

## Article

# The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?

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## I. INTRODUCTION

As nations attempt to rebound from the global recession of the late 2000s, political leaders continue to scramble to improve their domestic and supranational economies.<sup>1</sup> Governments have confronted “the difficult task of spurring current growth and employment without saddling their economies with so much debt that they sacrifice long-term growth and financial stability.”<sup>2</sup> The Office of the United States Trade Representative (USTR), along with economists and policy analysts, believe that free trade agreements (FTAs)<sup>3</sup> offer a sensible means to spur economic growth, trade, and investment,<sup>4</sup> thereby adding jobs and increasing prosperity throughout affected areas.<sup>5</sup> FTAs eliminate barriers to trade

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1. Josh Bivens, Andrew Fieldhouse, & Heidi Shierholtz, *From Free Fall to Stagnation*, ECON. POLICY INST. (Feb. 14, 2013), <http://www.epi.org/publication/bp355-five-years-after-start-of-great-recession/>.

2. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last visited Oct. 18, 2013).

3. WILLIAM H. COOPER, CONG. RESEARCH SERV., RL31356, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 1-2 (2012) (defining an FTA as an agreement between two or more countries that reduces or eliminates government interference in trade).

4. *Id.* at 9-10; *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, <http://www.ustr.gov/trade-agreements> (last visited Oct. 19, 2013).

5. CONG. RESEARCH SERV., RL31356 at 1–2.

between countries.<sup>6</sup> Contrary to their name, however, they may pose costly side effects when implemented improperly.<sup>7</sup>

FTAs can greatly increase a country's exports by reducing or eliminating import quotas, export subsidies, and protective tariffs.<sup>8</sup> The United States actively promotes FTAs<sup>9</sup> as an excellent way to open up foreign markets to exporters.<sup>10</sup> In 2010, 41% of all U.S. exports went to FTA partner countries,<sup>11</sup> with exports to such countries growing at a faster rate than

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6. *Id.* at 9-10.

7. See *Americans Are of Two Minds on Trade*, PEW RES. CENTER (Nov. 10, 2010), <http://www.pewresearch.org/2010/11/09/americans-are-of-two-minds-on-trade/>; Joseph Stiglitz, *So-called Free Trade Talks Should Be in the Public, Not Corporate Interest*, GUARDIAN ECON. BLOG (July 5, 2013), <http://www.guardian.co.uk/business/economics-blog/2013/jul/05/free-trade-talks-public-corporate-interest>.

8. See *Free Trade Agreements*, INT'L TRADE ADMIN., DEP'T OF COMMERCE, <http://trade.gov/fta/> (last visited Oct. 19, 2013); See, e.g., ORG. FOR ECON. COOPERATION & DEV.[OECD], CHINA IN THE WORLD ECONOMY: AN OECD ECONOMIC AND STATISTICAL SURVEY 761-65 (2003) (demonstrating the augmentation of exports and economic welfare in wake of the reduction of quotas and tariffs in China between 1996 and 2000); Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement* (Nat'l Bureau of Econ. Research, Working Paper No. 3914, 1991), available at [http://www.nber.org/papers/w3914.pdf?new\\_window=1](http://www.nber.org/papers/w3914.pdf?new_window=1) ("A reduction in trade barriers generally will affect the environment by expanding the scale of economic activity, by altering the composition of economic activity, and by bringing about a change in the techniques of production.").

9. CONG. RESEARCH SERV., RL31356 at 1-2 (noting that FTAs have played an integral role in U.S. foreign policy since 1994).

10. See INT'L TRADE ADMIN., *supra* note 8; See, e.g., Michael J. Boskin, Op-Ed, *World Watches Trans-Atlantic Free Trade Talks*, JAPAN TIMES, July 28, 2013, [www.japantimes.co.jp/opinion/2013/07/28/commentary/world-watches-trans-atlantic-free-trade-talks/#.UgEqbmR4Yap](http://www.japantimes.co.jp/opinion/2013/07/28/commentary/world-watches-trans-atlantic-free-trade-talks/#.UgEqbmR4Yap) ("[The Trans-Atlantic Trade and Investment Partnership] would eliminate all trade tariffs and reduce nontariff barriers, including in agriculture; expand market access in services trade; bring about closer regulatory harmonization; strengthen intellectual-property protection; restrict subsidies to state-owned enterprises; and more."); Marjorie Olster, *U.S. Hopes Free Trade Negotiations Will Drive Changes in Europe's Economy to Promote Growth*, ASSOCIATED PRESS, July 30, 2013, available at <http://bigstory.ap.org/article/us-hopes-trade-talks-will-spur-changes-europe> ("The U.S. hopes negotiations for a free trade deal with the European Union will drive growth-oriented reforms in the EU economy, the top American trade official said Tuesday. In a similar vein, U.S. Trade Representative Michael Froman said China's recent agreement to negotiate a bilateral investment treaty with the United States is a chance to press for economic reforms in the Asian giant that could level the playing field for American businesses.").

11. See INT'L TRADE ADMIN., *supra* note 8 (noting that FTAs continue to become increasingly important to the American economy).

those to the rest of the world.<sup>12</sup> The United States currently maintains FTAs with twenty countries,<sup>13</sup> and in the wake of Senate confirmation of Michael Froman as Trade Representative, the USTR appears ready to actively negotiate additional agreements.<sup>14</sup> The Trans-Pacific Partnership (TPP), one such agreement currently under negotiation, stands to become the largest free trade agreement in the world.<sup>15</sup>

The negotiating history of the TPP dates back to 2005 when New Zealand, Singapore, Chile, and Brunei signed an FTA known as the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP).<sup>16</sup> The TPSEP's founding members agreed to an accession clause that promoted accession by other countries.<sup>17</sup> Negotiations for the current, expanded version of this agreement, now known as the Trans-Pacific Partnership or TPP, began in 2009,<sup>18</sup> with new negotiating partners added in the years since.<sup>19</sup> Today there are eleven negotiating partners: the original four members, the United States, Australia, Canada, Malaysia, Mexico, Peru, and Vietnam.<sup>20</sup> The TPP is designed to expand. As talks progress,<sup>21</sup> the potential for additional members continues. Currently the

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12. *Id.*

13. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 4.

14. *Id.*; Jim Abrams, *Michael Froman Confirmed as U.S. Trade Representative*, HUFFINGTON POST, June 19, 2013, [http://www.huffingtonpost.com/2013/06/19/michael-froman-confirmed\\_n\\_3469031.html](http://www.huffingtonpost.com/2013/06/19/michael-froman-confirmed_n_3469031.html).

15. *What is the Trans-Pacific Partnership?*, CBC NEWS, <http://www.cbc.ca/news/world/what-is-the-trans-pacific-partnership-1.1147888> (last updated June 21, 2012, 9:49 AM).

16. *Trans-Pacific Partnership (TPP) Negotiations*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/> (last visited Oct. 19, 2013).

17. Ariella Park, *Explainer: What is the Trans-Pacific Partnership?*, AMERICAS SOCIETY/COUNCIL OF THE AMERICAS (Apr. 26, 2013), <http://www.as-coa.org/articles/explainer-what-trans-pacific-partnership>.

18. *Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-outreach-and-updates> (last visited Oct. 18, 2013) [hereinafter U.S. TRADE REPRESENTATIVE, TRANS-PACIFIC PARTNERSHIP].

19. IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, *THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (2012).

20. *Id.*

21. There have been 18 rounds of negotiations, the last taking place in July 2013 in Kota Kinabalu, Malaysia. See U.S. TRADE REPRESENTATIVE, TRANS-PACIFIC PARTNERSHIP, *supra* note 18.

admission of Japan is facing intense debate.<sup>22</sup> With the admission of more member countries, the potential for the TPP to widen its geographic and economic influence on the zone of free trade will grow.<sup>23</sup>

Enacting the expanded version of the TPP would likely have significant global economic effects.<sup>24</sup> The existing TPP countries have a combined GDP of close to \$20 trillion and a combined population of over 650 million.<sup>25</sup> Experts speculate that “if enacted, the TPP would eliminate 11,000 tariff lines among the parties” and “could serve as a template for future trade pacts among countries in the [Asian-Pacific region],”<sup>26</sup> an area that “accounts for nearly 60% of global GDP and roughly 50% of international trade.”<sup>27</sup> The Asian-Pacific market is one of the fastest growing in the world; goods traded in the market have “increased 300% since 1990 with a 400% increase in global investment in the region.”<sup>28</sup> Involving Pacific countries in the TPP would open additional markets to the United States and help to alleviate the United States’ staggering \$558 billion trade deficit in goods and services remaining from 2011.<sup>29</sup>

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22. *A TPP Stimulus For Japan*, WALL ST. J., Sept. 6, 2012, available at <http://online.wsj.com/article/SB10000872396390443819404577632953734008664.html>.

23. Deborah Elms, NAT'L BUREAU OF ASIAN RESEARCH, *Getting the Trans-Pacific Partnership Over the Finish Line*, NBR ANALYSIS BRIEF, Oct. 22, 2012, available at [http://www.nbr.org/publications/nbranalysis/pdf/brief/102212\\_Elms\\_TPP.pdf](http://www.nbr.org/publications/nbranalysis/pdf/brief/102212_Elms_TPP.pdf).

24. See *The Significance of the Trans-Pacific Partnership for the United States: Hearing on U.S. Trade Strategy: What's Next for Small Business Exports? Before the H. Small Bus. Comm.*, 112th Cong. (2012) (testimony of Joshua Meltzer, Fellow of Global Economy and Development at the Brookings Institute), available at <http://www.brookings.edu/research/testimony/2012/05/16-us-trade-strategy-meltzer>; Meredith Kolsky-Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27, 28-29, 51-52 (2011).

25. Christopher Sands, *How the Trans-Pacific Partnership Will Change Canada*, HUFFINGTON POST (CANADA) June 19, 2012, available at [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=9003](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=9003); *Trans-Pacific Partnership Agreement Negotiations*, AUSTRALIAN GOV'T DEPT OF FOREIGN AFF. & TRADE, <http://www.dfat.gov.au/fta/tpp/> (last visited Oct. 19, 2012).

26. See IAN F. FERGUSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, *THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (2012).

27. *Id.*

28. *Id.*

29. Robert E. Scott, *U.S. Trade Deficit Up in 2011, China Accounted for Three-fourths of Rise in Non-oil Goods Trade Deficit*, ECON. POLICY INST. (Feb. 10, 2012), <http://www.epi.org/publication/trade-deficit-2011-china-accounted-fourths/>.

FTAs have the ability to affect more than just trade.<sup>30</sup> In addition to increased trade flows, FTAs promote innovation, competition, growth, and economic freedom.<sup>31</sup> A uniform FTA “foster[s] a wellspring of freedom, opportunity, and prosperity” that benefits member nations as well as citizens at-large.<sup>32</sup> Despite the significant economic impacts of FTAs, they can also negatively influence areas such as the environment.<sup>33</sup> Since the dawn of industrialization, as trade, investment, and globalization have boomed, so too have concerns over their environmental impact.<sup>34</sup> Environmental indicators show that climate change, conservation, energy, pollution, and resource depletion are all directly related to trade.<sup>35</sup> Climate change, biodiversity, and glacier melt worsen as global trade increases,<sup>36</sup> ultimately leading to resource depletion, plant and animal extinction, flooding, drought, and starvation.<sup>37</sup> According to a DARA and Climate Vulnerable Forum report, if current trends persist, more than 100 million deaths may be attributable to climate change and a carbon-intensive economy by 2030.<sup>38</sup> The economic effects of climate change loom large,

30. See *Responsible Trade Program: Trans-Pacific Partnership Agreement*, SIERRA CLUB, <http://www.sierraclub.org/trade/trans-pacific-partnership-agreement.aspx> (last visited Oct. 19, 2013).

31. Scott L. Baiera & Jeffrey H. Bergstrand, *Do Free Trade Agreements Actually Increase Members' International Trade?*, J. OF INT'L ECON., Oct. 2004, at 1, available at [http://www3.nd.edu/~jbergstr/Working\\_Papers/BaierBergstrandFTA2Oct2004.pdf](http://www3.nd.edu/~jbergstr/Working_Papers/BaierBergstrandFTA2Oct2004.pdf) (“Stated succinctly, this estimate suggests that an FTA will on average increase two member countries’ trade about 86 percent after 15 years.”); Joanne Gowa & Edward D. Mansfield, *Power Politics and International Trade*, 87 AM. POL. SCI. REV. 408, 416 (1993) (“[Free trade alliances] exert a direct, statistically significant, and large effect on bilateral trade flows.”).

32. Denise H. Froning, *The Benefits of Free Trade: A Guide for Policymakers*, HERITAGE FOUNDATION, <http://www.heritage.org/research/reports/2000/08/the-benefits-of-free-trade-a-guide-for-policymakers> (last visited Oct. 19, 2013).

