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# The Estey Centre Journal of International Law and Trade Policy

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## Trade and Environment: A New Direction for Green Trade

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The United States has integrated environmental policy goals into trade policy for the past 20 years, but policy priorities have evolved over the years. Initial priorities were focused on hypothetical environmental effects of trade liberalization, whereas recent priorities are focused on tangible environmental concerns that are unrelated to trade liberalization but that justify urgent action. This shift in environmental policy priorities has merit but raises several important policy, political, and practical issues for future trade policy that have not yet been fully examined, and this article seeks to fill this gap.

Keywords: environmental policy, green trade, trade liberalization, Trans-Pacific Partnership

### Introduction

As the United States makes progress on negotiating two major regional free trade agreements, the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP) (see e.g. Statement of the Ministers, 2013), and the Obama administration lays the groundwork for submitting the agreements to Congress (Obama Asks for Fast-Track, 2013), one group of traditional skeptics of trade liberalization – environmentalists – is gearing up for a fight over passage of the proposed “fast track” legislation (Labor Unions, Enviro, 2014). Fast track legislation

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offers environmentalists perhaps their best chance at influencing the policy content of the trade agreements and as such, they are focused on identifying environmental priorities and defining minimally acceptable environmental policy provisions for these agreements (see e.g. Barfield, 2014). Inclusion of environmental policies within the TPP and TTIP should be a routine undertaking given that the United States has been integrating environmental policy goals into trade policy for over two decades, starting with North American Free Trade Agreement (NAFTA) in 1993 (OECD, 2007). This past precedent, however, may have limited import for the upcoming debate because trade-related environmental policy priorities have changed notably since the early 1990s.

For NAFTA, the priorities were addressing a broad range of hypothetical environmental effects of trade liberalization such as industry flight, pollution havens, downward harmonization, and conflicts between environmental laws and trade regime rules (see e.g. Audley, 1997). By contrast, for more recent trade agreements, environmentalists have focused on a narrower set of tangible environmental policy concerns that may not be linked directly to trade liberalization but rather are environmental issues that need urgent attention from the international community. This shift in environmental policy priorities has merit but raises several important policy, political, and practical issues that have not yet been fully examined. This article seeks to fill this gap and is organized as follows: first, an overview of historical efforts to “green” trade, followed by a discussion of environmental policies developed for U.S. free trade agreements over the past 20 years and how they have evolved, and lastly a discussion of emerging policy priorities and the implications of these priorities for future trade agreements.

### **Efforts to Green Trade – NAFTA to Present**

The The NAFTA, negotiated by the United States, Mexico, and Canada in the early 1990s, provides a logical starting point for discussing the greening of U.S. trade because it was the first trade agreement to inextricably and explicitly integrate environmental protection goals into trade policy (OECD, 2007). In conjunction with this trade agreement, the United States negotiated a suite of environmental policies that were intended to ensure that trade liberalization in North America did not foster increased environmental degradation, primarily in Mexico. Given the lack of any prior policy models to guide policy development at that time, the environmental policies for NAFTA were crafted to address the trade-related environmental concerns identified

primarily by the environmental lobby in the United States (see e.g. Audley, 1997; Mayer, 1998).

At that time, the most salient concern was lax enforcement of domestic environmental laws in Mexico; however, other concerns that were raised included insufficient levels of funding for environmental protection and remediation in Mexico, potential use of trade regime rules to challenge legitimate environmental regulations and standards as non-tariff barriers to trade, accelerated exploitation of natural resources due to liberalization of certain sectors, a general increase in levels of pollution due to economic growth, and lack of environmental expertise, transparency, and public participation in environment-related trade disputes (see e.g. National Wildlife Federation, 1990; U.S. Trade Representative, 1992; Audley, 1997). The environmental policies ultimately developed for NAFTA addressed many of these environmental concerns, resulting in an innovative and far-reaching set of policies that many envisioned would serve as a template for future trade agreements (Audley, 1997; Johnson & Beaulieu, 1994).

