new model BIT did, however, contain a substantially strengthened Investment and Environment Article which increases commitments to environmental protection in several ways. The 2004 model provided that “each Party shall strive to ensure that it does not waive or otherwise derogate from [its environmental laws] in a manner that weakens or reduces the protections afforded in those laws, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.” In the new 2012 model, the phrase “shall strive to ensure” was replaced with “shall ensure,” and an additional commitment not to “fail to effectively enforce” environment laws was added. A new clause starting the Article was added, stating that the Parties “recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.” The Labor and Investment Article similarly references a commitment to the International Labor Organization (“ILO”) Declaration. This is the first time a revised U.S. model BIT has made explicit reference to external multilateral agreements in these areas.

While the 2004 model had provided for state-state consultation if one Party believed the other to be derogating from domestic environmental law, the new consultation provision was expanded to apply to the entire Environment Article and a thirty-day response requirement was added. Finally, the revised model confirms that each Party “may . . . provide opportunities for public participation” regarding any matter arising under the Environment Article. These relatively weak enforcement provisions, while stronger than those under the 2004

111 Id.
112 2004 MODEL BIT, supra note 109.
113 2012 MODEL BIT, supra note 110, at 18.
114 Id.
Model, disappointed environmental NGOs. Many advocates had hoped for environmental obligations that were enforceable by means of binding dispute resolution, similar to the approach taken in recent U.S. free trade agreements. Meanwhile, industry groups questioned whether this new expansion of environmental protections might be “counterproductive.”

B. Legalization of International Environmental Law via BITs

Without a binding enforcement mechanism, it is unclear how changing “strive to ensure” to “shall ensure” will impact the legalization effect on the enforcement of environmental laws. Similarly, the implications of the explicit recognition of multilateral environmental agreements in the text of the BIT have not been fully explored. One possibility is that this change in language will increase the success of either environmental counterclaims or necessity defenses brought by states in investment arbitrations. The admissibility of counterclaims is typically determined by “the scope of the jurisdictional and choice of law clauses as well as the facts of the case.” Viñuales argues, “An environmental counter-claim could be brought only if the applicable treaty directs the arbitral tribunal to apply domestic (environmental) law.” However, the text of the U.S. Model BIT also provides that “the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.”

To the extent that any of these results lead to the elevation of the norms created under MEAs to the level of those obligations created

115 Kantor, supra note 108, at 47.
117 Kantor, supra note 108, at 47 (citing the Emergency Committee for American Trade (“ECAT”)).
118 For more on this topic, please see JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012).
119 Viñuales, supra note 79, at 10.
120 Id.
121 2012 MODEL BIT, supra note 110, at 33.
under the BIT, the MEAs themselves benefit from an increase in legitimacy and legalization.

C. Implications in Investment Arbitration for the Inclusion of MEAs: Environmental Rights of Actions for Investors

It is possible that the increased recognition of the importance of both international and domestic environmental law in the text of a BIT could lead to successful environmental claims as direct investment claims.\(^{122}\) Viñuales presents such a case, where a host State’s non-enforcement of its own environmental laws as well as international treaties has been alleged to be a violation of the investment protections granted under a BIT.\(^{123}\) Peter Allard v. Government of Barbados is a case currently in United Nations Commission on International Trade Law (“UNCITRAL”) arbitration under the Canada-Barbados BIT. In the Notice of Dispute, the Canadian investor alleges that Barbados’ acts and omissions violated the Convention on Wetlands of International Importance, the Convention on Biological Diversity, as well as the Marine Pollution Act of Barbados.\(^{124}\) These acts and omissions allegedly resulted in Barbados breaching the Fair and Equitable Treatment and Full Protection and Security guarantees of the BIT.\(^{125}\) In addition, the complaint asserts that the environmental degradation that resulted from Barbados’s acts and omissions led to a de facto expropriation of the investment in the eco-tourism facility.\(^{126}\) The Canadian investor seeks compensation in the amount of $34 million.\(^{127}\)

This opportunity for environmental claims to be brought under BITs in the form of investment claims has not been lost on the environmental advocacy community in the United States. The Advisory Committee Report submitted in 2009 to the Department of State contained recommendations for the upcoming Model BIT rewrite. In it, the Committee asked that the USTR confirm that “certain types of nonprofit acquisitions abroad have the character of an ‘investment’” and that “the Model BIT [should] accord BIT protections to such acquisitions.”\(^{128}\)

\(^{122}\) See generally Viñuales, supra note 79.

\(^{123}\) Id. at 6.


\(^{125}\) Id. ¶ 21.

\(^{126}\) Id. ¶¶ 17–20.

\(^{127}\) Id. ¶¶ 10–13.

Committee sought explicit confirmation that an ecological preservation would “enjoy BIT protections regardless of whether the acquirer had an expectation of profit.”129 Under the definitions of the 2012 Model BIT, “investment” is defined as “every asset that an investor owns or controls, . . . that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources. . . . Forms that an investment may take include: (a) an enterprise . . .”130 An “enterprise” is earlier defined as “any entity constituted or organized under applicable law, whether or not for profit . . . including a . . . trust.” 131 It appears that at least under the U.S. Model BIT, environmentalists who establish forest preserves and nature sanctuaries are permitted to bring a claim should their rights as investors be violated.

D. Corporate Social Responsibility

An environmentally related provision that has been occurring with more frequency in both investment treaties and trade agreements is one that asks for countries to promote Corporate Social Responsibility (“CSR”) in some way. The Chile-U.S. and the U.S.-Singapore FTAs (2004) both contain articles within their Environment Chapters entitled “Principles of Corporate Stewardship”:

Recognizing the substantial benefits brought by international trade and investment as well as the opportunity for enterprises to implement policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives, each Party should encourage enterprises operating within its territory or jurisdiction to voluntarily incorporate sound principles of corporate stewardship in their internal policies, such as those principles or agreements that have been endorsed by both Parties.132

Similarly, the Canada-Benin BIT, signed in 2013, provides that each Party “should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices

129 2012 MODEL BIT, supra note 110, at 2.
130 Id. at 3.
131 Id. at 2.
132 U.S.-Chile Free Trade Agreement, supra note 22, art. 19.10; U.S.-Singapore Free Trade Agreement, supra note 22, art. 18.9.
and internal policies.”¹³³ The Investment Chapter of the Canada-Peru FTA contains identical language; its preamble replicates it again.¹³⁴

Norway’s 2007 Model BIT (later shelved) went a step further and required the Parties to “agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.”¹³⁵ Hepburn and Kuuya point out that a comment released along with the Model BIT makes it clear that this CSR provision is meant to change the behavior of countries that have not already committed to the OECD guidelines.¹³⁶

What legal weight do these Corporate Social Responsibility (“CSR”) provisions really carry? The BITs and FTAs themselves are treaties that create legally binding obligations upon their State parties. CSR generally applies to corporate entities, not states, and its mandates are typically voluntary. At most, states are obligated to “encourage” the adoption of legally non-binding standards.