33. See SIERRA CLUB, *supra* note 30.

34. U.N. ENV'T PROGRAMME [UNEP], *Key Economic Indicators*, UNEP Y.B. 2012: EMERGING ISSUES IN OUR GLOBAL Env't 51–65 (2012), available at [http://www.unep.org/yearbook/2012/pdfs/UYB\\_2012\\_CH\\_4.pdf](http://www.unep.org/yearbook/2012/pdfs/UYB_2012_CH_4.pdf).

35. SIERRA CLUB, TRADING AWAY OUR CLIMATE? HOW INVESTMENT RULES THREATEN THE ENVIRONMENT AND CLIMATE PROTECTION, available at <http://www.sierraclub.org/trade/resources/Investor-State-Climate-TPP-6-4.pdf> (last visited Oct. 19, 2013) [hereinafter TRADING AWAY OUR CLIMATE].

36. See UNEP, *supra* note 34.

37. *Id.*

38. DARA, REPORT: CLIMATE CRISIS ALREADY CAUSING UNPRECEDENTED DAMAGE TO WORLD ECONOMY; HUMAN IMPACT ON LARGE-SCALE (2012), available at <http://daraint.org/wp->

already costing the world \$1.2 trillion a year in foregone prosperity.<sup>39</sup> Consequently, countries must consider the effects that an increase in trade will have on the environment before contemplating new FTAs. If the environmental issues are not addressed when drafting new FTAs, then the trade becomes far from free.<sup>40</sup>

This article examines the proposed expanded version of the TPP and its potential environmental effects. Part II examines the specific environmental effects of two previous multilateral trade agreements entered into by the United States. Part III discusses the TPP itself, the environmental areas it could influence, and the benefits of including environment provisions that promote sustainability within the TPP. Part IV proposes solutions to ensure that the TPP adequately protects environmental interests. The article concludes by analyzing the likelihood that the TPP would succeed in its environmental goals.

## II. THE EFFECTS OF FTAS ON THE ENVIRONMENT

Free trade efforts and environmental protection have seldom gone hand in hand;<sup>41</sup> although the World Trade Organization believes there is no reason that the two cannot do so.<sup>42</sup> However, before they can be reconciled the nearly limitless permutations by which an FTA can affect the environment must be realized.<sup>43</sup> The links between free trade agreements and the environment include production, management, technology, physical infrastructure, social organization, and government policy.<sup>44</sup> The policy and structure behind a FTA, as

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content/uploads/2012/09/CVM\_RELEASE\_FINAL\_ENGLISH.pdf (last visited Oct. 19, 2013).

39. *Id.*

40. See TRADING AWAY OUR CLIMATE, *supra* note 35.

41. *Id.*

42. Uruguay Round Trade Negotiations Committee in Marrakesh, *Full text of the Decision on Trade and Environment* (Apr. 14, 1994), [http://www.wto.org/english/tratop\\_e/envir\\_e/issu5\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm) (calling for the establishment of a Committee on Trade and Environment (CTE) on the occasion of signing the Marrakesh Agreement).

43. U.N. FOOD & AGRIC. ORG. [FAO], *International Trade, the Environment and Sustainable Agricultural Development*, THE STATE OF FOOD AND AGRICULTURE, AGRICULTURAL TRADE: ENTERING A NEW ERA?, 278–92 (1995), available at <http://www.fao.org/docrep/017/v6800e/v6800e.pdf>.

44. Comm'n for Env'tl. Cooperation [CEC], *Analytic Framework for Assessing the Environmental Effects of the North American Free Trade*

well as the economic, political, or legal means it utilizes can also determine the extent of its impact on the environment.<sup>45</sup> For example, although increases in production and physical infrastructure are likely to negatively impact the environment, government policy offers, perhaps, the most visible and effective way for an FTA to combat such impact.<sup>46</sup> Governments provide environmental support through direct expenditures, tax regimes, credit, subsidies, user-charges, set-asides, and conservation programs.<sup>47</sup> Governments also provide environmental support through the regulation of negative factors, such as greenhouse gas (GHG) emissions.<sup>48</sup> Still, too much regulation should be avoided to prevent the risk of stifling trade and defeating the underlying purpose of the FTA.<sup>49</sup>

Determining an efficient level of FTA regulation depends greatly on discovering the environmental effects of a certain FTA, which can prove problematic.<sup>50</sup> Environmental changes, such as increases in GHG emissions or decreases in air quality or biodiversity, are often caused by multiple factors, making them difficult to measure and hard to attribute to just one FTA.<sup>51</sup> Still, most global indicators demonstrate an overall environmental decline that shows no sign of slowing down.<sup>52</sup>

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*Agreement*, at 1, 59 (1999), *available at* [http://www.cec.org/programs\\_projects/trade\\_envIRON\\_econ/pdfs/frmwrk-e.pdf](http://www.cec.org/programs_projects/trade_envIRON_econ/pdfs/frmwrk-e.pdf).

45. *Id.* at 6.

46. *Id.* at 59.

47. *Id.* at 73.

48. *Id.* at 32.

49. *Id.* at 4.

50. *Id.* at 70.

51. *See generally* UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies (2001), *available at* <http://www.unep.ch/etb/publications/intAssessment/refmaniaFinal.pdf>; Colin Kirkpatrick & Norman Lee, Inst. for Dev. Policy and Mgmt., Univ. of Manchester, *Further Development of the Methodology for a Sustainability Impact Assessment of Proposed WTO Negotiations: Final Report to the European Commission* (2002), *available at* [http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc\\_112353.pdf](http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc_112353.pdf); Alejandro Nedal, CEC, *Issue Study 1. Maize in Mexico: Some Environmental Implications of the North American Free Trade Agreement*, *available at* [http://www.cec.org/Storage/52/4483\\_engmaize\\_EN.pdf](http://www.cec.org/Storage/52/4483_engmaize_EN.pdf).

52. *See* XAVIER LEFLAIVE, ET AL., *Water*, in OECD ENVIRONMENTAL OUTLOOK TO 2050: THE CONSEQUENCES OF INACTION 207–73 (2012); WORLD WILDLIFE FUND, LIVING PLANET REPORT 2012: BIODIVERSITY, BIOCAPACITY, AND BETTER CHOICES (Monique Grooten et al. eds., 2012); *Air Pollution Worsening Worldwide: Cut Emissions Further, Experts Urge*, SCI. DAILY, Aug. 1, 2012, <http://www.sciencedaily.com/releases/2012/08/120801112609.htm>.

Furthermore, with the world population predicted to reach 9 billion by 2050,<sup>53</sup> the increased threat of environmental scarcity will make operating an efficient international trade system, predicated upon the neoclassical trade theory of comparative advantage, a market and economic imperative.<sup>54</sup>

### III. MULTILATERAL FTAS INVOLVING THE UNITED STATES

A well-known premise is that past behavior is the best indicator of future behavior. Thus, by examining the environmental effects of past trade agreements, and how they dealt with environmental issues, we can ascertain a reasonable expectation of the environmental impact of the TPP.

#### A. NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement (NAFTA) came into force in 1994.<sup>55</sup> Signed by the United States, Canada, and Mexico, NAFTA created the largest free trade area in the world.<sup>56</sup> So far, NAFTA has accomplished its goal to increase trade and eliminate barriers to trade and investment between these countries.<sup>57</sup> From 1993 to 2010, U.S. exports to Canada and Mexico rose 190%.<sup>58</sup> Often credited as the first FTA of its kind in sheer size and influence, NAFTA is also the first multilateral FTA to include environmental provisions.<sup>59</sup> After

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53. U.N.: *Earth's Population to Hit 9 Billion by 2050, 10 Billion by 2100*, CNN, May 4, 2011, [http://articles.cnn.com/2011-05-03/us/united.nations.population.forecast\\_1\\_population-forecast-population-growth-fertility?\\_s=PM:US](http://articles.cnn.com/2011-05-03/us/united.nations.population.forecast_1_population-forecast-population-growth-fertility?_s=PM:US).

54. See Rüdiger Pethig, *Pollution, Welfare, and Environmental Policy in the Theory of Comparative Advantage*, 2 J. ENVTL. ECON. & MGMT. 160, 160 (1976).

55. *North American Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Oct. 19, 2012).

56. *Id.*

57. *Id.*

58. *Id.*

59. Dale Colyer, *Environmental Impacts of Agricultural Trade under NAFTA* (Feb. 2–6, 2002) (unpublished paper presented at the annual meeting of the Southern Agricultural Economics Association, West Virginia University), available at <http://ageconsearch.umn.edu/bitstream/19104/1/cp02co01.pdf>.



pressure from the Clinton administration to address environmental problems, the North American Agreement on Environmental Cooperation (NAAEC) was negotiated and signed as a supplement to NAFTA.<sup>60</sup> NAAEC's primary focus was to ensure that each NAFTA member effectively enforced environmental laws and regulations through appropriate governmental action;<sup>61</sup> thereby preventing a race to the bottom scenario in which the least environmentally conscious country received the most investment.<sup>62</sup>

To pursue this goal, the NAAEC established an intergovernmental organization, the Commission for Environmental Cooperation (CEC).<sup>63</sup> The CEC consists of the Council,<sup>64</sup> Secretariat,<sup>65</sup> and Joint Public Advisory Committee (JPAC),<sup>66</sup> and fosters cooperation between NAFTA members to address the environmental issues of continent-wide free trade.<sup>67</sup> The CEC examines environmental trends in the region and advocates for environmental solutions.<sup>68</sup> For example, the CEC proposed the development of an integrated North American electricity market that would maintain high levels of environmental protection.<sup>69</sup> The CEC also identified areas of

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Mark R. Goldschmidt, Note, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 B.C. ENVTL. AFF. L. REV. 343, 356 (2001–02) (explaining that the Council serves as the forum for the discussion and promotion of environmental policies, and oversees the Secretariat by approving or overruling decisions).

65. *Id.* at 357 (noting that the Secretariat holds responsibility for most of the Commission's activities; including completing the Annual Report of the Commission and reviewing Submissions on Enforcement Matters from external parties).

66. *Id.* at 358 (noting that the JPAC, a fifteen-member panel, primarily provides advice to the Council or Secretariat using technical or scientific information).

67. CEC, *Three Countries: One Environment* (2006), available at [http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=310&BL\\_ExpandID=154](http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=310&BL_ExpandID=154) (last visited Oct. 19, 2013).

68. Stephen P. Mumme, *NAFTA and Environment: The North American Free Trade Agreement's Impact on the Trilateral Environment Remains Controversial*, FOREIGN POL'Y IN FOCUS (Oct. 1, 1999), [http://www.pfif.org/reports/nafta\\_and\\_environment](http://www.pfif.org/reports/nafta_and_environment).

69. Secretariat of the CEC, *Environmental Challenges and Opportunities of the Evolving North American Electricity Market* (June 2002), available at [http://www.cec.org/Storage/31/2244\\_CEC\\_Art13electricity\\_Eng.pdf](http://www.cec.org/Storage/31/2244_CEC_Art13electricity_Eng.pdf).

improvement in GHG inventory, comparability, and structure that would help mitigate climate change.<sup>70</sup> The CEC also monitors NAFTA's environmental impacts in areas such as pollution.<sup>71</sup> Thus far, studies have been mixed, showing no general or overall environmental effect.<sup>72</sup>

While the CEC has successfully created greater environmental awareness in NAFTA, it falls short of holding member countries to a high environmental standard.<sup>73</sup> The CEC has no authority to enforce compliance.<sup>74</sup> The NAAEC contains no provisions that allow the CEC to investigate unenforced regulations or examine decisions that roll back environmental laws.<sup>75</sup> Even if the CEC had such authority, with an annual budget of only \$9 million, (the same budget it received at its 1994 inception), its potential to influence environmental protection would be limited.<sup>76</sup> Despite a \$140 million investment from NAFTA members, the CEC has done little to achieve its principal mandates or to foster tangible changes in government action.<sup>77</sup> Furthermore, there is little if any evidence that the CEC work has influenced NAFTA members' trade policies.<sup>78</sup> Although the NAAEC adds little in terms of environmental protection to NAFTA, it may be unfair

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70. CEC, *Improving Comparability of Emissions Data, Methodologies and Inventories in North America*, available at [http://www.cec.org/Storage/130/15491\\_ghg\\_cec\\_projectssummary\\_en\\_web.pdf](http://www.cec.org/Storage/130/15491_ghg_cec_projectssummary_en_web.pdf).

71. See, e.g., Kenneth A. Reinert & David W. Roland-Holst, CEC of N. Am., *The Industrial Pollution Impacts of NAFTA: Some Preliminary Results* (2000), available at [http://www.cec.org/programs\\_projects/trade\\_enviro\\_n\\_econ/pdfs/Reinert.pdf](http://www.cec.org/programs_projects/trade_enviro_n_econ/pdfs/Reinert.pdf).