Since NAFTA, the United States has concluded 12 other regional or bilateral trade agreements with 16 countries (Free Trade Agreements, n.d.); however, these agreements did not engender an intense debate over environmental issues in the way NAFTA had. The lack of debate was due largely to the fact that by the time the United States negotiated these agreements, it was clear that the dire predictions by environmentalists had not materialized under NAFTA (see e.g. Gallagher, 2004). As a result, the political saliency of many of the environmental issues declined by the mid-2000s (see e.g. Abetti, 2008), along with interest in trade-related environmental policies during this time period, with exception of the CAFTA-DR (see e.g. Baucus, 2003; Oppose the Central American Free Trade Agreement, 2004). Although the saliency of trade and environmental issues declined, the precedent set by NAFTA dictated that environmental policies would continue to be included in all subsequent trade agreements. As such, trade agreements up through the CAFTA-DR closely followed NAFTA's policy framework.

Since the CAFTA-DR, new environmental policy priorities have emerged for more recent trade agreements that differ from the earlier policy priorities (see e.g. Environmental Groups Laud, 2007). In general, the newer priorities are more focused on natural resources issues, in particular the illegal exploitation of and trade in natural resources, and fulfillment of obligations under multilateral environmental agreements (MEAs) (see e.g. U.S. Trade Representative, 2007). The policy priorities identified thus far for the TTP and TTIP mirror the more recent priorities as well as include some emerging priorities (see e.g. U.S. Environmental Groups, 2010; USTR Green

Paper, 2011). These recent and emerging priorities have allowed environmentalists to regain some influence within the trade policy domain while focusing on more politically salient, tangible, and urgent environmental problems.

Overall, the environmental policies developed for U.S. trade agreements over the past twenty years have been influenced by both the policy framework established under NAFTA and newer policy priorities identified by the environmentalists since the mid-2000s. Thus, there is some policy variation across agreements. However, even for earlier trade agreements that mirrored NAFTA environmental policies, the policies varied. To elucidate these variations and provide the context for understanding the significance of emerging policy priorities, a qualitative analysis of the environmental policies developed for the thirteen U.S. free trade agreements concluded since 1992 is presented in the technical annex to this article and is summarized below.

### **Analysis of Environmental Policies**

Collectively, the intent of environmental policies developed for U.S. trade agreements has been to strengthen environmental protection regimes of trading partners through a mixture of soft law provisions and enforceable commitments that are supported by voluntary environmental cooperation initiatives aimed at building capacity of trading partners on a range of environmental issues. As is illustrated by tables 1 through 4 in the technical annex, most of the environmental policies developed to date have mirrored the policies developed under NAFTA; however, not all NAFTA policies have been carried forward into subsequent trade agreements. The policies that have been carried forward now reflect a “core” set of policies that are included in all trade agreements (see e.g. USTR Touts TPP Environment Proposal, 2011). More recent trade agreements since the mid-2000s, however, also include newer policies that go beyond NAFTA policies. To facilitate discussion of the policy variations across trade agreements, the policies are categorized based on substantive content as *aspirational*, *cooperative*, *quasi-regulatory*, and *permissive*.

All of the trade agreements have included policies from each category, but quasi-regulatory policies have varied the most. These policies have been and remain the most politically salient as they are focused on ensuring the effective enforcement of domestic environmental laws by the trading partners and are enforceable under a state-to-state dispute resolution process with recourse to sanctions or fines (Johnson & Beaulieu, 1996). One major change to these policies has been their ambit: policies for trade agreements from NAFTA to CAFTA-DR had a very broad ambit, covering all domestic environmental laws, whereas more recent policies cover only domestic laws that fulfill obligations under a limited set of “common” MEAs (see Free Trade

Agreements, n.d.; U.S. Trade Representative, 2007). Although the more recent policies cover fewer domestic laws, they encompass adoption, maintenance, and implementation of MEA obligations as well as their enforcement.

Another notable change in the quasi-regulatory policies has been the inclusion of a set of highly prescriptive and enforceable obligations related to forest sector governance in the Peru FTA to improve compliance with one particular MEA, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (see e.g. Jinnah, 2011; Environmental Investigation Agency, 2010). Overall, the trend for quasi-regulatory policies has been to focus on effective enforcement of a more limited set of domestic laws while seeking to harmonize those laws upward to international standards. Moreover, in instances where the existing domestic laws fall drastically short of the international standards, the environmental policies include other enforceable commitments to achieve compliance with MEA obligations.