However, a legalization analysis shows that these may not be completely empty provisions. In terms of obligation, its legal characteristics are low. However, in terms of precision, the OECD Guidelines can themselves be quite specific. Corporations are encouraged to maintain an environmental management system that includes monitoring impacts, adopting efficient technologies, and providing environmental education to employees and customers.¹³⁷ It is also evident that Norway was attempting to use its BIT as a tool to get its treaty partners to agree to soft law principles that they would not have otherwise accepted. As Abbot et al. note, “[o]ver time, even nonbinding declarations can shape the practices of states and other actors and their expectations of appropriate conduct, leading to the


emergence of customary law or the adoption of harder agreements. Soft commitments may also implicate the legal principle of good faith compliance, weakening objections to subsequent developments.”  

The inclusion of CSR provisions in BITs and FTAs are an example of the “blurring” that can occur between “hard” and “soft” law. These provisions have at the very least moved CSR principles farther along the “continuum” from soft to hard law.

V. WHY THESE PROVISIONS IN THESE TREATIES? A LOOK AT NEGOTIATION THEORY AND PROCESS

The previous sections of this paper were devoted to an exploration of how international environmental law, its players, and its enforcement, has been changed by the evolution of free trade agreements and bilateral investment treaties. This next section seeks to answer the questions: ‘Why these provisions?’ and ‘Why these treaties?’ Why is detailed and aggressive protection for forests mandated, instead of clean water—or climate regulation? How do these provisions find themselves in trade and investment agreements at all? Why are these issues not simply dealt with in multilateral environmental agreements?

This section looks more closely at the policy and politics behind these agreements, with a focus on FTAs and the “fast track” legislative authorization they require. Applying theories of international negotiation, most significantly Putnam’s “two-level game,” this section identifies the factors that account for the trade and environment linkage outcomes outlined in the preceding sections. These factors include: trade-offs resulting from linkage of international issues; coalitions formed among domestic groups, as well as transnational coalitions formed between allied groups from different states at the negotiation table; whether the negotiation was bilateral or multilateral; and the relative size of the domestic “win-sets.” Reference to Putnam’s framework can be used to explain why enforcement provisions governing the seven Multilateral Environmental Agreements were included in the U.S.-Peru Trade Agreement and why MEA enforcement in the upcoming Trans-Pacific Partnership is one of the largest remaining areas of unresolved conflict in the negotiation. The next section provides a brief history of domestic politics with regard to the U.S. trade agenda.

138 Abbott et al., supra note 64, at 412.
A. Background on Process

In order to understand the role that Congress plays in international trade negotiations, it is necessary to look at the development of Trade Promotion Authority (or Fast Track) legislation. While the executive branch has constitutional power to negotiate international trade agreements, Congress must ratify these agreements if statutory implementation is required to bear them out. Starting in 1934, the Reciprocal Trade Agreements Act delegated authority to the president to negotiate tariff reduction with other nations. This authority was expanded under the Trade Act of 1974 to cover “non-tariff trade barriers,” though consultation requirements between Congress and the President were added. The 1974 Act was also the first instance of the “fast track” process, whereby Congress agreed to consider the implementing legislation required under trade agreements in an expedited fashion. Through this bargain, Congress bound itself to an up-or-down vote on the required legislation (with no amendments considered) in exchange for being consulted throughout the negotiation process. Fast track authorization continued with uninterrupted renewals until 1993.

1. 1990s: The Fight Over Trade Promotion Authority

In the early 1990s, domestic constituent concern about the negative effects of trade liberalization made the renewal of fast track authority more controversial. Labor and environmental groups, and the House Democrats they supported, were its strongest opponents. In 1991, a renewal of fast track authority was sought by President Bush in anticipation of the negotiation of the North American Free Trade Agreement (“NAFTA”). Labor coalitions were firmly opposed to a free trade agreement with Mexico and lobbied hard against the renewal of fast track authority. Environmental groups “were split on fast track”—with some giving conditional support if the agreement included

141 Smith, supra note 139, at 1.
142 Id.
143 Id.
144 William H. Cooper, Cong. Research Serv., Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy 6 (2014).
145 Devereaux et al., supra note 11, at 195.
environmental protection. The 1991 renewal eventually passed after a long battle by the Bush Administration, with the House vote divided by party lines (two-thirds of all Democrats voted to oppose it). The main agreement of the NAFTA text had already been signed (though not ratified), when Bill Clinton defeated George Bush in the 1992 presidential election. Rather than re-opening the text to negotiation, the Clinton Administration, in deference to the priorities of its party, began negotiating side agreements on labor and environment with Mexico and Canada. The two side agreements that resulted could reportedly be tolerated by House Republicans because “neither of them really had [enforcement] sanctions involved.” While some environmental groups remained loyal to the NAFTA side-agreement compromise, certain Democratic Congressmen that had voted to renew fast track in 1991 opted against NAFTA in the final vote. Partly out of disappointment with the substance of the NAFTA environmental agreements, House Democrats were reinvigorated to condition future fast track authority on more substantive requirements for environment and labor.

Following the acceptance of NAFTA, it was the Republican Party’s turn to oppose fast track renewal. The Clinton administration put forward a fast-track draft that required labor and environmental obligations to be included in future trade agreements. These requirements were to be enforced by trade sanctions. Citing opposition from their constituents in the business community, House Republicans rejected the draft. Fast track was defeated in 1994 and again in 1995 by the Republican-controlled House.