72. See Symposium, *The Environmental Effects of Free Trade, Papers Presented at the North American Symposium on Assessing the Linkages between Trade and Environment*, COMM'N FOR ENVTL. COOP. OF N. AM. (2000), available at [http://www.cec.org/Storage/45/3763\\_symposium-e.pdf](http://www.cec.org/Storage/45/3763_symposium-e.pdf).

73. See Chris Dove, Comment, *Can Voluntary Compliance Protect the Environment?: The North American Agreement on Environmental Cooperation*, 50 U. KAN. L. REV. 867, 881.

74. *Id.* at 882–83.

75. *Id.* at 881.

76. Katie Harr, *NAFTA, CAFTA-DR, and the Role of the Environment*, COUNCIL ON HEMISPHERIC AFF. (Jan. 23, 2006), <http://www.coha.org/nafta-cafta-dr-and-the-role-of-the-environment/>.

77. Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 121 (2012).

78. GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 302 (David L. Markell & John H. Knox eds., 2003).

to hold the treaty to a high standard considering it was the first FTA to include an environmental provision; NAFTA is, after all, first and foremost an economic agreement. Indeed, some environmental experts argue that the “most significant achievement of the environmental clauses [is] the fact that they existed at all . . . .”<sup>79</sup>

### 1.NAFTA Chapter 11

Chapter 11 of NAFTA contains provisions designed to protect cross-border investors and facilitate the settlement of investment disputes.<sup>80</sup> Article 1110, the investor-state dispute settlement provision, provides:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:
  - (a) for a public purpose;
  - (b) on a non-discriminatory basis;
  - (c) in accordance with due process of law and Article 1105(1); and
  - (d) on payment of compensation in accordance with paragraphs 2 through 6.<sup>81</sup>

Disputes under this section and the process for settling them have come under enormous scrutiny.<sup>82</sup> Chapter 11 establishes a mechanism for settling investment disputes. A NAFTA investor alleging that a host government breached its investment obligations under Chapter 11 may, at its option, pursue recourse under one of three arbitral mechanisms.<sup>83</sup> The

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79. Harr, *supra* note 76.

80. North American Free Trade Agreement ch. 11, Dec. 17, 1992, 32 I.L.M. 639 [hereinafter NAFTA].

81. *Id.* at 641-42.

82. Bernard J. Roth, *NAFTA, Alberta Oil Sands Royalties, and Change: Yes We Can?*, 46 ALBERTA L. REV. 335, 363–64 (2009).

83. *Overview of Disputes Between a Party and an Investor of Another Party*, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Default.aspx?tabid=93&language=en-US#Chapter11> (last visited Oct. 19, 2013) (noting that the three arbitral mechanisms available are the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the ICSID's Additional Facility Rules, and the rules of the United Nations Commission for

Chapter also indicates that “the investor may choose the remedies available in the host country’s domestic courts.”<sup>84</sup> Three-member tribunals hear investor-state arbitrations.<sup>85</sup> Tribunals must decide the disputes in accordance with the Agreement’s provisions, the applicable rules of international law, and all notes of interpretation issued by the NAFTA Commission.<sup>86</sup>

On its face, Article 1110 does not pose any potential threats to environmental protection. NAFTA’s drafters erred, however, by failing to expressly define expropriation.<sup>87</sup> As a result, arbitrators’ interpretation of the phrase “tantamount to expropriation”<sup>88</sup> has seriously affected governments’ ability to protect the environment, as demonstrated by the following three cases.

*a. Metalclad Corporation v. Mexico*

The first case to interpret Chapter 11, Article 1110 was filed in 1997 by Metalclad Corporation, an American waste disposal company.<sup>89</sup> In 1993, Metalclad purchased Coterin, a company that had secured a piece of land in the Mexican State of San Luis Potosi. Metalclad purchased the property with an assurance from Coterin and the Mexican federal government that all the necessary state and federal building permits to construct and operate a hazardous waste landfill on the land would be received.<sup>90</sup> In 1994, Metalclad started construction on the landfill, despite the governor’s statement that he did not plan to grant Metalclad’s building permit.<sup>91</sup> Federal officials assured Metalclad that the Guadalcazar municipality could not deny the permit and that the application was merely a

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International Trade Law (UNCITRAL Rules)).

84. *Id.*

85. NAFTA, *supra* note 80, at 644 (outlining that each party names one arbitrator, with the third arbitrator selected by mutual agreement, or failing agreement, by the Secretary-General of ICSID).

86. *Id.* at 645.

87. Roth, *supra* note 82, at 363.

88. NAFTA, *supra* note 80, at 644.

89. Metalclad Corporation v. United Mexican States, ICSID Case No. ARB (AF)/97/1, Final Award, ¶ 8 (August 30, 2000), 5 ICSID Rep. 212 (2002) [hereinafter Metalclad Final Award].

90. Stephen Kass & Jean McCarroll, *The ‘Metalclad’ Decision Under NAFTA’s Chapter 11*, N. Y. L. J. 3 (2000).

91. *Id.*

formality.<sup>92</sup> However, when Metalclad attempted to open its new facility, local demonstrators and officials blocked the opening and the landfill remained closed until November 1995.<sup>93</sup>

In November 1995 Metalclad entered into an agreement with two federal agencies and the facility began operation.<sup>94</sup> Yet, in December 1995 Guadalcazar once again rejected Metalclad's petition for a municipal building permit.<sup>95</sup> Guadalcazar also brought action against the federal government for illegally operating the landfill and successfully obtained a preliminary injunction barring further operations at the site.<sup>96</sup> In September 1997 the governor issued a state-level decree that established the landfill site as a protected national property.<sup>97</sup> Metalclad responded by filing a claim under Articles 1105 and 1110 of NAFTA.<sup>98</sup> The arbitral tribunal found in favor of Metalclad and awarded the company over \$16 million in damages.<sup>99</sup>

While the arbitral tribunal had good reason to find the Mexican federal government at fault under Article 1110, it should not have found the state of Mexico at fault, as well. By doing so, the tribunal interpreted Article 1110 too broadly. The tribunal found that:

Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>100</sup>

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92. *Id.*

93. *Id.*

94. *Id.* at 4.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Metalclad Final Award, *supra* note 89, at ¶131.

100. *Id.* at ¶103.

Incidental interference with the use of property that significantly deprives the owner of an important part of the expected benefit could apply to many scenarios where the government attempts to improve environmental protection laws.<sup>101</sup> A wide application of this interpretation could have chilling effects on environmental regulation. It could result in lowered standards, because any law which limits carbon emissions, restricts pollutants, or sets other environmental standards has the potential to cause a loss of property.<sup>102</sup> Furthermore, although the tribunal did not award Metalclad losses for expected profits due to a lack of evidence, it recognized that lost profits should be considered in the valuation of expropriated property.<sup>103</sup> By leaving the door open to award investors their lost profits, local governments could be forced to pay enormous damages or settlements when future claims arise.

*b. Ethyl Corporation v. Canada*

The chilling effects of the *Metalclad* decision were realized in *Ethyl Corp. v. Canada*. Ethyl Corporation is an American chemical company that produces the gasoline additive MMT<sup>104</sup> and was the sole supplier of MMT in Canada.<sup>105</sup> In April 1997, Canada imposed a ban on the import and interprovincial transport of MMT, effectively eliminating MMT from Canadian gasoline.<sup>106</sup> In passing the ban, the Canadian government cited its goals as tightening vehicle emissions standards, controlling air pollution, and preventing exposure of workers and drivers to airborne manganese particles via MMT.<sup>107</sup> A majority of countries do not use MMT and several countries and states,

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101. ORG. FOR ECON. COOPERATION & DEV., "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW 16 (2004).

102. Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement Under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L. J. 103, 110–11 (2007).

103. Kass & McCarroll, *supra* note 90, at 3.

104. MMT stands for methylcyclopentadienyl manganese tricarbonyl. *Id.*

105. Michelle Sforza & Mark Valliantos, *NAFTA & Environment Laws: Ethyl Corp. v. Government of Canada*, GLOBAL POL'Y F. (APRIL 1997), <http://www.globalpolicy.org/component/content/article/212/45381.html>.

106. *Id.*

107. *Id.*

including California, have banned it.<sup>108</sup> The same month that Canada implemented its ban on MMT, Ethyl Corporation filed a Chapter 11 investor-state claim against the Canadian government for \$250 million in damages, citing indirect expropriation of its assets under Article 1110.<sup>109</sup> After a NAFTA tribunal accepted jurisdiction over the claim, the Canadian government settled with Ethyl for \$13 million, reversed its ban on MMT, and issued a public statement that “current scientific information” did not demonstrate MMT’s toxicity.<sup>110</sup>

The outcome is evidence of Chapter 11’s direct effect on environmental legislation; the threat of a \$250 million fallout was enough for the Canadian government to settle and drop the MMT ban.<sup>111</sup> Although the health effects of MMT are still under debate,<sup>112</sup> it would have been more logical to err on the side of caution in legislating and regulating products related to health and the environment. It also seems counter-intuitive that an American corporation could sue the Canadian government for a ban on MMT, but had no recourse in its own country against California’s ban. It is entirely possible that Canada may have defeated Ethyl’s claim, but the merits of the case were never decided. *Metalclad* gave the Canadian government enough reason to doubt its chances.

*c. Methanex Corporation v. California*

The outcomes of *Metalclad* and *Ethyl Corp.* gave environmentalists serious concerns about the increasing scope of investor-state claims, but in 1995 *Methanex v. California* helped relieve some of the worry. Methanex is the world’s largest producer of methanol, a chemical used to produce MTBE,<sup>113</sup> a gasoline oxygenate designed to reduce harmful auto

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108. Michael P. Walsh, *The Global Experience with Lead in Gasoline and the Lessons We Should Apply to the Use of MMT*, 50 AM. J. OF INDUS. MED. 853, 853–60 (2007).

109. Sforza & Valliantos, *supra* note 105.

110. Ken Traynor, *NAFTA and the Erosion of Federal Environmental Protection or, How NAFTA Became a Shill for Ethyl Corp.*, 23 INTERVENOR, JULY–SEPT. 1998, at 6.

111. *Id.*

112. Walsh, *supra* note 108, at 859 (adding that the \$13 million settlement alone exceeded Canada’s budget for environmental enforcement and compliance programs).

113. MTBE stands for methyl tertiary-butyl ether. Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44

emissions.<sup>114</sup> Studies indicate that MTBE causes significant water contamination and it has been associated with human neurotoxicological effects.<sup>115</sup> Other studies show MTBE to be an animal carcinogen with the potential to cause cancer in humans.<sup>116</sup> In March 1999, the governor of California issued an Executive Order requiring the phase-out of MTBE in the state's gasoline by 2002 because of evidence that MTBE had contaminated drinking water wells and systems.<sup>117</sup> At the time, 17 states had banned MTBE or were in the process of restricting it.<sup>118</sup>

In response to the ban, Methanex filed a Chapter 11 investor-state claim against the California Executive Order seeking to either lift the ban or to be compensated \$970 million for future lost profits.<sup>119</sup> Methanex argued that the California Executive Order violated several provisions of NAFTA, including Article 1110, because the ban was tantamount to an expropriation of the company's investment.<sup>120</sup> In August 2005, after almost six years, the tribunal ruled to dismiss all claims, including the claim under Article 1110.<sup>121</sup> In denying Methanex's claim, the tribunal significantly limited the scope of the expropriation clause from its broad interpretation in *Metalclad*. The Panel stated that:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the

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I.L.M. 1345, 1368 (2005) [hereinafter Methanex Final Award].

114. *Id.*

115. Mary Bottari, *NAFTA's Investor "Rights:" A Corporate Dream, A Citizen Nightmare*, MULTINATIONAL MONITOR MAG., Apr. 2001, at 10.

116. PUB. CITIZEN, NAFTA CHAPTER 11 INVESTOR-STATE CASES: LESSONS FOR THE CENTRAL AMERICA FREE TRADE AGREEMENT 31 (2005), available at [http://www.citizen.org/documents/NAFTAReport\\_Final.pdf](http://www.citizen.org/documents/NAFTAReport_Final.pdf).

117. Methanex Final Award, *supra* note 113, at 1370.

118. *Id.*

119. *Id.* at 1345.

120. *Id.* at 1371.