The aspirational, cooperative, and permissive policies are soft law commitments and are largely legacy policies from NAFTA. These policies are not politically salient but have been retained due to established precedent. Of these policies, the cooperative policies have the greatest potential to foster changes in environmental protection regimes of trading partners. Although cooperative policies have varied a little over the years, the level of cooperation actually undertaken is determined primarily by funding for implementation rather than policy content (Government Accountability Office, 2009). In addition to changes in substantive policy content, policies have varied in terms of policy locus, institutions established to administer the policies, and funding resources, all of which ultimately influence the effectiveness of the environmental policies.

Overall, the environmental policies developed for U.S. trade agreements since NAFTA have remained fairly consistent over time, but more recent trade agreements have included some newer quasi-regulatory policies that may be more effective at strengthening environmental protection regimes of trading partners compared to the legacy policies of past trade agreements (see e.g. Allen, 2012; Aspinwall, 2013; Johnson, et al., 2004; Jinnah, 2011). Building on the trends under the newer policies, the environmental policy priorities identified thus far for the TPP and TTIP go beyond what was included under the Peru, Panama, S. Korea, and Colombia trade agreements and are discussed in more detail below.

### **Environmental Policy Priorities for the TPP and TTIP**

Negotiations completed to date on the TPP and TTIP as well as the proposed fast track legislation highlight several environmental policy priorities for these trade agreements

that build on recent policy trends or present emerging priorities not previously integrated into U.S. trade policy (see e.g. Eleven Senators Push, 2012). One top policy priority for both trade agreements will be fulfilling obligations under seven “common” MEAs (Bipartisan Congressional Trade Priorities Act, 2014), which was also a priority for the most recent trade agreements with S. Korea, Peru, Panama, and Colombia (see U.S. Trade Representative, 2007). The negotiation of the TTIP is less advanced than the TPP, thus other specific environmental policy priorities have not yet been identified for this agreement (see e.g. Kraemer & Gerstetter, 2013; European Union, n.d.; U.S. – E.U. High Level Working Group on Jobs and Growth, 2013).

A For the TPP several new policy priorities have emerged related to overfishing, illegal trade in wildlife and plant products, and illegal logging (U.S. Environmental Groups, 2010; U.S. Tables Parts, 2011; Addressing Conservation Challenges, 2013; USTR Green Paper, 2011). The extent to which these problems are present in the TPP countries varies, but they can be substantial for some countries, such as illegal logging in Peru and illegal wildlife trade in Malaysia and Vietnam (Interim Environmental Review, 2013). These problems are not uniformly present in all countries and are not likely to worsen solely due to the TPP (Interim Environmental Review, 2013), but they are viewed as serious, long-standing global problems that are not being dealt with effectively and need urgent attention by the international community (see e.g. USTR Green Paper, 2011).

Overfishing has led to a significant decline of fisheries worldwide despite multilateral efforts to conserve fish stocks through regional fisheries management organizations; over 60 percent of fishing stocks are fully exploited or depleted (see e.g. Food and Agriculture Organization, 2009; Murawski, 2010). Three specific policy goals identified for addressing overfishing under the TPP are reduction of domestic fishing subsidies, reduction of illegal, unregulated, and unreported (IUU) fishing, and reduction of shark-finning (USTR Green Paper, 2011). Illegal trade in wildlife and plants is another pressing global problem that is only addressed on a limited basis under CITES for listed species (Eberhardt, 2013). The primary policy goal for reducing illegal trafficking in wildlife and plants is restricting imports of resources illegally harvested in countries of origin, similar to import bans in the United States under the Lacey Act (U.S. Environmental Groups, 2010). Lastly, the global market for illegal logged timber is valued at \$100 billion (Interpol Launches Crackdown, n.d.), which has led to considerable deforestation (see e.g. Felbab-Brown, 2011) with its attendant impacts on biodiversity. The primary policy goal for dealing with illegal logging is strengthening the institutional frameworks for forest conservation,

management, production, and trade in each of the TPP countries (USTR Green Paper, 2012).