Joining Republican opposition to fast track in this period were traditionally Democratic constituents. Labor unions organized in force

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146 Id. at 195.
147 Id. at 196–97.
148 Id. at 198.
149 Id. at 198 (citing Interview by Cheran Devereaux with Brian Biernon, Legislative Assistant to Representative David Dreier (Mar. 1998)).
151 “The side agreements were unacceptable to Mr. Gephardt, which is why he opposed the final passage of NAFTA. So having that history under our belt, we then wanted to make sure that the fast-track language in 1994 and thereafter was much more specific about what constituted an acceptable conclusion.” Devereaux et al., supra note 11, at 200 (citing Interview by Cheran Devereaux with Mike Wessel, Trade Advisor to Rep. Richard A. Gephardt (Mar. 1998)).
152 Devereaux et al., supra note 11, at 198.
153 Id. at 202–204.
against a 1997 fast-track effort, claiming that job loss was directly attributable to the enactment of NAFTA.\textsuperscript{154} In addition, several environmental organizations that had supported NAFTA in 1993 now switched sides to oppose fast track legislation. Steven Shimberg of the National Wildlife Federation gave testimony to the House Subcommittee on Trade to that effect:

\begin{quote}
We recognized the potential of trade as an instrument to enhance environmental protection, and believed that NAFTA was a good first step toward the integration of trade and environment… Based on our experience with NAFTA and with other trade and investment agreements, we now know we can no longer rely solely on side agreements to achieve our environmental objectives, or on fast track rules which do not state explicit goals for environmental protection.\textsuperscript{155}
\end{quote}

The major push in 1997 on the part of the Clinton administration and lobbyists from business to renew fast track failed yet again. House Democrats refused to support a bill that did not “use the power of trade sanctions to keep developing nations from lowering labor and environmental standards to win in the global marketplace.”\textsuperscript{156}

In 2001, with a Republican president in the White House, new fast track legislation was once again proposed, though this time repackaged with the new name of ‘Trade Promotion Authority.’ While the bill did include labor and environmental standards in its outline of negotiating goals for U.S. trade agreements, these goals were not required for a negotiated agreement to receive ultimate approval from Congress.\textsuperscript{157} In July of 2002 the “Bipartisan” Trade Promotion Authority was finally passed, with eighty-eight percent of Republicans supporting the measure as compared with twelve percent of Democrats.\textsuperscript{158}

Under this 2002 Authority, the Bush Administration entered into trade agreements with Singapore, Chile, Australia, Morocco, Bahrain, as well as a group of Central American countries under DR-CAFTA.\textsuperscript{159}

\begin{footnotes}
\item[154] Id. at 207.
\item[157] Devereaux et al., \textit{supra} note 11, at 229–30.
\item[158] Id. at 231.
\end{footnotes}
Continued opposition from the Democratic Party meant that these agreements relied on the Republic majority to pass the yes-no ratification vote. The Administration was in the process of negotiating four further trade agreements—with South Korea, Panama, Colombia and Peru—when Democrats took control of Congress in January of 2007. There was little hope of these agreements receiving Congressional approval—even just via a down-up vote—without concessions for labor and environment.

2. May 10 Agreement

U.S. Trade Representative Susan Schwab and President Bush entered into lengthy negotiations with the House Democrats, represented by House Speaker Nancy Pelosi and House Majority Leader Steny Hoyer. These negotiations centered on the desired labor and environment objectives. The Democrats made it clear that the additional provisions had to be incorporated into the main text of the negotiated treaties, not added in a side agreement as they had been with NAFTA when President Clinton gained control in 1993. During this time, House Ways and Means Committee Chair Charles Rangel announced that there was “‘no question’ that a deal must include a provision that would obligate countries to uphold their obligations under multilateral environmental agreements.”

The resulting May 10 “Bipartisan Trade Deal” functioned as the blueprint for the U.S.-Peru TPA discussed at length in Sections II and III above. The Agreement was hailed as both a “victory for Democrats” and a “shrewd compromise by the White House.” The Bush Administration hoped that this agreement would mean that Democrats, largely anti-trade since the days of NAFTA, could be counted on to support trade deals in the future. Officials from both parties expressed hope that the May 10 Agreement could be “a template for all trade agreements.”

161 Administration, Congress Continue High-Level Effort on FTAs, INSIDE U.S. TRADE, Mar. 9, 2007.
162 Id.
163 Id.
deals” beyond the four at issue. Pelosi announced, “where it comes down to labor standards and environment, this is enormous progress.”

B. Negotiation Theory and Environmental Priorities of Trade Agreements

Free trade Republicans and the business interests they represented fought a long battle against their pro-labor and environment Democratic counterparts. Clearly, simple electoral politics is one of the biggest reasons for the existence of the May 10 Agreement and the U.S.-Peru FTA provisions that it shaped. Public opinion had selected more trade-skeptical leaders to define the negotiating objectives of the U.S. government in Congress. To understand some of the other factors that played a role in this ideological battle, this paper now turns to negotiation theory.

1. Theory of Two-Level Games

A better understanding of just how the environmental provisions of these trade and investment agreements are determined can be gained by borrowing the now famous conceptual framework of Robert Putnam. In 1988, Putnam proposed that the interaction of international diplomacy and domestic politics can be described as a two-level game: “At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.” In Putnam’s terminology, the “Level I” game occurs between the lead negotiators in the international arena. This could be the United States Trade Representative and his Peruvian counterpart, if we take the U.S.-Peru TPA as our example. The “Level II” game occurs when these leaders bring the negotiated agreement back home and there is a separate discussion among the various domestic constituents about whether or not to endorse the agreement.

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165 Id.
166 Id.
167 Putnam, supra note 98, at 434.
168 While Putnam’s article concerned international agreements generally, not just those dealing with trade, his quote from Robert Strauss illustrates this point well: “During my tenure as Special Trade Representative, I spent as much time negotiating with domestic constituents (both industry and labor) and members of the U.S. Congress as I did negotiating with our foreign trading partners.” Putnam, supra note 98, at 433 (citing Robert S. Strauss, Foreword to THE
These games do not necessarily occur in sequence. The estimated Level II preferences are ever-present in the minds of the Level I negotiators, knowing that they cannot reach an agreement among themselves that will fail to be ratified when brought home. In the U.S. system, the basic Level II game occurs when Congress must vote on whether or not to ratify a treaty. However, there are many domestic determinants of foreign policy, and each member of Congress is influenced by a wide range of constituents. Interest group lobbying, upcoming elections, and political party preferences are all considerations in the overall Level II game.