121. *Id.* at 1462.



government would refrain from such regulation.<sup>122</sup>

This decision signified a big victory for environmentalists; it held that non-discriminatory regulation for a public purpose is not considered expropriation under NAFTA, and, therefore, governments are not required to compensate foreign investors.<sup>123</sup> An exception still applies to situations like *Metalclad*, where the government made commitments to foreign investors that it would refrain from such regulation. Thus, the *Methanex* tribunal reconciled the *Metalclad* decision with its interpretation of the expropriation clause, thereby limiting the scope of Article 1110 and providing governments the legal standing to regulate environmental matters without breaking NAFTA rules.<sup>124</sup>

While *Methanex* was an immediate victory for environmentalists, the deeper implications of investor-state claims could still impact a government's ability to protect the environment in the future. *Methanex* suggests the undesirable scenario where foreign companies receive broad protection under the expropriation clause but domestic companies do not, thus creating an uneven playing field that encourages countries to drop environmental standards further.<sup>125</sup> The concern remains that a claim against a state's legitimate regulatory action could require the state to pay compensation to the claimant.<sup>126</sup> These concerns, as well as the length and cost of arbitration, cause a chilling effect on public authorities, as seen in *Ethyl Corp.*<sup>127</sup> Even worse, public authorities may choose not to enforce current regulations against foreign investors for fear of a Chapter 11 claim.<sup>128</sup> *Methanex* lessens these fears to an

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122. *Id.* at 1456.

123. *Id.*

124. *Id.*

125. PUB. CITIZEN, *supra* note 116, at 8.

126. See S.D. Myers v. Canada, Partial Award, Separate Opinion by Dr. Bryan Schwartz, at 86 (Nov. 12 2000), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-19.pdf>.

127. PUB. CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY vii (2001), *available at* <http://www.citizen.org/documents/ACF186.PDF> ("In the end, the government of Canada settled the case by revoking the ban . . .").

128. *Id.* ("[T]he potential for large multinational corporations to bully the government of the weakest and poorest countries of the hemisphere would be extraordinary. The mere threat of a vast damage award and high cost of defending a suit could make poorer nations concede before the fight had been joined . . ."); See also Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in*

extent and to date very few claims have succeeded under Chapter 11,<sup>129</sup> although large claims continue to be filed under NAFTA.<sup>130</sup> While concerns under NAFTA remain, the United States has the ability to learn from past oversights in future trade agreements to better address environmental concerns.<sup>131</sup>

## 2. Dominican Republic-Central America-Free Trade Agreement

Based on the perceived economic success of NAFTA, the United States became a party to another multilateral FTA in 2004, joining Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic in signing the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).<sup>132</sup> Based largely on the shortcomings of NAFTA, the agreement did not receive overwhelming support and only narrowly garnered majority support in both houses of Congress.<sup>133</sup> Despite mixed support in Congress, the agreement represented a way to stimulate growth, foster stability, and lay the foundation for further cooperation in the region.<sup>134</sup>

In drafting the new trade agreement, the United States realized the inherent weaknesses in NAFTA's inadequate

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*Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1438 (2003) ("One understandable concern is that the specter of ruinous liability might restrain lawmakers from acting in the public interest.").

129. See Coe, *supra* note 128. ("The staggering numbers accompanying the Chapter 11 prayers for relief, though making sensational headlines, are misleading . . . [a]pproximately fifteen Chapter 11 cases have come to a conclusion. Two have settled, five seem to have been abandoned . . . and eight have reached an adjudicated outcome. Only *Metalclad* and *Myers* have ended in awards of arguably significant compensation.").

130. Ilana Solomon & Deb Nardone, *Fracking Causes Friction Between Trade and Environment*, SIERRA CLUB (Nov. 16, 2012), <http://sierraclub.typepad.com/compass/2012/11/nafta-fracking-case.html> (citing example of a \$250 million claim by an American firm against Canada's ban on fracking in November 2012).

131. PUB. CITIZEN, *supra* note 127, at 30 ("[T]he firm succeeded in a regulatory takings claim . . . sent alarm bells through national associations representing state and local officials and Congress. As a result . . . Congress instructed the USTR to ensure that future trade agreements would not permit this type of regulatory takings claim.").

132. J. F. HORNBECK, CONG. RESEARCH SERV., R42468, THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR): DEVELOPMENTS IN TRADE AND INVESTMENT 1 (2012).

133. The vote was 217 to 215. *Id.*

134. *Id.*

environmental protection. As a result, the United States made strengthening environmental provisions in CAFTA-DR a priority. The USTR even went so far as to promote CAFTA-DR as a significant improvement upon NAFTA.<sup>135</sup> It endorsed CAFTA-DR as having “real teeth, including binding dispute settlement, monetary fines directed at solving problems, and potential trade sanctions,” as well as “[a] first-ever citizen participation process [that] will identify and find solutions for trade-related environmental problems.”<sup>136</sup>

At first glance, CAFTA-DR seems to significantly improve upon NAFTA and includes many replications of NAFTA’s environmental provisions. Similar to NAFTA, CAFTA-DR contains many pro-environment provisions in Chapter 17, but is without any enforcement measures.<sup>137</sup> CAFTA-DR encourages countries to strengthen environmental regulation at all levels, but it neither requires them to do so nor gives them incentives for such action.<sup>138</sup> According to proponents of CAFTA-DR, its programs provide “assistance to over 340 companies in cleaner production technologies that promote energy and water conservation and reductions in waste, raw material use, and emissions; and train more than 13,000 people in enforcement and implementation of environmental laws, public participation, and cleaner production practices.”<sup>139</sup>

CAFTA-DR seems more like a promotional tool; true gains in environmental protection occur when countries are

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135. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA FACTS (June 2005), [http://www.ustr.gov/archive/assets/Trade\\_Agreements/Regional/CAFTA/Briefing\\_Book/asset\\_upload\\_file133\\_7801.pdf](http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file133_7801.pdf).

136. *Id.*

137. See Dominican Republic-Central America-United States-Free Trade Agreement ch. 17, art. 17, Aug. 5, 2004, Hein’s No. KAV 7157 [hereinafter CAFTA-DR], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

138. See *id.* at art. 17.1 (“Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies.”); See also David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT’L & COMP. L. REV. 331, 403–05 (2007) (“Given . . . the use of monetary assessments as an alternative to trade sanctions generally, and the only remedy for . . . environmental disputes, it is not surprising that there is a mechanism which provides for a review of the effectiveness of these provisions.”).

139. Rebecca Slocum, *Promoting Trade and a Better Environment: CAFTA-DR Environmental Cooperation*, DIPNOTE, U.S. DEP’T OF ST. OFFICIAL BLOG (Feb. 21, 2011), <http://blogs.state.gov/stories/2011/02/21/promoting-trade-and-better-environment-cafta-dr-environmental-cooperation>.

inherently committed to enacting and enforcing environmental protection legislation.<sup>140</sup> Chapter 17 of CAFTA-DR contains a provision asserting that a country “shall not fail to effectively enforce its environmental laws.”<sup>141</sup> If a country fails to effectively enforce its laws, a claim can be made by another country under Chapter 20, which deals with state-to-state disputes.<sup>142</sup> However, Chapter 20 falls short, only punishing “sustained or reoccurring” instances of non-enforcement of environmental provisions; first-time offenders will not be punished.<sup>143</sup>

Once the arbitration panel concludes that a country has failed to implement environmental regulations, trade sanctions are not an available remedy.<sup>144</sup> The only remedy available is an assessment limited to \$15 million to be paid into a fund for improving environmental enforcement provisions.<sup>145</sup> Consequently, if a country benefits by more than \$15 million by not enforcing its environmental laws, it would have few practical incentives to do so, especially considering the lack of other trade sanctions or direct payment to said country.<sup>146</sup> CAFTA-DR members also lack the incentive to file a Chapter 20 claim given the high threshold for state-to-state claims.<sup>147</sup> The high threshold, combined with the small monetary remedy if successful, makes it unlikely any state would risk alienating the offending state to pursue a claim. Perhaps unsurprisingly, there has only been one state-to-state claim pursuant to Chapter 20 since CAFTA-DR's inception, unrelated to the environment.<sup>148</sup>

CAFTA-DR has, however, improved upon NAFTA in two major areas related to investor-state claims. First, the drafters of CAFTA-DR corrected the overall lack of transparency in the arbitration process that was rightfully criticized by environmentalists and legal scholars.<sup>149</sup> To make the dispute

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140. See Generally Gantz, *supra* note 138 (arguing that the enforcement provision of Chapter 20 is burdensome and of questionable effectiveness).

141. CAFTA-DR, *supra* note 137, at art. 17.2.1.

142. See *id.* at art. 20.

143. *Id.*

144. *Id.* at art. 20.17.

145. *Id.*

146. See Gantz, *supra* note 138, at 404.

147. *Id.*

148. *Id.*

149. See CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW 230-40 (2007) (providing an

resolution process more transparent, the drafters made many critical changes.<sup>150</sup> For example, CAFTA-DR requires that all major documents involving investor-state claims be made public<sup>151</sup> and allows the court to consider amicus curiae briefs from third parties. Disputing parties may review the proposed decision or award and submit written comments within 60 days for the tribunal to consider.<sup>152</sup> The tribunal may award costs and attorneys' fees if it considers the claim or the respondent's objection "frivolous."<sup>153</sup> These provisions improve NAFTA by providing more oversight, more participation by interested third parties, and more public awareness.

Second, CAFTA-DR heavily improved upon its predecessor NAFTA by limiting the types of investor-state claims. While CAFTA-DR's Chapter 10 on Investment is nearly identical to NAFTA's Chapter 11, it includes a significant addition in its Annex.<sup>154</sup> Annex 10-C addresses expropriation by further defining and narrowing an investor's ability to recover due to indirect expropriation. There are two types of expropriation: direct and indirect. Direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. Indirect expropriation occurs when an action or series of actions by a party has an effect equivalent to direct expropriation, but without formal transfer of title or outright seizure.<sup>155</sup> To determine whether there has been an indirect expropriation, several factors are considered: (1) the economic impact of the government action, (2) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and (3) the character of the government action.<sup>156</sup> Annex 10-C adds, "except in rare circumstances, nondiscriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect

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overview of the NAFTA's blunders which CAFTA-DR attempted to rectify or avoid).

150. CAFTA-DR, *supra* note 137, at art. 10.7.1.; LEATHLEY, *supra* note 149, at 232 ("[I]nvestors under the US-CAFTA-DR can expect certain information to be made public . . .").

151. CAFTA-DR, *supra* note 137, at art. 10.7.1.

152. *Id.* at arts.10.20.3, 9.

153. *Id.* at art. 10.20.6.

154. *Id.* at Annex 10.

155. *Id.* at Annex 10-C.

156. *Id.* at Annex 10-C(4)(a).

expropriations.”<sup>157</sup> Annex 10-C does not give examples of what those “rare circumstances” might be. However, by narrowly defining expropriation and clearly delineating the types of disputes the provision applies to, the drafters created a more effective rule to follow. Parties now have a stronger foundation for holding environmental regulation claims to a higher standard.

Thus far, redefining expropriation has had a seemingly positive effect on curbing state-investor disputes over environmental public welfare objectives. Only one claim has been filed since CAFTA-DR’s inception in 2004, and the claim was ultimately dismissed under the expropriation clause in Article 10.7.<sup>158</sup> While an arbitral interpretation of expropriation under CAFTA-DR’s definition would be beneficial, the lack of claims filed is a sign that environmental actions and regulations have more protection under CAFTA-DR than NAFTA.

#### IV. THE TRANS-PACIFIC PARTNERSHIP

Despite the poor environmental record of the United States on prior FTAs, there have been some indications that the TPP will include strong environmental protection provisions. At the 2008 Democratic National Convention, Barack Obama’s party pledged to “not negotiate bilateral trade agreements that stop the government from protecting the environment.”<sup>159</sup> In 2012, the USTR spokesperson, Nkenge Harmon, provided a statement on the Obama administration’s position:

[The Obama] administration is committed to ensuring strong environmental . . . laws. Nothing in our TPP investment proposal could impair our government’s ability to pursue legitimate, non-discriminatory public interest regulation, including measures to protect . . .

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157. *Id.*

158. *Pac Rim Cayman, LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, ¶ 1.10 (June 1, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita0935.pdf>.

159. DEMOCRATIC NAT’L CONVENTION COMM., RENEWING AMERICA’S PROMISE (2008) (Presented to the 2008 Democratic National Convention by the Platform Standing Committee), *available at* [http://www.citizenstrade.org/ctc/wp-content/uploads/2011/01/2008DemocraticPlatformbyCmte\\_08-13-08.pdf](http://www.citizenstrade.org/ctc/wp-content/uploads/2011/01/2008DemocraticPlatformbyCmte_08-13-08.pdf).

the environment.<sup>160</sup>

In August 2010, USTR officials announced that all TPP participants, despite differences in levels of development, would be required to meet the same labor and environmental conditions;<sup>161</sup> USTR official, Mark Linscott, stated that an “environment chapter in the TPP should strengthen countries’ commitments to enforce their environmental laws and regulations, including areas related to ocean and fisheries governance, through the effective enforcement obligation subject to dispute settlement.”<sup>162</sup>

Other negotiating members of the TPP have shown their commitment to protecting the environment as well. The original four TPP members included an Environmental Cooperation Agreement in the original trade agreement, which outlined the parties’ commitment to a high level of environmental protection.<sup>163</sup> In addition, Australia’s government has stated it

[D]oes not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on . . . environmental . . . matters in circumstances where those laws do not discriminate between domestic and foreign businesses.<sup>164</sup>

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160. Zach Carter, *Obama Trade Document Leaked, Revealing New Corporate Powers and Broken Campaign Promises*, HUFFINGTON POST (June 13, 2012, 9:17AM),

[http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak\\_n\\_1592593.html](http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html).