### **Implications of Recent and Emerging Policy Priorities for Future Trade Agreements**

There is no doubt that the recent and emerging environmental policy priorities and goals address very legitimate and serious environmental issues and can contribute to upward harmonization of environmental laws of TPP countries; however, their inclusion within the context of a regional trade agreement raises several important policy, political, and practical implications, some of which are already becoming apparent. The United States proposed many of these policy priorities during the TPP negotiations in 2011 (see e.g. U.S. Tables Part, 2011; USTR Green Paper, 2011), but the other TPP countries have resisted their inclusion within the trade agreement (Froman Tamps Down, 2013; U.S., TPP Partners Working, 2013; USTR Acknowledges Objections, 2012), and some of the policy goals have not been included in the recent fast track legislation (Bipartisan Congressional Trade Priorities Act, 2014), indicating that the Obama administration may be backing away from supporting some of these goals.

These recent and emerging policy goals have several important implications that have not been fully examined. Opposition by the other TPP countries is likely due to concerns over infringement of state sovereignty. Additionally, the recent experience with implementation of environmental policies of the Peru FTA indicates that stronger environmental commitments are not easily implemented and can have unintended consequences that may undermine domestic political processes. Other implications of new environmental policy priorities are their potential to undermine the general credibility and effectiveness of the multilateral system for managing environmental issues (see e.g. Jinnah, 2011), to create differential environmental policy obligations on trading partners (see e.g. U.S. TPP Environment Proposal, 2011), to create enforceable obligations that require substantial funding allocations and assistance, and to place important MEA or other environmental commitments under the purview of non-environmental government agencies that may not have the expertise or inclination to ensure effective implementation of obligations (see e.g. Allen, 2012 for NAFTA environmental policies). These implications are discussed below.

### **Fulfilling Multilateral Environmental Agreement Obligations**

The fulfillment of MEA obligations has always been a priority policy goal for U.S. trade agreements (see e.g. The NAFTA: Report on Environmental Issues, 1993; U.S. *Estey Centre Journal of International Law and Trade Policy*

Trade Representative, 2007); however, past environmental policies focused on only one issue: allowing trading partners to honour MEA obligations when the obligations are inconsistent with trade agreement rules. While this is an important policy goal, it is reactive rather than proactive, does little to ensure MEA obligations are implemented in the first place, and more importantly, deals with a hypothetical concern that has never materialized (see e.g. Eckersley, 2004). Since 2007, the United States has integrated more proactive and enforceable policies on MEAs that require trading partners to adopt, maintain, and enforce regulations to fulfill obligations under seven “common” MEAs (U.S. Trade Representative, 2007), and the draft negotiating objectives for the TPP and TTIP also include these enforceable policies (Bipartisan Congressional Trade Priorities Act, 2014).

These more recent policies are intended to strengthen multilateral efforts to harmonize upward certain domestic laws to uniform international standards and ultimately lead to policy convergence (see e.g. Bechtel & Tosun, 2009). According to Jinnah (2011), these environmental policies create new linkages that can strengthen global environmental governance and enhance MEA effectiveness. On the negative side, however, these linkages can also have a chilling effect on future MEA negotiations if countries anticipate future linkages between MEAs and trade agreements (Jinnah, 2011). At the same time, the use of an external mechanism such as a trade agreement to enforce MEAs may undermine the credibility and effectiveness of the multilateral system for managing environmental issues by removing the implementation of MEAs from the purview and control of the international community. In addition, these environmental policies subordinate MEAs to the trade policy of one country, whose interests and priorities may diverge from those of other MEA countries. Lastly, although the United States is providing important leadership on implementation of MEA obligations, power asymmetries between the United States and its trading partners can easily evolve into coercion and infringement of state sovereignty (see e.g. Jinnah, 2011; see also Richardson, 1993). Thus, the use of environmental policies under U.S. trade agreements to ensure compliance with MEA obligations has numerous negative effects that must be weighed against the positive benefits that may arise from these policies.