In international negotiation, the Level I players deliver a negotiated agreement to their home legislatures that must be accepted as a whole, or rejected entirely. Any desired amendment at Level II, however minor, sends the entire agreement back to the Level I drawing board for re-negotiation. With U.S. trade agreements this process is formalized by the passage of “Fast Track” authority, more recently called Trade Promotion Authority. Under this legislation, USTR is given the authority to negotiate a trade agreement that, so long as it meets certain minimal requirements outlined by Congress, will be subject to a simple up-or-down vote for ratification. In this framework, Putnam calls all the possible Level I agreements that could receive ratification at Level II a “win-set.”

2. Why MEAs?

A key question that arises when considering the May 10 Agreement is: Why did the House Democrats define their environmental agenda with reference to pre-existing multilateral environmental agreements? An alternative could have been to draft minimum environmental standards that became obligatory on the FTA partner. There are several possible explanations for the use of MEAs in this fashion.

Firstly, reference to an already-negotiated agreement makes the Level I negotiation more manageable. A “take it or leave it” approach to the minimum environmental requirements means that Level I negotiators do not expend resources negotiating environmental details in addition to the topics traditionally covered by trade agreements, including tariff reductions and stances on intellectual property rights. If the parties...
undertook to negotiate substantive binding environmental provisions from scratch, the negotiation process might never conclude.

The second explanation emerges from Putnam’s theory that “the relative size of the respective Level II win-sets will affect the distribution of the joint gains from the international bargain.”170 This means that the wider the perceived range of agreements that will be accepted at the Level II game, the more the Level I negotiator can be forced to compromise to reach agreement. As a result, it is advantageous for the United States to demonstrate to its potential treaty partners that Congress will not budge on certain issues—including the environment. The May 10 Bipartisan Agreement, which listed the original seven MEAs in 2007, was such a signal. The Agreement was not only a negotiation directive to USTR, it was also a public document meant to be read by Peruvian negotiators so they knew not to fight hard against the enforcement of the MEAs. There is a bargaining advantage to having a document that lists the environmental hard lines of the United States. Reference to the MEAs facilitated this signaling.

A third reason for integration of the MEAs is legitimacy. A former USTR official stated in an interview that MEAs were used because Congress was looking for international agreements that had the same kind of consensus as the ILO Principles: “We needed this to know what the right kind of international environmental obligations would be.”171 The United States appears as less of an aggressor to the sovereignty of its developing country trading partner if it asks for that country to enforce obligations already willingly agreed to in previous treaties.

Inter-Level II negotiation is a fourth explanation. The Democratic Party knows that its voting base cares about the environment, though neither the Congressmen nor most of the constituents that vote for them are experts on the environment. Voters look to groups like the Sierra Club to tell them which issues are important and educate them on which politicians are “pro-environment.” Especially in the context of trade agreements, where the large number of issues can pull in multiple directions, the “asks” of interest groups must remain simple and easy to communicate. Reference to an environmental treaty is a simple way to package a long list of obligations.

170 Putnam, supra note 98, at 440.
171 Interview with Former U.S Trade Representative Official (Mar. 2014).
3. Why Trade Agreements?

A repeated opposition to the inclusion of labor and environmental provisions in free trade agreements is that they do not belong there, which is sometimes articulated as, ‘leave tariff reductions to trade agreements and negotiate environment laws in environmental treaties.’ The chief of staff for a Republican Congressman in the era of the 1994 fast track vote said as much:

We have contended all along that there is no reason to have [labor and environmental provisions] in fast-track legislation, because the administration already has the authority to negotiate labor and environmental agreements. . . . We can do the same thing as in NAFTA where those issues were handled outside the scope of the actual treaty.  

a. Issue Linkage

In his influential article, Putnam wrote that understanding “issue linkage[s] is absolutely crucial to understanding how domestic and international politics can become entangled.” Issue linkage is fundamental to the success of modern trade agreements, and was crucial in the long debate over the passage of Trade Promotion Authority. An example is useful in understanding how linkages work: suppose some majority of Level II players are opposed to a certain policy (say liberalized trade, because of fears of job loss). However, some number of these players could be convinced to change their stance in exchange for progress on another issue that they care about (increased global environmental regulation, for example). This trade-off could never occur at the Level II bargaining table alone, because while the U.S. government can lower its own tariff barriers, it cannot unilaterally regulate pollution in Mexico.

The explanation, from a negotiation perspective, for why interest groups fight to have environmental provisions in trade agreements comes from the political realities in both the Level I and Level II games. At Level II, interest groups know that their issues are far more likely to get approval if they are tied as a package with an issue the majority strongly supports. The environmental community knew that House Republicans would not vote “no” on the set of four upcoming FTAs that included Peru. Their successful passage was too important to their

172 Devereaux et al., supra note 11, at 200 (citing an Interview by Charan Devereaux with Don Carlson, Chief of Staff for Representative Bill Archer (Mar. 1994)).
173 Putnam, supra note 98, at 446–47.
business constituents to be derailed by the inclusion of unwanted environmental provisions. Environmental NGOs know that they are much more likely to get environmental provisions in an FTA passed than a freestanding international agreement on the environment. “Look at the track record with regard to Congressional approval of treaties,” a USTR official said. “Congress is much more likely to sign on to a trade agreement than a multilateral environmental treaty.”\(^{174}\)

Issue linkage also plays a crucial role at the Level I game. The legalization of environmental provisions in international economic treaties was discussed at length above. There, it was observed that though Peru had already signed on to CITES, it had failed to pass measures to enforce its requirements. Peru eventually signed on to the “stick” of binding and enforceable forestry measures because it was also promised the “carrot” of liberalized trade with the United States. Devereaux et al. observed a similar linkage occurring around the union lobby for labor provisions in fast track. While Republicans argued that “labor talks belong at institutions like the International Labor Organization . . . [u]nions disagreed, noting that workers have no leverage at the ILO because the organization lacks the power to enforce its conventions.”\(^{175}\) “We want the same kind of binding dispute resolution for our concerns that business gets for things like intellectual property rights and investment rules,” said union policy analyst Thea Lee. “Businesses understand, as we do, that you use the leverage of a trade agreement to obtain promises from your lending partners to improve their laws.”\(^{176}\)

Issue linkages can occur because a coalition of Level II constituents hold the ratification of the agreement hostage while demanding concession on their individual special interest. Of course, this phenomenon can also occur in votes on solely domestic legislation. However, it is more likely to occur in the international trade context. “People are looking for tools,” said a USTR negotiator in an interview, “[W]e are in the process of negotiating a] BIT with China, and it’s the only treaty being debated with China at the moment, so a lot of people want to pack a lot into it.”\(^{177}\) People want every issue they have with China solved through this one BIT because it is the only treaty on the table.