161. Amy Tsui, *Labor, Environmental Standards to be Same Across all Eight TPP Countries*, 27 INT’L TRADE REP. 1261 (2010).

162. *Marine Wealth: Promoting Conservation and Advancing American Exports: Hearing before the S. Subcomm. on Int’l Trade, Customs and Global Competitiveness*, 111th Cong. (2010) (written testimony of Mark Linscott, Assistant U.S. Trade Rep. for Env’t and Natural Res.), available at <http://www.finance.senate.gov/imo/media/doc/071410mltest.pdf>.

163. See *Environment Cooperation Agreement Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*, NEW ZEALAND MINISTRY OF FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/environment-agreement.pdf> (last visited Oct. 19, 2013).

164. AUSTRALIAN GOV’T, DEPT OF FOREIGN AFFAIRS & TRADE, GUILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS

The United States has also supported the reduction of tariffs on environmental goods,<sup>165</sup> while New Zealand and Chile reportedly have tabled trade and climate change submissions.<sup>166</sup>

There is, however, cause for concern that the TPP will not adequately protect environmental interests. It is not an easy task getting eleven or more countries to agree on any type of international law, but environmental provisions are an especially difficult topic. Accordingly, the environmental chapter has emerged as one of the most challenging areas of the negotiations.<sup>167</sup> Developing nations are the most concerned with including environmental provisions, as they would be at a disadvantage if they must adhere to the same standards as developed nations.<sup>168</sup> Enforcement is also a major issue as several parties do not want to make environmental obligations binding under the TPP dispute settlement mechanism as the United States has proposed.<sup>169</sup> Even though New Zealand has proposed including climate change provisions in the TPP, its support has been limited to a non-binding affirmation of the benefit of pricing carbon.<sup>170</sup> It remains uncertain how hard the United States will push for strict environmental provisions where it may conflict with its other interests regarding drafting of the TPP.

Chinese scholars believe that successful implementation of the TPP will have a negative economic and geopolitical impact on China “as a force that could rip apart the regional economic integration of East Asia.”<sup>171</sup> This has led many people to

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AND PROSPERITY 14 (April, 2011) available at <http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf>.

165. *U.S. Pushes Conservation Initiatives for Proposed Trans-Pacific Pact*, INT'L CENTRE FOR TRADE & SUSTAINABLE DEV. (Dec. 7, 2011), <http://ictsd.org/i/news/bridgesweekly/121000/>.

166. See IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, *THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (2012).

167. *Key Areas Of TPP Talks At Different Stages After 30 Months Of Effort*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Sept. 5, 2012), <http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/key-areas-of-tpp-talks-at-different-stages-after-30-months-of-effort/menu-id-896.html>.

168. *Id.*

169. *Id.*

170. *Id.*

171. Guoyou Song & Wen Jin Yuan, *China's Free Trade Agreement Strategies*, WASH. Q. (Fall 2012), available at <http://csis.org/files/publication/twq12FallSongYuan.pdf>; Jianmin Jin, *China's Concerns Regarding TPP No More than Empty Worries?*, FUJITSU RES. INST. (Jan. 11,



speculate, including members of the press in China, that the United States is using the TPP to marginalize China's influence in Asia.<sup>172</sup> During the 2012 presidential debates, President Obama said, "we're organizing trade relations with countries other than China so that China starts feeling more pressure about meeting basic international standards."<sup>173</sup> Former Secretary of State Hillary Clinton indicated that China has an open invitation to join TPP talks.<sup>174</sup> However, there is no evidence that China would have any additional influence over the terms of the TPP. With the current concerns over China's growing economic influence, the United States may be using the TPP to force China either to "meet basic international standards" or else risk substantial trade losses to countries in their own region. If this truly is the main priority of the TPP from the American perspective, environmental provisions could be threatened with elimination if they become too controversial. Many believe that China's undervalued currency is a mounting foreign policy concern that may take precedence over international environmental goals.<sup>175</sup>

Another part of the concern stems from the intense secrecy that has surrounded the TPP negotiations. Even though negotiations have been ongoing since 2008, the negotiating partners have not been willing to offer any details of the trade documents or drafts.<sup>176</sup> While 600 representatives of corporations have access to draft versions of the TPP, they are restricted from sharing the information with the public.<sup>177</sup>

The lack of transparency is especially alarming considering the Obama administration is expected to ask Congress for

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2012), <http://jp.fujitsu.com/group/fri/en/column/message/2012/2012-01-11.html>.

172. Song & Yuan, *supra* note 171; Jin, *supra* note 171.

173. Tom Miles, *US-led US-Asian Pact Spurs China's Asian Trade Bloc, S.Korea Minister Says*, REUTERS (Nov. 6, 2012, 6:12 AM), <http://in.reuters.com/article/2012/11/06/trade-china-bloc-idINDEE8A500A20121106>.

174. *Clinton: China Welcome in TPP*, BANGKOK POST, Nov. 17, 2012, <http://www.bangkokpost.com/breakingnews/321762/clinton-welcomes-china-to-join-trade-pact>.

175. Chad Karnes, *What Does China's 'Currency Manipulation' mean for the Dollar?*, YAHOO! FINANCE (Oct. 17, 2012), <http://finance.yahoo.com/news/does-chinas-currency-manipulation-mean-220039282.html>.

176. Mike Delrio, *Secrecy Surrounding Trade Talks Reflects Obama Administration Transparency*, EXAMINER.COM (June 25, 2012), <http://www.examiner.com/article/secrecy-surrounding-trade-talks-reflects-obama-administration-transparency>.

177. *Id.*

Trade Promotion Authority,<sup>178</sup> which would give the President the authority to negotiate international agreements that Congress can approve or disapprove but not amend.<sup>179</sup> Congress created the power of trade promotion authority in the Trade Act of 1974.<sup>180</sup> The power created by this act would allow the President to sign the TPP before a Congressional vote and imposes rules on Congress that limit debate and prevent amendments, resulting in a straight up or down vote on the TPP.<sup>181</sup> Ron Kirk, USTR from March 18, 2009 to March 15, 2013, was remarkably forthright in revealing his opposition to making the text public: “doing so, he suggested to Reuters, would raise such opposition that it could make the deal impossible to sign.”<sup>182</sup>

Such an approach to the adoption of an FTA, where Congress and citizens have negligible input in the negotiations, could put Congress in a tough position. Forcing an up or down vote on the text of the TPP requires Congress to choose between the status quo and whatever agreement to which the President and the TPP member countries agree. Absent Trade Promotion Authority, Congress would have the ability to amend any provisions of the TPP; however, the vast number of countries involved, combined with the number of years it has taken to negotiate, essentially dictates that member countries be prevented from proposing amendments after the agreement is finalized. Bearing this in mind, it makes it more imperative that members of Congress have input in the TPP while it is still being negotiated in order to increase the chances that tough environmental provisions are included.

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178. *Id.*

179. CAROLYN C. SMITH, CONG. RESEARCH SERV., RS21004, TRADE PROMOTION AUTHORITY AND FAST-TRACK

NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES (2011). If the President transmits a trade agreement to Congress, then the majority leaders of the House and Senate or their designees must introduce the implementing bill submitted by the President on the first day on which their House is in session. 19 U.S.C. § 2191(c)(1) (2006). Senators and Representatives may not amend the President's bill, either in committee or in the Senate or House. 19 U.S.C. § 2191(d). The committees to which the bill has been referred have 45 days after its introduction to report the bill, or be automatically discharged, and each House must vote within 15 days after the bill is reported or discharged. 19 U.S.C. § 2191(e)(1).

180. 19 U.S.C. §§ 2191–2194.

181. Lori Wallach & Ben Beachy, *Obama's Covert Trade Deal*, N.Y. TIMES, June 2, 2013, [http://www.nytimes.com/2013/06/03/opinion/obamas-covert-trade-deal.html?\\_r=0](http://www.nytimes.com/2013/06/03/opinion/obamas-covert-trade-deal.html?_r=0).

182. *Id.*

If the secrecy was not enough to cause concern, a portion of the TPP draft was leaked in June 2012.<sup>183</sup> That draft contained the TPP's investment chapter, a section that reveals that TPP negotiators are considering a dispute resolution process that would grant transnational corporations special authority to challenge countries' laws, regulations and court decisions in international tribunals that circumvent domestic judicial systems.<sup>184</sup> Environmentalists fear implementation of such a program would repeat the mistakes of NAFTA and CAFTA-DR.<sup>185</sup> Article 12.12, the proposed draft of TPP's language on investor rights, contains almost identical language on investor rights as that of CAFTA-DR while the investor-state disputes have the same arbitration procedures.<sup>186</sup> The investment chapter did contain Annex 12-D, however, which goes even further in limiting the scope of investor-state disputes than CAFTA-DR, which states that:

In order to constitute indirect expropriation, the state's deprivation of the investor's property must be [either] severe or for an indefinite period [and] disproportionate to the public purpose. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or in breach of the state's prior binding written commitment to the investor, whether by contract, license or other legal document.<sup>187</sup>

Article 12.15 also states:

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183. See generally *TPP Draft Text On Investment Reveals Debate on Capital Controls*, INSIDE U.S. TRADE NEWSSTAND, June 15, 2012, at 1, 25-26 (providing commentary on the leaked draft of the Trans-Pacific Partnership).

184. Llana Solomon, *NAFTA on Steroids: What it Could Mean for the Environment*, HUFFINGTON POST, July 16, 2012, [http://www.huffingtonpost.com/ilana-solomon/nafta-on-steroids\\_b\\_1670748.html](http://www.huffingtonpost.com/ilana-solomon/nafta-on-steroids_b_1670748.html).

185. See *id.* (discussing the concerns of environmental groups).

186. *Compare Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations*, CITIZENS TRADE CAMPAIGN, (June 13, 2012), <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf> (providing relevant text on investor rights), with CAFTA-DR, *supra* note 137, at art. 10.1-10.31 (providing relevant text on investor rights).

187. CITIZENS TRADE CAMPAIGN, *supra* note 186, at Annex 12-D.

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental. . . [concerns] False
2. The Parties recognise that it is inappropriate to encourage investment by relaxing its health safety or environmental measures . . . .<sup>188</sup>

These improvements to the investment chapter should help ensure that investors are not able to subvert government attempts to enforce and enact environmental regulations.

In addition to these provisions, the United States' environment proposal tabled in September 2011 contains three main components that may be included in the TPP.<sup>189</sup> The main components are: conservation, core commitments, and public participation.<sup>190</sup> The conservation component focuses on illegal logging, marine fisheries, endangered species, and prevention of illegal trade in plants and wildlife while the core commitments component would require parties to uphold their commitments to any of the multilateral environmental agreements (MEA) they have signed.<sup>191</sup> The public participation component would allow stakeholders the ability to challenge a member state's adherence to the provisions.<sup>192</sup> While the current and proposed provisions might seem like victories for environmental advocates, there are still no observable enforcement measures to ensure their compliance and similar versions of these provisions are found in both NAFTA and CAFTA-DR.<sup>193</sup> The United States' proposal is also lacking any provisions directly aimed at reducing the emissions of GHGs.<sup>194</sup>

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188. *Id.*

189. See IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 15 (2012).

190. *Id.*

191. *Id.*

192. *Id.*

193. Compare CITIZENS TRADE CAMPAIGN, *supra* note 186, at 14, with NAFTA, *supra* note 80, at 642 (providing relevant NAFTA text on investment and the environment), and CAFTA-DR, *supra* note 137, at 10.8 (providing relevant CAFTA-DR text on investment and the environment).

194. USTR *Green Paper on Conservation and the Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF

If these remain the only environmental provisions contained in the TPP, then it becomes increasingly likely the TPP will merely be an extension of NAFTA's and CAFTA-DR's shortcomings when it comes to actively promoting and enforcing environmental provisions. The TPP could become the largest FTA in history,<sup>195</sup> representing a golden opportunity to promote the type of tangible environmental sustainability that was absent from NAFTA and CAFTA-DR. Enforcement measures are likely the most challenging and controversial aspect to environmental provisions in the TPP, so there is still likely to be significant negotiations on those measures before their inclusion in the draft. However, it is concerning that there currently is no evidence of basic agreements on enforcement measures between TPP members.