## **Variable Obligations for Trading Partners**

Policies to adopt, maintain, and enforce domestic laws to fulfill MEA obligations under the TPP and TTIP also create highly variable binding obligations for the trading partners because not all countries are parties to the set of “common” MEAs that have been covered by this policy (U.S. TPP Environmental Proposal, 2011). The recent trade agreements with Peru, S. Korea, Colombia, and Panama included the same policy, but it did not create variable obligations because all trading partners were parties to the common MEAs with one exception (see table 8). By contrast, only two of the seven MEAs are truly common for the TPP countries (see table 9), and the TTIP countries would likewise have variable binding obligations for MEAs (see table 10). While there are numerous reasons why some countries may not be parties to the “common” MEAs, this particular policy priority would create fewer binding obligations for some countries, which raises concerns about fairness and equity. At the same time, there are important legal issues that need to be resolved for these policies, such as whether a nonmember country could challenge a member country to a MEA to fulfill its commitments under the dispute resolution process (see U.S. TPP environmental proposal, 2011). Thus, MEAs that are not “common” for trading partners may not be good candidates for inclusion in these environmental policies.

## **Sovereignty and Domestic Democratic Processes**

Ever since NAFTA, U.S. trading partners have been concerned about the inclusion of enforceable environmental obligations that could infringe on state sovereignty by overriding domestic enforcement decisions, by-passing domestic judicial systems, overriding constitutional guarantees of due process (see e.g. Richardson, 1993), undermining democratic processes, or producing deep regulatory intrusion (see e.g. Jinnah, 2011). All international agreements infringe on sovereignty to some degree (see e.g. Krasner, 1999), but highly prescriptive obligations that are enforceable under a dispute resolution process have a greater potential to infringe on sovereignty than weak soft law policies. For the more recent or emerging policy priorities, there are two main concerns related to sovereignty and democratic traditions.

One concern is that commitments to enact far-reaching changes to domestic laws or institutions may subvert democratic processes, which typically involve time-consuming efforts to build consensus on proposed changes. The potential to undermine these processes is even greater for countries with weak democratic traditions, and implementation of the forest sector policies under the Peru trade agreement provides a cautionary example of this potential problem (U.S., Peruvian NGOS, 2009). In 2008, the Peruvian president was granted powers to unilaterally

enact legislation needed to fulfill the forest sector commitments, but the power was severely abused, resulting in laws without adequate public or political consultation that weakened the protection of forest resources in Peru (see e.g. Hughes, 2010; Jinnah, 2011). The forest sector policies created “perverse incentives for the Peruvian government to subvert standard national regulatory developed channels” (Jinnah, 2011, p. 207). Violent protests over the laws by indigenous groups resulted in the deaths of at least 30 Peruvians (Environmental Investigation Agency, 2010). The United States played a key role in shaping the legislation and other institutional reforms, creating the impression of “one country drafting forest law for another” (as cited in Jinnah, 2011, p. 207). Based on this experience, inclusion of similar policies in future trade agreements should be viewed with caution (see e.g. Jinnah, 2011).

The second sovereignty concern is a more general one pertaining to imposition of a developed country’s values onto developing countries, which is viewed by developing countries as a new form of imperialism (see e.g. Gonzalez, 2001). Sovereignty affords each country the authority to set its standards and laws based on its own national interests and values (see e.g. Butler, 1992). Many of the emerging policy priorities, however, may impose U.S. environmental standards on trading partners because they are not adequately covered under various MEAs, which are the preferred mechanisms for voluntary upward harmonization of environmental standards via agreed upon international norms (see Eberhardt, 2013), and the U.S. has domestic laws that provide a policy model for the trade agreements (U.S. Environmental Groups, 2010). Thus, in the absence of established international standards, the potential exists for the **United States** to impose its own standards on the other TPP countries.