\(^{174}\) Interview with U.S. Trade Representatives Official (Mar. 2014).
\(^{175}\) Devereaux et al., *supra* note 11, at 208–09.
\(^{176}\) *Id.* at 209.
\(^{177}\) Interview with U.S. Trade Representative Official (Mar. 2014).
b. Bilateral Bargaining

The bilateral nature of the FTAs in question is a further reason why environmental special interest groups seek action through FTAs rather than MEAs. Salacuse provides two explanations for why the number of bilateral investment treaties has steadily risen even while attempts to form a global Multilateral Agreement on Investment (“MAI”) have repeatedly failed.178 Firstly, a negotiation of an agreement between two parties is far less complicated than a negotiation between multiple parties.179 The technical difficulties of accommodating all party interests have stalled the creation of an MAI. Secondly, the political realist explanation for the ‘success’ of bilateral agreements is that these FTAs are typically negotiated between a wealthy and powerful country and a weaker country still in the process of development.180 This power asymmetry results in the developed nation coercively achieving most of its objectives.181 The developing country sees itself as having more to gain from an FTA relative to its partner, and thus more to lose if the negotiation fails.182

In a multilateral negotiation, however, the weaker nations are able to ally themselves into coalitions to block the objectives of the powerful nation(s).183 Therefore, it is easier for the Level I negotiator to get concessions from Peru when he is negotiating with just Peru. In a multilateral setting, Peru could ally itself with other countries and form an oppositional coalition to resist binding environmental commitments, or perhaps suggest environmental issues that the U.S. does not want to consider (like action on climate). Indeed, such a situation is occurring in the negotiation of the Trans-Pacific Partnership, discussed below.

c. BITSs v. FTAs as Vehicles for Environmental Linkage

Now we turn to the question of why, from a negotiation and process perspective, there has been more progress on environmental provisions in free trade agreements than bilateral investment treaties. One key factor is that the United States already has an open and secure

179 Id.
180 Id.
181 Id.
183 Salacuse, supra note 178, at 464.
investment climate for foreign investors, and so it has less to offer in a BIT negotiation than it does in an FTA. The U.S. has less bargaining power to make its negotiating partners accept unpopular environmental provisions in BIT negotiations. Another factor is that the Level II ratification process is different for BITs than for FTAs, meaning different considerations for players who must weigh domestic politics in the negotiation process. BITs, as international treaties, must receive approval from two-thirds of the Senate, rather than a majority of both the Senate and the House, as is required for the implementing legislation of TPAs.\textsuperscript{184} For this reason, the president does not need to seek Trade Promotion Authority before he enters into negotiations with another country.\textsuperscript{185} This means that in pursuing a completion of a BIT, 1) there are a smaller number of politicians for special interest groups to persuade and 2) the time window for coalition forming and Level II negotiation is smaller.

4. Coalitions

a. Level II Coalitions

In Putnam’s universe, the key to winning the Level II game is by forming a coalition among domestic constituents that together have the strength to refuse to accept any Level I agreement that does not meet the objectives of the group. This theory explains well the story of the evolution of environmental objectives in free trade agreements. The fast track vote preceding NAFTA in 1991 and the vote on NAFTA itself, “split” the environmentalists.\textsuperscript{186} The Sierra Club and Friends of the Earth opposed it.\textsuperscript{187} Greenpeace wrote that “even by modest expectations . . . [the side agreements] would have to be judged a complete failure.”\textsuperscript{188} On the other side, the Environmental Defense

\begin{footnotesize}
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\item Devereaux et al., supra note 11, at 195.
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Fund, the Natural Resources Defense Council, and the Nature Conservancy decided to support NAFTA.189

The Bush Administration fostered this fractioning in order to avoid a strong Level II coalition that would push for more binding environmental commitments. “NAFTA was a hard process,” said one veteran of that time. “The Environmental Groups were set against one another during the negotiations of the NAFTA side agreements. Eight or nine were allowed to give input on the negotiations in exchange for not opposing the final outcome. This ostracized the Sierra Club and Public Citizen.”190 Level II coalitions had to make a choice on whether or not to engage with the policy makers and try to shape the trade agenda in a pro-environment way, or to oppose the measure altogether. When leaders from the Nature Conservancy and other groups met with President Bush to discuss NAFTA objectives, Ralph Nader issued a public letter accusing them of “selling out.”191 All of the labor groups and some of the environmental groups stood strong in their opposition to NAFTA, while certain others thought that the side agreements had made enough progress to play along. The leader of the National Wildlife Federation (“NWF”), Jay Hair, wrote an op-ed supporting NAFTA in the Washington Post that called the 1991 fast track compromise “considerable progress.”192

The environmental groups that remained firm in their opposition knew that their position was doomed once their coalition had been broken. “At the very least,” said a spokesperson for the Friends of the Earth, “we expected the big environmental groups to stay on the fence. Hair’s endorsement was strong enough to hurt our position.”193 Hair, of the NWF, later declared that environmental opponents of NAFTA “put their narrow political agenda ahead of the broad public interests.”194

Many of the environmental groups would come to regret siding with the pro-NAFTA coalition. Ironically, NWF was one of the most vocal opponents to future fast track authorization. In 1997, a representative testified that, “we can no longer rely . . . on fast track rules which do not

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190 Interview with leader from large environmental nonprofit (Mar. 2012).
191 Lee, supra note 187; Devereaux et al., supra note 11, at 195–196.
state explicit goals for environmental protection.” Environmental groups made this opposition clear to the Democrats in the House throughout the period between NAFTA and the 2007 Bipartisan Agreement. In July 2006, DR-CAFTA had passed the House by just two votes, with 187 out of 202 Democrats voting “no.” The eventual May 10 victory was a result of the Democratic/Labor/Environment coalition holding strong to the binding provisions that they had been seeking since 1991. In the words of one Hill staffer, “All in all, there is not one issue in which the Democrats caved to the White House. This was one of the best showings of spine by Democrats in Congress” in four years.

b. Transnational Coalitions

Putnam also introduced the concept of “transnational coalitions,” whereby a “Level I negotiator may find silent allies at his opponent’s domestic table. . . . Thus transnational alignments may emerge, tacit or explicit, in which domestic interests pressure their respective governments to adopt mutually supportive policies.” These cross-border coalitions developed throughout the negotiations of FTAs. One year before the final U.S.-Peru TPA was concluded, the Natural Resources Defense Council teamed up with two NGOs from Peru to sue the U.S. Government in the U.S. Court of Trade. The suit alleged that the U.S. government facilitated the violation of CITES by allowing inspectors to look the other way when illegal wood imports entered the United States. The case was dismissed but the groups continued to lobby for forestry regulation in the U.S.-Peru TPA. The anti-environment coalition had similar allegiances. One House Republican


198 Putnam, supra note 98, at 444.


200 Id.

201 Id.
recalled, “what we heard from the Canadians and the Mexicans was that the [Clinton] administration was attempting to portray Congress as demanding side agreements that were enforceable by sanctions. For much of that year, Republican members actually consulted more closely with the Mexicans and Canadians than they did with the Clinton administration. The staff members were having meetings saying ‘Don’t believe [the administration].’”