#### A. ENVIRONMENTAL CONCERNS

While any increase in trade and production has potential environmental impacts, the TPP would particularly affect several specific environmental areas due to the current state of socioeconomic affairs of its potential members. One such area, anthropogenic climate change, is a widely recognized global problem.<sup>196</sup> According to the International Energy Agency, trends indicate that "delaying action is a false economy" and that the opportunity cost of preventative action today is less than twenty percent of what would be required after 2020.<sup>197</sup> A November 2012 World Bank report predicts that the world

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THE PRESIDENT, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership> (last visited Oct. 5, 2013).

195. See generally *What is the Trans-Pacific Partnership?* CBC NEWS (June 20, 2012, 2:14 PM), <http://www.cbc.ca/news/world/what-is-the-trans-pacific-partnership-1.1147888> (providing information on the scope of the TPP).

196. *Global Warming Seen as a Major Problem Around the World Less Concern in the U.S., China and Russia*, PEW RES. CENTER (Dec. 2, 2009), <http://www.pewglobal.org/2009/12/02/global-warming-seen-as-a-major-problem-around-the-world-less-concern-in-the-us-china-and-russia/> (discussing the consensus on climate change as a global problem); see also Kristin Eberhard, *New Poll: Americans Believe Global Warming is Real and Threatens Their Families*, SWITCHBOARD NAT. RESOURCES DEF. COUNCIL STAFF BLOG (Oct. 24, 2012), [http://switchboard.nrdc.org/blogs/kgrenfell/new\\_poll\\_americans\\_believe\\_glo.html](http://switchboard.nrdc.org/blogs/kgrenfell/new_poll_americans_believe_glo.html) (discussing Americans' views on climate change).

197. Brad Plumer, *When Do We Hit the Point of No Return for Climate Change?*, WASH. POST, Nov. 10, 2011, 10:36 AM, [http://www.washingtonpost.com/blogs/wonkblog/post/when-do-we-hit-the-point-of-no-return-for-climate-change/2011/11/10/gIQA4rri8M\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/when-do-we-hit-the-point-of-no-return-for-climate-change/2011/11/10/gIQA4rri8M_blog.html).

temperature will increase by as much as four degrees Celsius by 2100 if GHGs continue to rise at current rates.<sup>198</sup> This past century has already seen a 0.8 degrees Celsius increase, and while governments have vowed to make efforts to limit the increase to only two degrees Celsius, the authors of the report do not believe the proposed global efforts, if enacted, will be effective enough to meet their goal.<sup>199</sup> A broad consensus exists for the proposition that a global mean temperature increase greater than two degrees Celsius will result in increasingly costly adaptation and considerable impacts that exceed the adaptive capacity of many systems and an increasing and unacceptably high risk of large-scale irreversible effects.<sup>200</sup>

NAFTA's members<sup>201</sup>, Mexico, Canada, and the United States, represent some of the worst offenders for GHG emissions. The three North American countries are among the top fifteen countries in terms of GHG emissions; in 2009, the United States alone accounted for 18.9 percent of the world's emissions.<sup>202</sup> From 1990 to 2005, GHG emissions increased at an alarming rate, with increases of 17, 26, and 37 percent in the United States, Canada, and Mexico, respectively.<sup>203</sup> While emissions from Asian countries, excluding China and India, are not nearly as large as North American countries, their emerging economies are expected to produce a very large increase in GHGs over the next few decades.<sup>204</sup>

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198. Wendy Koch, *World Bank: Climate Change Could Cause Massive Damage*, USA TODAY, Nov. 19, 2012, <http://www.usatoday.com/story/news/nation/2012/11/19/world-bank-warns-climate-change/1715165/>.

199. *Id.*

200. See generally *The 2°C Target Information Reference Document of the EU Climate Change Expert Group 'EG Science'*, at 3 (July 9, 2008), available at [http://ec.europa.eu/clima/policies/international/negotiations/future/docs/brochure\\_2c\\_en.pdf](http://ec.europa.eu/clima/policies/international/negotiations/future/docs/brochure_2c_en.pdf) (discussing the possible negative impacts of a two degree temperature increase and methods for preventing such outcomes).

201. "The North American Free Trade Agreement (NAFTA) is a regional agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America to implement a free trade area." *Frequently Asked Questions*, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Default.aspx?tabid=113&language=en-US> (last visited Oct. 23, 2013).

202. Simon Rogers & Lisa Evans, *World Carbon Dioxide Emissions Data by Country: China Speeds Ahead of the Rest*, THE GUARDIAN, (Jan. 31, 2011, 2:20 AM), <http://www.guardian.co.uk/news/datablog/2011/jan/31/world-carbon-dioxide-emissions-country-data-co2>.

203. Jeffrey J. Schott & Meera Fickling, *Setting the NAFTA Agenda on Climate Change, 2009* PETERSON INST. FOR INT'L ECON. 1.

204. Ross Toro, *Greenhouse Gases: The Biggest Emitters (Infographic)*, LIVESCIENCE (Aug. 26, 2011, 12:30 PM), <http://www.livescience.com/15715->

Climate change is an environmental concern of the TPP because of the increases in GHGs resulting from trade liberalization. FTAs usually result in the increase of exports, which requires increases in production and transportation. According to one study, trade liberalization leads to an expected increase in exports of 3.36 percent per year, which coincides with an increase of 3.4 percent in transport emissions and 4.3 percent in output related emissions per year.<sup>205</sup> Numerous econometric studies have found similarly large positive correlations between instances of trade liberalizing and GHG emissions.<sup>206</sup> Considering that the TPP covers members that are separated by the Pacific Ocean, the increase in transport related emissions could be especially significant as 33 percent of trade-related emissions come from international transport.<sup>207</sup>

Many countries have shown their commitment to reducing GHGs through international agreements such as the Kyoto Protocol.<sup>208</sup> As a trade agreement without any offsetting GHG provisions will negatively contribute to the increasingly dire climate situation, countries that are concerned about the environment will want to take into consideration the inevitable effects that the TPP will have on climate change.

Another environmental concern of the implementation of the TPP is the impact it could have on fishing. The United States, Vietnam, Canada, and Chile are among the top fifteen exporters of fish in the world.<sup>209</sup> Overfishing is an ever-

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greenhouse-gases.html.

205. Misak Avetisyan et al., *Trade and the Greenhouse Gas Emissions from International Freight Transport* 4 (Dec. 2010) (unpublished manuscript) (on file with author).

206. See, e.g., Rhys Jenkins, *Has Trade Liberalization Created Pollution Havens in Latin America?*, 80 CEPAL REV. 81 (Aug., 2003); Org. for Econ. Co-operation & Dev., *Domestic and International Environmental Impacts of Agricultural Trade Liberalisation*, COM/AGR/ENV(2000)75/FINAL (Vol. VIII, n.90), (2000); Michael J. Ferrantino & Linda A. Linkins, *The Effect of Global Trade Liberalization on Toxic Emissions in Industry* (Office of Econ. U.S. Int'l Trade Comm'n, Working Paper No. 96-11-A, rev. 1998), available at [http://www.usitc.gov/publications/docs/pubs/research\\_working\\_papers/ec9611a.pdf](http://www.usitc.gov/publications/docs/pubs/research_working_papers/ec9611a.pdf); ORG. FOR ECON. CO-OPERATION & DEV., *GLOBALISATION, TRANSPORT AND THE ENVIRONMENT* (Publication Brief, 2010), available at <http://www.oecd.org/env/transportandenvironment/45095528.pdf>.

207. Cristea et al., *supra* note 205, at 154.

208. See *Status of Ratification of the Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php) (last visited Oct. 19, 2013).

209. Jeffrey J. Schott & Julia Muir, *Environmental Issues in the TPP*, in

increasing concern as “one half of the global marine catch is designated as fully exploited, one quarter as over exploited or depleted, and the other quarter as underexploited but composed mainly of low-value species.”<sup>210</sup> This problem is not strictly a conservational one, as “losses to the global economy from the unsustainable exploitation of marine resources exceed \$50 billion annually.”<sup>211</sup> While relaxed restrictions on fishing contribute to overfishing, fishing subsidies, which are estimated to total \$16 billion worldwide each year, are a more immediate concern as governments are actively promoting overfishing.<sup>212</sup> The TPP’s potential to curb such subsidies or mitigate the potential for overfishing is another environmental aspect that should not go unnoticed in negotiations between member countries.

Wildlife conservation and illegal logging are additional environmental concerns that could be addressed through the TPP as member countries contain primary trading routes for some of the world’s greatest concentrations of biological diversity in animal and plant species.<sup>213</sup> Illegal trade in wildlife endangers species, destroys wildlife, and can cause the spread of disease as well as the undesirable effects of organized crime.<sup>214</sup> Worldwide, illegal trade in wildlife generates between ten to twenty billion dollars annually, and is especially prevalent in TPP members countries such as Peru, Chile, and those in Southeast Asia.<sup>215</sup> Illegal logging is another problem in TPP countries.<sup>216</sup> Illegal logging contributes to forest degradation and accounts for five to ten percent of global timber production, with annual losses of public assets in developing countries estimated at roughly ten billion dollars.<sup>217</sup> The United States is one of the world’s largest timber product

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THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST-CENTURY TRADE AGREEMENT 187, 193 (C. L. Lim et al. eds., 2012).

210. *Id.* at 191 (citing WORLD BANK & FOOD AND AGRIC. ORG., *THE SUNKEN BILLIONS: THE ECONOMIC JUSTIFICATION FOR FISHERIES REFORM* (2009)).

211. *Id.* at 193.

212. *Id.*

213. *Id.* at 194–95.

214. *Id.* at 194.

215. *Id.*

216. *Id.* at 195–96 (describing illegal logging as logging in protected areas or areas of endangered species of trees, without the necessary permits).

217. Organisation for Economic Co-operation and Development, Arnaldo Contreras-Hermosilla et al., *The Economics of Illegal Logging and Associated Trade*, at 4, 17, OECD Doc. SG/SD/RT(2007)1/REV (Jan. 8, 2007), available at <http://www.oecd.org/dataoecd/15/43/39348796.pdf>.



consumers and top importers of tropical hardwoods, a significant portion of which is illegally logged.<sup>218</sup> Peru is one source of illegally logged timber, while Malaysia and Vietnam engage in smuggling and laundering of illegally logged timber and products.<sup>219</sup>

The TPP presents an opportunity to address worsening environmental trends.<sup>220</sup> Climate change, overfishing, and illegal logging have negative economic effects and could cause even greater problems in the future if not dealt with as soon as possible.<sup>221</sup> Environmental sustainability is extremely important for the continuing prosperity and growth to which the global economy is accustomed.<sup>222</sup>

#### B. WHY INCLUDE ENVIRONMENTAL PROVISIONS?

Inserting environment provisions into trade agreements is not the only way countries implement environmental agreements; however, it may be the most effective way of enforcing them. It is estimated that “[w]orld leaders have signed up to an impressive 500 internationally recognized environmental agreements in the past 50 years . . . .”<sup>223</sup> Today there are over 250 multilateral environmental agreements in effect.<sup>224</sup> Environmental protection has become such a big issue that it is now the second most common area of global rule-making behind only trade.<sup>225</sup> Despite the progress made over the last couple of decades in actively promoting environmental protection, there remains a lack of substantial change. Even the promising “Rio+20,” a 2012 international conference on sustainable development, attended by more than 130 heads of state with government official from 192 countries, resulted in only a forty-nine page nonbinding document which renewed participants’ commitment to sustainable development and

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218. *Id.*

219. Schott & Muir, *supra* note 209, at 196.

220. *Id.*

221. *Id.*

222. *Id.*

223. John Vidal, *Many Treaties to Save The Earth, But Where's the Will to Implement Them?*, THE GUARDIAN (June 7, 2012), <http://www.theguardian.com/environment/blog/2012/jun/07/earth-treaties-environmental-agreements>.

224. *The Doha Mandate on Multilateral Environmental Agreements*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_neg\\_me\\_a\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_neg_me_a_e.htm) (last visited Oct. 21, 2013).

225. Vidal, *supra* note 223.

promotion of an economically and environmentally sustainable future.<sup>226</sup> The conference was on par with previous efforts to promote a sustainable environment but, as usual, resulted in mostly hollow promises.

The problem with these environmental efforts is that international law of any kind is inherently weak due to the sovereignty each country possesses.<sup>227</sup> International environmental law runs into the tragedy of the commons dilemma where countries acting independently and rationally according to their own self-interest will pollute and deplete the environment despite knowing that doing so is contrary to their long-term best interests.<sup>228</sup> Even if countries attempt to avoid this dilemma through treaties or other agreements, free-riding becomes an issue, as countries that decide not to join environmental agreements still reap the benefits of those agreements without paying the costs.<sup>229</sup> Therefore, any agreed upon environmental provisions are likely to be inadequate.