### **Financial Support, Expertise and Institutional Capacity**

Implementation of emerging policy priorities on illegal logging, illegal trade in wildlife and plants, and overfishing will require considerable dedicated resources and support for a long period of time to ensure their effective implementation, especially for countries that lack expertise, resources, and institutional capacity, which has been the case for policies to improve forest sector governance in Peru (see e.g. Hughes, 2010; Jinnah, 2011). The forest sector commitments required substantial changes to domestic laws and institutions within 18 months after the Peru trade agreement took effect, but actual implementation of the commitments has been arduous, resource intensive, and time-consuming (see e.g. U.S. Monitoring Situation, 2010; U.S., PERU Agree to Illegal Logging Plan, 2013). The United States has provided full-time staff with expertise in forestry management along with \$60 million in assistance to support

implementation, but the obligations are still not fully implemented after six years of efforts (see *The United States and Peru Reach Agreement*, 2013; *Progress under the Forest Annex*, 2013; *U.S. and Peru*, 2009; *U.S. and Peru*, 2011). Because these policies are driven by the United States, there has always been an expectation that the United States will provide the funding and support needed to ensure their implementation (see e.g. *Government Accountability Office*, 2009). Dedicated new funding from the United States for past trade agreements has been quite limited while the use of reprogrammed funds constitutes a shell game, where existing programs are defunded in order to support environmental policies under the trade agreements. The trend towards making these policy commitments enforceable will make it difficult for countries to exercise discretion in fulfilling their obligations. Therefore, emerging policy priorities will likely come with a hefty price tag attached for the U.S. to provide needed resources, expertise, and institutional capacity building for implementation.

### **Oversight by Trade Ministries**

The vast majority of environmental policies associated with U.S. trade agreements are located within an environmental chapter of the trade agreement itself, which places them under the purview of the trade ministries. Historically, trade ministries have not been supportive of strong environmental policies and largely view these policies as the “price” for getting the trade agreement (see e.g. *Allen*, 2005). Their primary concern has been ensuring that environmental obligations do not undermine the benefits of trade liberalization (see e.g. *USA\*NAFTA*, 1993; *Chemical industry Coalition*, 1993). Over time, however, trade officials have become more comfortable with inclusion of environmental policies as their locus has moved to the trade agreement, which allows for a high degree of policy control (see e.g. *Allen*, 2012; *Schorr*, 2000; *U.S. Groups Criticize*, 2010 for use of dispute resolution process). At the same time, the trade ministries lack expertise to oversee implementation of environmental policies, as was clearly demonstrated in the Peruvian experience to implement forest sector policy commitments. Ongoing efforts to implement these policies have succeeded only because of extensive assistance from other line ministries and continued pressure from environmentalist (see e.g. *U.S. and Peru*, 2009; *U.S. and Peru*, 2011; *U.S., PERU Agree to Illegal Logging Plan*, 2013). Thus, the inclusion of highly technical emerging policy priorities in trade agreements may create an inherent bias against effective implementation from the onset.

## **Conclusions**

Twenty years ago, environmentalists made dire predictions of industry flight, pollution havens, and downward harmonization of domestic laws under NAFTA, creating the political imperative for integration of environmental protection goals into U.S. trade policy. Although these apocalyptic predictions never materialized, the imperative has remained to integrate these two policy domains. The environmental policies for U.S. trade agreements over the years have mirrored many of NAFTA's environmental policies, but they have also evolved over the years to address other environmental issues that are not directly related to trade liberalization but are widely viewed as needing urgent attention from the international community. Past precedent guarantees that a suite of environmental policies will be integrated into the TPP and TTIP, and these environmental policies will consist of a mix of legacy policies that have been carried forward from past trade agreements as well as policies that reflect recent and emerging environmental policy priorities, such as fulfilling obligations under MEAs, reducing overfishing, illegal logging, and illegal trade in wildlife and plants. The legacy policies are soft law commitments that are implemented on a discretionary and historically limited basis by the trading partners. The recent and emerging environmental policy priorities, however, are likely to be more prescriptive and binding policies that have already been resisted by TPP countries during negotiations to date. These recent and emerging environmental policy priorities have considerable merit, with their focus on pressing environmental issues; however, these policy priorities by virtue of their focus and binding nature raise several important policy, political, and practical implications that have been outlined in this article.

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