5. Why these MEAs?

One particular, and unusual, Level II coalition played a major role in the 2007 Amendments to the already negotiated U.S.-Peru TPA: the allegiance between the U.S. timber lobby and environment groups. Crucially, these groups were already united and motivated around the passage of a separate law, the 2008 amendment to the Lacey Act, which unanimously passed the House Committee on Natural Resources in October of 2007. The strangeness of the bedfellows behind this law is well demonstrated by an introduction to an NRDC article on the issue: “Name an environmental law strongly supported by both Republicans and Democrats, America’s timber industry, purchasers of wood products, labor unions, and environmental organizations. Stumped?”

The Lacey Act was first passed in 1900 to combat illegal poaching of game. The 2008 Amendment expanded its scope to cover illegal logging in the global timber industry. The existence of this “ready-made coalition” is a partial explanation for not only why CITES was included on the list of seven required MEAs in the May 10 Agreement, but also why such a disproportionate effort was spent on its enforcement in the U.S.-Peru TPA. One tenth of the text of the May 10 agreement is spent detailing the mandate to “USTR to conclude an Annex to the FTA covering forest sector governance and operations in Peru.”

As one insider to the process noted, figuring out how certain provisions make it into a trade agreement over others often involves

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202 Devereaux et al., supra note 11, at 198 (citing Interview by Charan Devereaux with David Dreier (Mar. 1998)).
205 Interview with Former U.S Trade Representative Official (Mar. 2014).
VI. LOOKING AHEAD: ENVIRONMENTAL PROVISIONS IN MEGA-TREATIES

The inclusion of international environmental obligations within the text of international trade and investment agreements has received increased popular attention with the rise of U.S. participation in “mega treaties.” The Trans-Pacific Partnership (“TPP”) is a trade agreement currently under negotiation between the United States, Canada, and ten other countries around the Pacific Rim.210 The negotiation of the TPP has gone through twenty-one rounds since it was kicked off in 2010.211 The 2013 deadline for completion was missed, though the Ministers and Heads of Delegation for the parties issued a statement in February 2014 that all were “committed to concluding as soon as possible.”212 The Transatlantic Trade and Investment Partnership (“T-TIP”) is a proposed free trade agreement between the European Union and the United States. Negotiations for the agreement began in July 2013 and both parties have indicated that a final agreement could come as early as 2015.213 There has been controversy over the environmental impact of both agreements, particularly the TPP.

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207 Interview with Former U.S Trade Representative Official (Mar. 2014).
209 Id.
211 Adam Behsudi, Two top EU posts decided—21st round of TPP talks in Hanoi—U.S. rice seed dealers can’t shake GMO testing, POLITICO (Sept. 2, 2014 10:02 AM), http://www.politico.com/morningtrade/0914/morningtrade15139.html
A. Trans-Pacific Partnership

The current parties to the TPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Numerous news agencies have reported that the United States has faced significant opposition from its partners in the negotiation of the Environment Chapter. The U.S. demand that the obligations in the environment chapter be subject to the same dispute settlement provisions as commercial violations has met with particular resistance. There are four challenges to reaching agreement on an aggressive environmental chapter: 1) the U.S. is seeking the most expansive environmental commitments sought in any free trade agreement to date; 2) some parties to the TPP are seeking commitments on climate, a particularly challenging issue in domestic U.S. politics; 3) Trade Promotion Authority expired at the end of 2007 and has yet to be renewed; and 4) the TPP is a multilateral rather than bilateral arena.

1. Expansion of Environmental Objectives

USTR has indicated that it considers the May 10 Agreement to be its “marching orders” on environment, despite the fact that the Trade Promotion Authority it was written to amend expired at the end of 2007. A January 2014 Wikileaks release of the draft text of the Environment Chapter indicates that this is mostly true. The U.S. proposal includes commitments to the list of seven original MEAs, though whether or not all of those commitments would be binding is unclear—and controversial. The United States is calling for obligations to “adopt, maintain, and implement measures to fulfill specific MEAs . . . enforceable through the DS [dispute settlement].” The leaked proposal includes obligations related to conservation of plants and wildlife that are similar to those required under the U.S.-Peru TPA. Most interesting is that, in addition to the measures seen in the Peru FTA, the U.S. proposal in the environment chapter lists desired obligations regarding “curbing . . . fisheries subsidies” and

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216 Id.
217 Interview with Former U.S Trade Representative Official (Mar. 2014).
219 Id.
“preventing[ing] overfishing and overcapacity.” These environmental provisions go beyond the original measures of the May 10 Agreement.

On February 20, 2014 a coalition of 122 Democrats from the House of Representatives sent a letter to U.S. Trade Representative Michael Froman reiterating their position that the TPP must include strong environmental measures. The letter was drafted in reaction to the leaked text of the Environment Chapter and concerns that U.S. negotiators had backed down on their goal to have all seven MEAs enforced by binding dispute resolution. “These commitments must be strong, binding and enforceable, and subject to the same dispute settlement procedures as the commercial chapters, including recourse to trade sanctions,” the letter stated. The letter also noted that because the current parties to the TPP make up more than one-third of the global fisheries catch, the Partnership “offers the opportunity to put in place a rules-based, sustainable fishery management system.” The suggestion that the trade agreement should be the tool for shaping a new global fisheries law goes significantly beyond the territory of the May 10 Agreement by creating international environmental obligations without reference to an already negotiated MEA.