Furthermore, enforcement of these laws is an enormous problem. The competing capitalist nature of nations encourages the limited enforcement of any type of international law that would negatively affect GDP. Because environmental law poses a direct threat to short term gains of countries, many nations are unwilling to enforce it absent any incentives or enforcement measures.<sup>230</sup> If a country fails to adhere to environmental law, there must be consequences in order for the law to have any substantial impact. Yet, if the consequences are too harsh countries will not engage in environmental agreements at all. For example, the Kyoto Protocol was organized to create binding obligations on industrialized countries to reduce their GHG emissions. It was signed but never ratified by the United States and was withdrawn from by Canada.<sup>231</sup> There were

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226. United Nations Conference on Sustainable Development RIO+20, Rio de Janeiro, Braz., June 20-22, 2012, *The Future We Want*, U.N. Doc. A/CONF.216/L.1.

227. See generally STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 50 (1998) (discussing the legal concept of sovereignty).

228. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (describing the tragedy of the commons).

229. See generally RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS (1986) (discussing the free rider problem).

230. See generally Schott & Muir, *supra* note 209 (discussing the links between economies and environmental protection).

231. U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 208.

certain provisions in the Protocol with which the United States Congress disagreed and to which they declined to adhere.<sup>232</sup> This is not the first time the United States has signed but failed to ratify a treaty.<sup>233</sup> There are currently ten treaties that the United States has signed but not ratified that would improve global environmental protection.<sup>234</sup> With all the factors working against strong and effective environmental agreements, any opportunity for countries to enact effective environmental laws should be taken. Therefore, it is imperative that the TPP contain strong environmental provisions.

The international power of sovereign states renders it exceptionally difficult for a government of intergovernmental organization to impose its will upon a separate sovereign.<sup>235</sup> Trade sanctions are one of the few options at a country's disposal that directly affect another country.<sup>236</sup> This is why the current draft of the TPP contains at least twenty-six chapters, many of which deal with diverse areas of trade such as intellectual property rights, foreign investment, labor, and the environment.<sup>237</sup> These topics are covered because trade between countries is more complex than just tariffs and quotas. The laws that govern a country's labor practices, copyrights, patents, investment, and consumer and environmental protection all affect the price of goods and services.<sup>238</sup> Without laws governing areas such as these, goods and services could be provided at a much cheaper cost.<sup>239</sup> At the local level, many governments realize that the added cost is worth the benefits and protection that these laws provide.<sup>240</sup> Internationally,

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232. Paul Reynolds, *Kyoto: Why Did the U.S. Pull Out?*, BBC NEWS, Mar. 30, 2001, <http://news.bbc.co.uk/2/hi/americas/1248757.stm>; U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 208.

233. MARY JANE ANGELO ET AL., CTR. FOR PROGRESSIVE REFORM, RECLAIMING GLOBAL ENVIRONMENTAL LEADERSHIP: WHY THE UNITED STATES SHOULD RATIFY TEN PENDING ENVIRONMENTAL TREATIES 2–4 (White Paper No. 1201, Jan. 2012), *available at* [http://www.progressivereform.org/articles/International\\_Environmental\\_Treaties\\_1201.pdf](http://www.progressivereform.org/articles/International_Environmental_Treaties_1201.pdf).

234. *Id.*

235. *See generally* TALMON, *supra* note 227.

236. *See, e.g.*, Milica Delevic, *Economic Sanctions as a Foreign Policy Tool: The Cases of Yugoslavia*, 3 INT'L J. OF PEACE STUD. 1 (1998).

237. *See* IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (2012).

238. *See, e.g.*, PAUL R. KRUGMAN ET AL., INTERNATIONAL ECONOMICS: THEORY AND POLICY (Addison-Wesley 2009) (1988).

239. *Id.*

240. *Id.*

however, it is much harder to get countries to agree to international standards because of the increasingly competitive and diverse nature of the globalized world.<sup>241</sup> Connecting these areas of law to trade agreements, therefore, is the only true way to make them effective in order to provide real consequences for those who do not adhere to an agreement while still creating incentives for countries to join the agreement. FTAs need to internalize the costs that free trade has on the environment in order to promote both an environmentally and economically sustainable future.<sup>242</sup>

#### C. ENVIRONMENTAL PROVISIONS FOR A SUSTAINABLE FUTURE

The first step towards ensuring that the TPP adequately promotes environmental interests is eliminating the secrecy of the document and negotiations. Negotiation drafts of the TPP should be made available to Congress and the public. In June 2012, four senators sent a letter to the Obama administration asking for greater congressional access to negotiations on the TPP.<sup>243</sup> In August, Representative Walter Jones introduced a resolution in the House of Representatives that would require Congress to be allowed to observe TPP negotiations.<sup>244</sup> Then, in October, ten senators said that a strong environment chapter in the TPP would be critical to their support.<sup>245</sup> It is apparent that there is a growing concern in Congress over the secrecy of the TPP. Congress has the ultimate say in whether the United States accepts the finalized version of the TPP. If more members of Congress continue to demand strong environment

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241. *Id.*

242. See generally David P. Vincent, *Internalizing Externalities: An Economic and Legal Analysis of an International Carbon Tax Regime*, 92 OR. L. REV. 163, 164 (2013) (addressing the costs of environmental externalities and the possibilities present within the current international trade regime for enhancing economic welfare by liberalizing world trade and mitigating climate change by reducing greenhouse gas emissions).

243. Zach Carter, *Trans-Pacific Partnership Talks: Senators Demand Access to Controversial Documents After Leak*, HUFFINGTON POST, June 25, 2012, [http://www.huffingtonpost.com/2012/06/25/trans-pacific-partnership-documents-sherrod-brown-jeff-merkley-ron-wyden-robert-menendez\\_n\\_1624956.html](http://www.huffingtonpost.com/2012/06/25/trans-pacific-partnership-documents-sherrod-brown-jeff-merkley-ron-wyden-robert-menendez_n_1624956.html).

244. H.R. Res. 767, 112<sup>th</sup> Cong. (2012).

245. Ilana Solomon, *Senators Agree: Trade Must Protect the Environment*, HUFFINGTON POST, Oct. 23, 2012, [http://www.huffingtonpost.com/ilana-solomon/trans-pacific-partnership-\\_b\\_1982368.html](http://www.huffingtonpost.com/ilana-solomon/trans-pacific-partnership-_b_1982368.html).

provisions and require transparency in the negotiations in order for the TPP to receive their support, they will force the Obama administration to take them seriously or risk wasting years on an FTA that has no chance of passing.

Another improvement that should be made in the TPP concerns the dispute resolution system. The arbitration model used in NAFTA and CAFTA-DR needs to be changed because it is not living up to its goal of creating a unity of expectations for the parties involved in Chapter 11 disputes.<sup>246</sup> The current system's use of a non-consistent group of arbitrators does not adequately protect environmental interests; it lacks consistency and accountability, which makes it difficult for parties to know what the law is or what to expect if certain claims are resolved through arbitration. While CAFTA-DR's additional language on expropriation was beneficial in correcting NAFTA's mistakes, there is no guarantee that arbitrators will interpret other parts of the TPP in ways the drafters intended. Establishing a permanent international court system, resembling current American courts, to oversee TPP environmental disputes could be one solution. Ideally, one judge with a background in environmental law could be appointed from each member nation. A five-judge panel would hear disputes that arise, making sure to exclude any judges appointed from a member nation in the dispute. Such a system would provide much greater consistency. There would be a regular group of judges who have experience in the type of law they are ruling on. They would be held more accountable for inconsistent decisions, giving decisions a greater precedential effect.

The TPP also needs to include concrete standards on environmental sustainability that member countries must achieve. The initial plan of the United States to incorporate the same environmental standards for all TPP members is not fair or rational, based on varying degrees of development.<sup>247</sup> Provisions such as emission standards and polluting regulations that are tailored to the size and development of member countries would be a fairer approach and more likely to receive approval. Standards that gradually change over many years would be the most effective approach, as countries

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246. Jack Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1453 (2003).

247. See IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, *THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (2012).

would have the opportunity to improve their environmental impact. Considering the amount of environmental treaties currently in effect, the TPP should adopt many of the environmental standards from popular treaties but add the enforcement mechanism that current treaties lack. The Kyoto Protocol was a good starting point to raise awareness of climate change, but it failed to address a number of core issues, such as “setting targets based on a fair and efficient burden-sharing principle, effectively engaging developing countries, setting a long-term goal, implementing cost-effective policy instruments with given binding target, [and] non-compliance penalties . . .”<sup>248</sup> Under the TPP, developed countries could adopt standards on GHGs that require members to decrease emissions each year. The largest emitters would be required to decrease their emissions the most and prevent their emissions from increasing by more than five percent a year until they reached a designated level of emissions under which they would be required to remain. Those that violate the standards would be taxed on the amount of emissions that exceeded their limit and would fund programs designed to promote greener production.

Another provision the TPP could adopt is from the recent APEC agreement to cut tariffs on fifty-four categories of goods that are seen as environmentally friendly.<sup>249</sup> The agreement was seen as an environmental achievement but hardly a breakthrough because of its unenforceability.<sup>250</sup> By integrating such provisions, the TPP would promote environmental progress while giving earlier agreements an enforcement mechanism not previously attainable. This agreement would likely be effective, because it would be easy to implement and monitor and would increase the export and use of environmentally friendly goods.

The TPP could even look to implement a system of carbon taxes or border adjustments.<sup>251</sup> Ideally, border adjustments

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248. Jing Cao, *Reconciling Human Development and Climate Protection: Perspectives from Developing Countries on Post-2012 International Climate Change Policy 1* (Harvard Project on Int'l Climate Agreements, Discussion Paper 2008-25, 2008), available at <http://belfercenter.ksg.harvard.edu/files/CaoWeb2.pdf>.

249. *Partners and Rivals: Another Ambitious Trade Agreement Gets Bogged Down*, THE ECONOMIST, Sept. 22, 2012, available at <http://www.economist.com/node/21563292>.

250. *Id.*

251. The Organisation for Economic Co-operation and Development

would apply to both imports and exports entering into international trade, enabling nations to offset the economic burdens associated with carbon taxes when trading countries vary in their tax regimes.<sup>252</sup> Nations could tax imports from non-carbon-taxing countries based on their carbon content.<sup>253</sup> This would enable countries to “rectify domestic price differentials by taxing imported products at the same level as those produced domestically.”<sup>254</sup> For exports, nations could offer rebates for carbon taxes paid by taxed producers for goods exported to other countries with carbon taxes.<sup>255</sup> Countries would be able to refund the carbon taxes paid by their domestic producers for exported goods in order to prevent the double taxation of domestic producers by both the domestic state as well as the importing state.<sup>256</sup>

Although carbon taxes coupled with border adjustments present a viable solution for reducing emissions, the unilateral adoption of such a regime “may well raise complex questions with respect to the WTO consistency and the conditions under which border taxes can be adjusted to accommodate a loss of international competitiveness.”<sup>257</sup> These questions arise because

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(OECD) Working Party in 1970 defined border tax adjustments as “[A]ny fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products).” World Trade Organization, *Report by the Working Party on Border Tax Adjustments*, ¶ 4, L/3464 (Nov. 20, 1970), available at [http://www.wto.org/gatt\\_docs/English/SULPDF/90840088.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf).

252. *Id.* ¶ 5.

253. Daniel McNamee, *Climate Change, the Kyoto Protocol, and the World Trade Organization: Challenges and Conflicts*, 6 SUSTAINABLE DEV. L. & POLY 41, 41–42 (2006).

254. *Id.* at 42.

255. Joshua Elliott et al., *Trade and Carbon Taxes*, 100 AM. ECON. REV. 465, 465 (2010), available at [http://home.uchicago.edu/~kortum/papers/AERpp\\_final.pdf](http://home.uchicago.edu/~kortum/papers/AERpp_final.pdf).

256. Comm. of Experts on Int’l Cooperation in Tax Matters, *Tax Cooperation on Climate Change*, 13–15, U.N. Doc. E/C.18/2010/CRP.12 (Oct. 22, 2010), available at [http://www.un.org/esa/ffd/tax/sixthsession/CRP12\\_Draft.pdf](http://www.un.org/esa/ffd/tax/sixthsession/CRP12_Draft.pdf).