2. Climate

The Wikileaks text was followed in February 2014 by a second leak, which purported to summarize the U.S. counter proposal to the draft text made public the month before. One of the most striking edits was on the subject of climate change. The U.S. proposed to rename an entire chapter from “Trade and Climate Change” to “Transition to a Low Carbon Economy.” Text that originally read: “The parties . . . recognize the importance of implementation of their respective commitments under the United Nations Convention on Climate Change (“UNFCCC”) and related legal instruments,” was rewritten in the U.S. version as: “The Parties affirm the importance of moving towards low-emissions

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222 Id.
economies, and recognize the desirability of mutually supportive trade and emissions-reduction policies in this regard."

It seems that TPP members have adopted the U.S. strategy of referencing commitments to multilateral environmental treaties in the text of trade agreements. In a reversal of roles, the U.S. balked at the inclusion of the UNFCCC. The USTR released a statement in response to the leak:

As part of President Obama’s Climate Action Plan, the United States is fully committed and actively working with our partners to negotiate an ambitious agreement in the United Nations Framework Convention on Climate Change. The environment chapter of the TPP presents an opportunity to focus on making progress on key, regional conservation issues and issues where the nexus with trade is clear, such as in our proposals for the first-ever disciplines on fisheries subsidies, and commitments to combat wildlife trafficking and illegal logging.

The decade-old argument that had been repeatedly used to counter fast track authority—that certain (environmental) subjects do not belong in trade agreements—was now used by the Obama Administration to fight climate language in the TPP.

3. TPA Remains Expired

USTR negotiators at the Level 1 game may simply be “looking over their shoulder” at the Level II ratification challenge when they seek to avoid climate language. Climate change regulation remains an extremely controversial topic in domestic U.S. politics. The inclusion of climate commitments may be enough to rally opposition even among those Congressmen who would otherwise like to see the successful completion of the TPP. The fate of the Level II game for the TPP is both crucial and uncertain. To date, Trade Promotion Authority remains expired. While President Obama mentioned hopes for TPA in his

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224 Id.
State of the Union speech in January, however its fate remains uncertain.227

4. Multilateral Arena

TPP success at the Level I game is more uncertain than previous trade agreements because it is the first one in a truly multilateral arena. The dynamics described by Salacuse to explain the prevalence of bilateral agreements over multilateral agreements are now working in reverse. The negotiation is more complicated because there are more players with more issues. More relevant is the fact that weaker nations can join together in their opposition rather than face off against the U.S. alone. The leaked consolidated text of the TPP Environmental Chapter indicates that ten countries—every TPP member except Malaysia—currently oppose the U.S. in its desire to enforce certain MEAs via binding dispute settlement.228

B. The Transatlantic Trade and Investment Partnership

The Transatlantic Trade and Investment Partnership (“T-TIP”) presents a further unpredictable negotiation dynamic with regard to environmental issues. In this agreement, unlike the TPP, the United States is not facing off against a coalition of smaller developing countries, most of whom have weak environmental regulation. Instead, the U.S. is negotiating bilaterally with another powerful state—a powerful state with arguably more stringent domestic environmental regulation. A position paper summarizing the E.U. proposals for the T-TIP “Trade and Sustainable Development” Chapter (the E.U. typically combines labor and environmental provisions into one chapter), was leaked in July 2013.229 The position paper listed a number of MEAs it wishes to include in T-TIP, four of which the U.S. is not a signatory to, and noted that they were “of particular importance in trade negotiations.”230

228 ANALYSIS OF LEAKED ENVIRONMENT CHAPTER, supra note 218.
Despite their “importance,” the E.U. reportedly does not wish to see binding dispute settlement provisions in the chapter(s) dealing with labor and environment. Instead, the T-TIP should recognize “each Party’s right to define and regulate its own domestic levels of environmental and labor protection at the level deemed necessary.” Inside U.S. Trade called the paper “further evidence of the discrepancy between the E.U.’s generally high aims and the degree to which any deal will actually have teeth.”

As discussed above in the section on the general E.U. approach to FTAs, the E.U. has a practice of incorporating the Kyoto Protocol and nonbinding commitments to counter climate change in the text of its FTAs. We have seen from the leaked TPP negotiations that the current U.S. Trade Representative wishes to avoid any mention of the word “climate.” What will happen when two economically powerful nations come to the negotiating table with different environmental agendas? Will the United States agree to hortatory language regarding climate change commitments, which would result in its most significant international obligation to date in that arena—or will the E.U. agree to scrap the mention of climate altogether?

C. Current Consensus on Trade/Investment Linkages and the Environment: Has it Worked?

There are valid arguments on both sides of the debate around the inclusion of binding environmental obligations in international economic agreements. Some see the linkage of trade and environment as a necessary counterweight to the harmful externalities of globalization. Others balk at the idea of American Sierra Club members telling Malaysians what they can and cannot harvest in their own country. They would insist it would be better for Malaysians to write environmental laws under their own sovereign power when they have the income to afford it. This difference in opinion brings us back to the introduction of the two competing theories of trade and environment linkages: the Environmental Kuznets Curve and the pollution haven hypothesis. Before casting judgment on the legalization of environmental norms through economic treaties, one might want to know: Does it work? Is environmental degradation less than it would

\[231\text{Id.}\]
\[232\text{Id.}\]
\[233\text{Id.}\]
\[234\text{GALLAGHER, supra note 4, at 4–7.}\]
otherwise have been in those countries that signed on FTAs under the May 10 template?

The U.S. Government Accountability Office (“GAO”) recently conducted an assessment of the impact of the environmental provisions of trade agreements in four partner countries: Chile, El Salvador, Guatemala, and Peru.\(^{235}\) The GAO observed that, while significant progress had been made in passing environmental laws and establishing environmental institutions,\(^ {236}\) more progress was needed to ensure these laws were being adequately enforced:

Chile, El Salvador, Guatemala, and Peru continue to face environmental challenges, including limited technical capacity and enforcement resources. Chile has taken significant steps to meet its FTA obligations since 2009, while concerns remain about Peru’s capacity to enforce protection of endangered timber species and address emerging deforestation threats in the Amazon. . . . [Notably] the U.S.-Peru bilateral plan to address specific challenges in Peru’s forestry sector, lack[s] time frames and performance indicators to assess progress. \(^ {237}\)

A previous GAO report on four other FTAs with Jordan, Chile, Singapore, and Morocco was released in 2009.\(^ {238}\) While these agreements did not have nearly as ambitious environmental provisions, the GAO observed that, while significant progress had been made on lowering tariffs and increasing government transparency, progress on the environmental objectives was less successful:

The selected partners have improved their environmental laws and made other progress, such as establishment of an environmental ministry and a 400-strong environmental law enforcement force in Jordan, according to U.S. and foreign officials. However, partner officials report that enforcement remains a challenge, and U.S. assistance has been limited. Elements needed for assuring partner progress remain absent. Notably, USTR’s lack of compliance plans and sporadic monitoring, State’s lax management of environmental projects, and U.S. agencies’ inaction to translate environmental


\(^{236}\) Id. at 10–12.

\(^{237}\) Id. at 39.

\(^{238}\) U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-439, FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN (2009).
commitments into reliable funding all limited efforts to promote progress.239

These observations are echoed in much of the literature reviewing the success of the NAFTA environmental side agreements.240 The key criticisms are that the U.S. government neglected to take the initiative to investigate and enforce compliance of the environmental obligations and that there was insufficient allocation of funds to assist in environmental compliance. Gallagher notes that, while Article 22 of NAFTA provides for a dispute resolution process with punitive measures against a party that has “persistently fail[ed] to enforce environmental law,” this Article has never been exercised.241

Gallagher argues that environmentalists, instead of turning away from free trade entirely, should instead push for increased participation of developed countries to support (financially and otherwise) the fledgling environmental institutions of developing nations. “During the NAFTA debates the international community ‘demanded’ that Mexico do more to protect its environment, but only ended up allocating a paltry $3 million per annum to that end.”242 A former USTR official expressed the same sentiment: “On the cooperation dimension it’s important that adequate funding is provided. We need the resources to provide both a carrot and a stick.”243

The increased resources spent on implementing domestic reforms in order to come into compliance with a BIT or FTA are necessarily not being spent elsewhere within the developing state. Is it a good idea to allow the U.S. and E.U. to set the environmental priorities of other nations? One view may be that the support provided for the implementation of these environmental laws can only help bolster environmental governance in the trade partner. However, a competing view is that these reforms displace those that would have otherwise developed in a grassroots fashion spearheaded by stakeholders on the ground. Rodrik has shown that the process of meeting the requirement for integrating into an economic system, like the WTO or NAFTA, can be extremely costly for a developing nation.244 The cost of compliance

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239 Id.
240 See generally GALLAGHER, supra note 4; ANALYSIS OF LEAKED ENVIRONMENT CHAPTER, supra note 218.
241 GALLAGHER, supra note 4, at 77. Though Gallagher originally made this observation in 2004, there have been no Article 22 environmental dispute resolutions initiated since that time.
242 Id. at 92.
243 Interview with Former U.S Trade Representative Official (Mar. 2014).
with external norms can “crowd out” other government spending 
priorities, such as education and public health.245

An analogy can be made to the question of whether the availability of 
international arbitration helps or hurts the development of the domestic 
adjudication system of a host state. Ginsburg, using empirical analysis, 
finds that the dispute resolution provided for under bilateral investment 
treaties are substitutes, rather than complements, for domestic 
institutions, and lead to overall reductions in the quality of governance 
over time.246

VII. CONCLUSION

The practices presented in this paper can be seen as great 
achievements of negotiation and diplomacy. The domestic 
environmental lobby in the U.S. has been successful in shaping an 
international legal mechanism that has the power to counter at least 
some of the harmful environmental impacts of trade liberalization. The 
obligation, precision, and enforcement of otherwise weak multilateral 
environmental agreements and soft law principles are increased through 
a process of legalization of international environmental protection. These 
new environmental provisions increase the obligation upon states to 
create and enforce environmental laws; they often describe, with 
great precision, just how these laws are to be implemented; and they 
increase the amount of delegation given to third parties to determine 
compliance and resolve disputes.

These innovations could also be seen as a necessary broadening of 
the scope of international trade and investment law. Odumosu, for 
example, has argued that the investor state dispute settlement system, 
and ICSID in particular, lacks legitimacy because it is limited by its 
“single economic rationale for investment protection” that is unable, or 
unwilling, to take into account alternative interests.247 The recognition of 
environmental law in the text of BITs is an attempt by states to expand 
the interests that are, at the least, not trampled by international dispute 
resolution and, at the most, enforced by it.

However, these linkages come with some cost, as can be seen from 
the presentation of the fallout over the implementation of the Forest 
Annex of the U.S.-Peru FTA. There are serious threats to state
sovereignty if powers such as the United States are able to use their economic might to force domestic legal action from their trade partners in areas that are only tangentially related to trade. It was no coincidence that CITES was the MEA enforced the most aggressively and the MEA that received the widest domestic U.S. support—from environmentalists, but also the American timber lobby.

Peru’s enforcement of CITES following the signing of the FTA can be seen as proof that “economic interdependence can be leveraged to help manage real political conflict.”\textsuperscript{248} However, one can wonder whether this “leverage” is, in fact, plain coercion and whether or not there is anything wrong with that (a legal realist would likely say no). The very fact that the incorporation of environmental obligations occurs more frequently, and to a great degree, in FTAs rather than in BITs tells a story. The United States is able to get more of what it wants in an FTA precisely because it has more to offer. BITs are less successful bargaining arenas partially because the U.S. already maintains an extremely open investment environment.\textsuperscript{249}

A further concern rising out of these trade/environment linkages is that international treaties may contain a package of provisions that individually would never be adopted through the democratic political processes of the states that ratify them. From one perspective, that insight represents the beauty of international negotiation: the interaction between Level I and Level II preferences leads to trade-offs (issue linkages) that could not otherwise have been achieved on the domestic level. A different take is that trade and investment agreements allow leaders to circumvent the Level II domestic process to the detriment of democracy and transparency. This concern was apparent in the rapid passage of the Peruvian Ninety-nine Decrees, claimed to be necessary to implement the Forest Annex of the U.S.-Peru TPA.

It is clear that the question is not whether trade and environment are linked—because they are—but instead how to best promote global economic growth and a clean environment for the long term. As Destler writes, “[L]inking labor standards to trade agreements is entirely legitimate in a world where globalization is putting increased stress on domestic economic arrangements. . . . To say it is legitimate, of course, does not mean it is effective, at least in the near term.”\textsuperscript{250}

\textsuperscript{248} Feldman, supra note 80 (referencing the hypothetical solution of adjudicating human rights claims in the WTO).
\textsuperscript{249} Kantor, supra note 108, at 59.