257. Timothy E. Deal, U.S. Council for Int’l Bus., *WTO Rules and Procedures and Their Implication for the Kyoto Protocol 2* (Discussion Paper, 2008), available at [http://www.uscib.org/docs/wto\\_and\\_kyoto\\_2008.pdf](http://www.uscib.org/docs/wto_and_kyoto_2008.pdf) (quoting ZhongXiang Zhand & Lucas Assunção, *Domestic Climate Policies and the WTO 3* (East-West Ctr., East-West Ctr. Working Papers, Env’t. Ser. No. 51, 2002)) (internal quotation marks omitted).

such a tax regime may be considered a barrier to trade, and therefore present a potential conflict with the rules of the WTO.<sup>258</sup> However, recent legal research suggests that such a system would comport with international law.<sup>259</sup>

The TPP should also encourage growth in green technology in order to promote strong investment in that sector. Currently, there is a WTO dispute regarding what particular types of green subsidies are permissible, something the TPP could clarify in order to foster more development of green technology.<sup>260</sup> While it may seem counter-intuitive to environmental protection to limit subsidies on environmental goods, it is essential in order to promote long-term benefits. When countries are allowed to boost exports through green subsidies, foreign investment in green technology is negatively impacted due to artificially low cost alternatives.<sup>261</sup> Long-term viability in industries, such as clean energy, rests on the ability to provide energy at an equal or lower cost than fossil fuels while maintaining equal or better performance.<sup>262</sup> Subsidizing exports may promote the *deployment* of green technology in the short-term, but it reduces the incentive for countries to invest in the *improvement* of green technology, which is essential to progressing to a point where clean energy is less costly than the available alternative.<sup>263</sup>

Of course these proposals will not have the desired effect without enforcement mechanisms tied into the TPP, but the potential agreement represents a great opportunity to hold countries to their commitments. The United States has a considerable advantage in trade negotiations because it represents the largest economy not only at the table, but in the world. Reducing barriers to trade with the United States and

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258. All WTO members must undergo periodic scrutiny of their trade policies and practices to ensure they do not impose an unfair barrier to trade. See *Annual Report 2010*, WORLD TRADE ORG. 2, [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep10\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep10_e.pdf).

259. Valentina Durán Medina & Rodrigo Polanco Lazo, *A Legal View on Border Tax Adjustments and Climate Change: A Latin American Perspective*, 11 SUSTAINABLE DEV. L. & POL'Y 29, 31–32 (2011).

260. United Nations Conference on Sustainable Development RIO+20, *supra* note 226, at 47–48.

261. Matthew Stepp & Robert D. Atkinson, *Green Mercantilism: The Threat to the Clean Energy Economy*, THE INFO. TECH. & INNOVATIVE FOUND. (June 14, 2012), <http://www.itif.org/publications/green-mercantilism-threat-clean-energy-economy>.

262. *Id.*

263. *Id.*



other large countries could provide enormous benefits for developing nations, but giving up the ability to use tariffs and quotas without guarantees of stronger environmental protection measures would be foolish. The benefits of free trade are obvious, which is likely why so many countries are onboard with the TPP. If adopted, it would be the largest multilateral FTA in the world, and additional countries like Japan and Thailand are still considering joining.<sup>264</sup>

As more countries join the TPP, countries that are left out will feel increasing pressure to join or lose out on the benefits that competing TPP member nations gain.<sup>265</sup> Thus, requiring countries to adhere to certain environmental standards before obtaining membership in the TPP may create incentives for nations outside the agreement to improve environmental standards in hopes of gaining acceptance. The European Union (E.U.), while much more than a trade agreement, has a similar trade and economic structure though its amalgamation of numerous national governments and economies.<sup>266</sup> Much like E.U. economic standards for membership, TPP members could consider a country's environmental resume before agreeing to admit that country. TPP nations must already agree to promote sound environmental policies.<sup>267</sup> Potential members' current environment policies, environmental improvements over the past several years, and likelihood of continual improvement could all be factors considered before acceptance into the TPP. There could also be temporary membership for the first several years to ensure that countries abide by the environmental standards before giving them permanent membership.

Once members are permanent, one of the more important enforcement mechanisms that should be integrated into the TPP are trade sanctions. While the effectiveness of trade

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264. *TPP Talks Go Slowly*, BANGKOK POST, Aug. 30, 2013, <http://www.bangkokpost.com/breakingnews/367226/tpp-talks-go-slowly>.

265. See MIREYA SOLIS, SOUTH KOREA'S FATEFUL DECISION ON THE TRANS-PACIFIC PARTNERSHIP (Foreign Policy at Brookings Policy Paper No. 31, Sept., 2013), available at <http://www.brookings.edu/~media/research/files/papers/2013/09/0918%20south%20korea%20trans%20pacific%20partnership%20solis/0918%20south%20korea%20trans%20pacific%20partnership%20solis.pdf> (explaining how the size and openness of the TPP is making it increasingly necessary for South Korea to join).

266. *EU Enlargement: The Next Seven*, BBC NEWS, (July 1, 2013), <http://www.bbc.co.uk/news/world-europe-11283616>.

267. Nadia Gire, *The Trans-Pacific Partnership Agreement: A Revival in United States Trade Policy Reform*, 20 CURRENTS: INT'L TRADE L.J. 60, 67 (2012).

sanctions is often debated, economic studies have shown “that a punishing tariff can be effective when environmental and trade policies are endogenous.”<sup>268</sup> The use of trade sanctions would not create the perfect balance between free markets and environmental protection but could be very effective.<sup>269</sup> Unless the world can come together and implement global environmental taxes, there is little hope for incentivizing a significant level of environmental protection apart from trade sanctions.<sup>270</sup> Trade and competition are significant causes of environmental problems, and the solution to those problems must be connected to the source.

However, trade sanctions and other forms of ‘hard law’<sup>271</sup> are not favored by those who believe the “soft law approach” is more suitable for environmentally sustainable development.<sup>272</sup> The first problem presented by trade sanctions is the supranational enforcement agency that could be created to investigate and impose the sanctions, analogous to NAFTA’s CEC, except with greater authority. An outside force second-guessing decisions of local and federal governments presents a unique and daunting challenge. It would also require a large bureaucracy to implement an independent multinational secretariat, which could possibly conflict with the constitutions of its member nations. While these are obvious legitimate concerns, the soft law approach alone is just too ineffective and “soft” to currently combat the increasingly dire environmental

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268. Alireza Naghavi, *Trade Sanctions and Green Trade Liberalization*, 15 ENV’T AND DEV. ECON. 379, 379 (2010).

269. See Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

270. See *id.* at 2151 (explaining why multilateral cooperation on environmental protection is difficult to achieve).

271. Arguably the term ‘hard law’ is redundant, but the phrase is useful to distinguish these policies from ‘soft law’. See Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167, 168 (1996); see also Wolfgang Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE 75, 76 n.3 (Dina Shelton ed., 2000) (“[S]oft’ law as used herein means normative agreements that are not legally binding.”).

272. See generally RALPH H. FOLSOM ET AL., NAFTA AND FREE TRADE IN THE AMERICAS: A PROBLEM-ORIENTED COURSEBOOK 763–65 (2d ed. 2005) (citing Richard A. Johnson, Commentary, *Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT’L ENVTL. L. REV. 577 (1993)); Susan Emmenegger & Alex Tschentscher, *Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 5 GEO. INT’L ENVTL. L. REV. 545 (1993).

picture.<sup>273</sup> Ideally, trade sanctions would be rarely used and would mainly function as a deterrent. If they are to be used, however, it should be only when there is a clear violation of an environmental provision. A small increase on tariffs for the offender's non-environmental goods would be an adequate sanction.

It is important to ensure that sanctions are not too harsh or else they risk significantly stifling trade to the point where members no longer receive the expected economic benefits of the TPP.<sup>274</sup> Implementing defined environmental standards with trade sanctions and/or significant monetary penalties for violators combined with the soft law approach taken by NAFTA and CAFTA-DR would be a substantial improvement over any current international environmental law system. The soft law approach should not be completely abandoned as organizations that research and propose new and effective ways to create environmental sustainability are important and should be given the proper funding and support to fulfill their goals.<sup>275</sup> The soft law approach, combined with these potential provisions to the TPP would finally internalize the costs of trade and production, and incentivize its members to promote environmental sustainability in the present day.

## CONCLUSION

FTAs remain an important part of global economic policy. As countries search for ways to economically grow, it is essential for them to realize the current path is not an economically sustainable one due to the present and future challenges that climate change and other environmental problems present. FTAs represent both a possible threat and solution to environmental sustainability, and may be the difference in whether the global community is able to prevent the predicted death of millions of people and trillions of dollars in lost prosperity due environmental problems.

Although environmentalists greatly opposed both NAFTA

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273. See Chang, *supra* note 269 at 2150–60.

274. *Id.* at 2162 (observing that overly harsh sanctions could cause countries to abandon activities where the economic benefit outweighs the environmental harm, decreasing growth).

275. See Mumme, *supra* note 68 (explaining the beneficial effects of the CEC in NAFTA).

and CAFTA-DR,<sup>276</sup> the measurable environmental effects of those trade agreements have not been as dire as previously predicted. Even the missteps of investor-state cases of NAFTA were corrected in CAFTA-DR and so far have been limited in scope. Extrapolating from that, there is not a large likelihood of investor-state cases in the TPP causing significant environmental effects, although the dispute resolution system can be improved from those of NAFTA and CAFTA-DR to provide more transparency and certainty. Even though the environmental impact of past FTAs has not been overwhelmingly negative, the TPP could go a long way towards actively protecting the environment in ways NAFTA and CAFTA-DR failed to do. There are several important environmental issues involving TPP members such as GHG emissions, overfishing, and illegal logging. The TPP could be a significant force in limiting these environmental problems.

Outside of large economic agreements such as the TPP, there is little hope for effective international environmental law, putting more pressure on the negotiators of the TPP to succeed in including effective environmental provisions. Although world leaders have signed over 500 international environmental agreements in the last fifty years, there has been little progress toward environmental goals.<sup>277</sup> In 2012 the Global Environmental Outlook researched the ninety most important environmental issues and found that significant progress had only been made in four.<sup>278</sup> Environmental agreements are negatively impacted by the increasing amount of FTAs, lack of ratification or participation of important countries, and even the over-congestion of environmental agreements themselves. In the UN alone, thirty-five separate organizations influence global environmental governance.<sup>279</sup> This creates conflicting agendas and inconsistent rules and norms, which greatly impair the organizations' abilities to complete their goals.<sup>280</sup> Lack of enforcement remains the largest

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276. *North American Free Trade Agreement (NAFTA)*, PUBLICCITIZEN, <http://www.citizen.org/Page.aspx?pid=531> (last visited Oct. 19, 2013) (mentioning that environmental groups opposed NAFTA).

277. Richard Black, *Green Decline 'May Bring Irreversible Change'*, BBC NEWS (June 6, 2012), <http://www.bbc.co.uk/news/science-environment-18339905>; Vidal, *supra* note 223 (mentioning the 500-plus agreements signed in the last 50 years).

278. *Id.*

279. Vidal, *supra* note 223.

280. *Id.*

issue as countries are unwilling to give up their sovereignty or economic advantages. Countries largely remain short-sighted on the environment. This lack of incentive to protect the environment on a global scale, combined with the tragedy of the commons issue and free-riding dilemmas, makes all current international environmental agreements insufficient.

For these reasons, the TPP and similar trade agreements represent the best chance for true promotion of environmental sustainability. Because the economic benefits of the TPP increase with each new member, the agreement provides the leverage needed to compel its members and potential members to enforce their environmental agreements and create stronger ones. The TPP has the opportunity to set the standard for environmental sustainability by requiring potential members to improve their environmental policies in order to join. Actual members would also be held to high standards that require gradual improvement and are based on that country's level of economic development.

Trade sanctions, taxes, and monetary penalties would provide the enforcement mechanisms, which, when combined with the current soft law approach of NAFTA and CAFTA-DR, could create the first truly effective body of international environmental law. This would allow the TPP to include many environmental standards from other popular treaties that have previously been ineffective due to lack of enforcement. The goal of the environmental provisions is not to prohibit trade but to internalize the negative costs of trade and industrialization. Countries may lose some economic gains in the short term, but by doing so, they will prevent massive losses in the long term.

Unfortunately for the environment and our future, strong environmental provisions that include real enforcement measures are not likely to be included in the TPP. The TPP is an expansive document and environmental concerns are not a high priority for many negotiating countries that want to focus on strengthening their economies. The United States and other countries' main priority may be to marginalize China's influence in the area, and therefore, they may be willing to exclude strong environmental provisions in order to reach an agreement. Additionally, the sheer number of countries involved makes detailed environmental provisions and standards hard to manage, and the public has had little say or influence over the document due to its secrecy in negotiations.

Most of the additions to the TPP proposed in this comment

are not being considered in TPP negotiations and represent significant changes to past free trade agreements. If public was more aware of the TPP, perhaps proposed provisions such as these could gain more traction, but as it stands the TPP has not received the level of press that should be associated with such an important document. While the TPP may not pose a large threat to the environment, it is also unlikely to be the environmental savior that is severely needed. For the sake of present and future generations, we must hope that world leaders implement robust environmental protections before it is too late.